SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Harding (re)*, 2021 NSSC 219

Date: 20210705
Docket: No. 40365
Registry: Halifax
Estate Number: 51-2157623

In the Matter of: The bankruptcy of Douglas William Harding

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	March 15, 2021, in Bridgewater, Nova Scotia
Counsel:	Edward A. MacDonald, for the Trustee, Grant Thornton Limited Caitlin Ward, for the objecting creditor, Canada Revenue Agency Douglas William Harding, self-represented

Balmanoukian, Registrar:

[1] Douglas William Harding, now 62, is a skilled geologist with global abilities. On a personal level, he is a decent, hardworking, compassionate man.

[2] On a financial and organizational plane, he is a third-time bankrupt, whose sole meaningful unsecured creditor[1] is the Canada Revenue Agency. That debt is over half a million dollars. He has channeled his at-times significant income to various other places, some more understandable and justifiable than others, and it falls to this Court to determine what is a fair resolution as a result.

[3] This filing engages s. 172.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"); the "personal income tax debt," as defined by that section, is both in excess of $200,000 and 75% of proven unsecured debt. As such, I am mandated to consider the four factors in s. 172.1(4) in disposing of this matter, as well as such other factors as are relevant, and that disposition cannot take the form of an absolute discharge. In addition, by virtue of this being a third bankruptcy, if 172.1 had not been engaged I would be precluded by s. 173(1)(j) from ordering an absolute discharge; and the presumptive emphasis has shifted

[1] The only other listed unsecured creditor is Capital One Mastercard, for $5,888.00

from debtor rehabilitation to creditor protection and system integrity: See *Re Burns*, 2019 NSSC 155, at para. 17.

[4] I recently had occasion to discuss the scheme of s. 172.1, in the rehabilitative context of the *BIA*, in two other cases: *Re Sorochan,* 2021 NSSC 200, and *Re Smith*, 2021 NSSC 205. I do not propose to reiterate those framework comments in detail here. Instead, I will turn directly to Mr. Harding's factual matrix and then the s. 172.1(4) analysis before effecting my disposition.

Background

[5] Mr. Harding's first assignment[2] was a small one, in 1989; he had obtained a loan for his then-common law spouse's business, which failed. By the time the loan was called, he was a 30 year old student.

[6] Mr. Harding's second bankruptcy was in 2005. He was, at the time, embroiled in a substantial custody battle ancillary to his divorce. Additional material as to the underlying circumstances was put in evidence. I do not think I need delve into it in detail, except to observe that it was nasty, brutish, and anything but short. The legal bills mounted. However, it is germane to say that

[2] Information taken from Official Receiver's ("OR") examination of January 25, 2017.

not only did Mr. Harding divert funds to finance this battle that could and should have gone to tax payments, but he in fact did not file returns for the period of 1999 through 2005. His liabilities are listed on the OR's examination as $139,531. I am advised that approximately $113,000 of this was tax debt. He was discharged in March 2007.

[7] It is adequate for my analysis to say that he has had other difficulties, financial and behavioral, with his now adult children. By 2015, "things had settled down," as Mr. Harding put it; and he tried to meet with the Trustee, with the proposal discussed below as the presumed outcome.

[8] Tax debts continued to accrue between discharge number two and Mr. Harding's next filing. As he was employed overseas, he incorporated a company as a payment vehicle. It became evident to me at the hearing that this was a "flow through," with payouts to Mr. Harding being equal or nearly equal to the company's net income. I mention this so that there is no question of his earnings differing in any material respect from what he in fact generated, which would require my current attention under s. 68(11) *BIA*. However, as a result of this situation, there were no withholdings at source through which Mr. Harding paid all or most of his taxes as they came due, and he did not make any meaningful

installments.[3] I am advised this corporation has not been the payment channel for some years.

[9] He did not file T1 returns from 2008 to 2015 prior to his bankruptcy[4]; they were ultimately filed.[5]

[10] In 2015, he attempted to refinance his properties, apparently to pay off CRA. This came to something of a chicken-and-egg, according to the OR report. He attempted to raise funds through RBC, who in turn would only provide funds if CRA agreed not to execute against the properties. CRA would only make that assurance if he made a proposal. He did. The proposal resulted in RBC revoking its willingness to finance. The only other alternative was unsustainable private equity with interest at 15%.

[11] Bankruptcy number three, the one at bar, ensued in August 2016. Shortly before (in April 2016) property held by Mr. Harding's current spouse, which was to be sold to help fund the proposal, was indeed sold. The OR's report says that

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[3] The affidavit of Dan MacAulay of CRA sets forth a $16,631.44 payment for 2016 post-bankruptcy and $20,000 for 2017, and no others.
[4] OR report, p.4, under the heading "CRA."
[5] Trustee's representations at the hearing.

the net proceeds of $80,000 remained in her account, at least at the time of that 2017 report.

Recent income, and current tax status

[12] As a part of his bankruptcy obligations, Mr. Harding filed his 2016 pre-and-post bankruptcy returns. By the time of the hearing, he had filed for 2017, 2018, and 2019.[6]

[13] Mr. Harding's income, while variable, has generally also been enviable. The 2004 support order on file recites his "guideline" income for child support purposes at $120,720. According to the MacAulay affidavit, 2017 taxable income was $113,209[7]. The 2018 and 2019 returns filed in evidence show that 2018 was $189,910.73; 2019 was $177,306.93.

[14] The total tax obligation for 2009 through 2016 inclusive, according to the proof of claim, was $443,611.13 in principal and $137,740.67 in interest and

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[6] The 2018 return is dated August 26, 2019 which I was advised was 'just' filed on the eve of hearing in March 2021; the affidavit of Mr. MacAulay of February 26, 2021 indicates CRA had no record of 2018 as at that date; the 2019 return is dated March 6, 2021. While obviously "road to Damascus" filings, at least they are now in hand for assessment. 2018 shows an outstanding amount due of $74,824.37, presumably now plus late filing penalty and interest; 2019 has a balance owing of $67,629.56. Neither has any course-of-year installments or source deductions. The MacAulay affidavit refers to a 2017 outstanding balance of $28,282, net of a $20,000 payment in February 2020.

[7] A reference in the affidavit to $11,209 was a typographical error.

penalties, for a total of $581,351.80. As noted, this is substantially all of Mr. Harding's unsecured debt. And as also noted, he has continued to accrue additional and significant tax debt and has only belatedly brought his filings up to date. Collectively, his post-bankruptcy additional tax outstanding is at least another $170,000.[8]

[15] At the time of the hearing, he was employed as a trucker earning $4,000 to $5,000 per month gross, while awaiting other geological opportunities abroad. He deserves full credit for a trait too often lacking in those before this Court – a willingness to take a job outside of his core expertise, at a lower wage, pending positive developments in his career. I am too often faced with underemployed individuals who consider a particular vocation "beneath" them, or in which they see little or no work incentive pending their discharge, lest it give rise to estate obligations. I expect Ayn Rand is not commonly cited in Bankruptcy Court (especially if speaking of tax debt), but when she said "there is no such thing as a lousy job - only lousy men [sic] who don't care to do it," she was not thinking of folk such as Mr. Harding.

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[8] Balance of 2017, plus as-filed 2018 and 2019 amounts as noted. At the time of hearing, 2020 figures were not available to me and the 2020 tax return was not yet overdue.

Mr. Harding's allocation of capital

[16] Mr. Harding's work ethic does not, however, take away from the fact that he was and remains a chronic non-filer and non-payor. One may sympathize with what he felt were priorities generated from his marital and custodial litigation; however, it does not justify or excuse two inescapable points: first, this litigation did not preclude (or fully overlap the time frame for) filing and second, this dispute should not be taxpayer-subsidized through resources that should have been (and would have been, in the case of domestic employment with payroll deductions) earmarked for the public fisc.

[17] More problematically, meaningful portions of Mr. Harding's resources went into private pursuits, namely property acquisition and renovations and support for his/his spouse's tourist-oriented seasonal small businesses. [9] The precise amounts were substantial but at times unclear, not least because accounts were not segregated between business and personal. It therefore was not at all times apparent whether and to what extent cash on hand was used to subsidize these

[9] The OR report recites an investment of about $25,000 to $30,000 in a first business; it is unclear whether this unprofitable enterprise repaid this capital; he testified that $20,000 of this was his investment and that he paid at least part of the rent which was $400 per month; the second business was purchased for $54,000 and is self-sustaining; it is unclear whose apparently comingled funds made up the bulk of this acquisition, or whether any of the capital has been drawn out. It is Mr. Harding's spouse's proprietorship.

enterprises, net of withdrawals. Given my disposition, what matters is magnitude, not exactitude.

[18] These endeavours included the purchase of a second home in River John for around $142,000; although he said that this was with contributions from both spouses, he also said that the $30,000 down payment came from his own income.

[19] Mr. Harding testified that they thought it was a bargain that they could fix up and remortgage, paying off CRA in the process. That didn't happen, although apparently not for lack of trying as I recounted above. His stepson lives in the property rent-free, except for coverage of utilities.

[20] He has put some $60,000 (which had been earmarked for taxes) into his other home, as an addition due to his family size; this addition is occupied but incomplete. Another $60,000 had been put into this home, prior to bankruptcy.

[21] He acquired a $5,000 boat "to stop playing video games." This has apparently been repurchased from the Trustee.

[22] He has an interest – apparently with some title problems – in a small lot in the Bahamas, which he purchased from his mother for a comparatively nominal amount in 2006. It appears to have no realizable value to the estate.

[23] Mr. Harding testified that in and around 2019, they paid approximately $40,000 on credit cards in his spouse's name; some of this was for family debt, some for business debt. While this was an unsegregated and somewhat amorphous payment, Mr. Harding said that he "likely" uses his income to support his spouse's marginal business when it is unprofitable.

[24] Since October 2020, he has been paying $1,000 per month to the Trustee on account of his known and anticipated obligations.

Current estate receipts

[25] At the time of hearing, there was approximately $140,000 in the estate. Much of this consists of realization on assets; a small amount is for surplus income, an "assets first" approach to allocation of which I approve. The Trustee estimates remaining surplus income payment obligations for 36 months at $167,875 at the time of its s. 170 report. That may be subject to adjustment depending on family size and potential non-discretionary expenses, as well as post-report payments. As will appear, I deviate from this obligation's 36 month timeline as is my general practice in third-time bankruptcies.

[26] According to the Trustee's s. 170 report, the assets were paid for in full, with the approval of the inspector. These calculations were not in evidence. They

would not be binding on the Court, and I have my suspicions that my equity calculation would differ[10].

[27] The Court is fully at liberty to (re)calculate equity up to the date of the discharge order, when appropriate and when I consider payments to date to be inadequately or improvidently calculated. If the property has meanwhile been disclaimed or conveyed by the Trustee, it may be an obligation that can no longer be enforced against the property *in rem,* or as against a *bona fide* purchaser for value; but that does not mean that the Court cannot impose the financial obligation on the debtor as a condition of their discharge. I do not discuss here whether or in what circumstances an action may lie against an improvident Trustee, leaving that to an appropriate case.

[28] Here, it appears the Trustee acted *with the approval of the inspector*. That inspector was an agent of the only meaningful unsecured creditor, CRA.

[29] While it still remains open to the Court to revisit these calculations, I do not do so in this case, despite having qualms; unlike other cases in which I have doubted that estoppel applies to Trustee actions or representations (as the doctrine

[10] For a discussion on this calculation methodology and the Court's ability to adjust Trustee submissions, se *Re McInnis*, 2020 NSSC 64 at para. 18 and *Re Gavel*, 2021 NSSC 5 at paras. 40-73.

does not fully contemplate the perhaps unknowing or adverse interests of the bulk of creditors)[11], that is not the case here. The near-sole creditor signed off via its inspector.[12] As well, as I have found that Mr. Harding has a considerable way to go in obtaining his third discharge, I bear in mind that what he has yet to do must be reasonably practicable; to impose further payment obligations would strain that objective.

[30] As will appear, I believe there to be remaining income obligations to do justice in this case, in addition to such additional matters as I consider appropriate in the context of s. 172.1.[13]

Post-bankruptcy tax conduct

[31] At the hearing, Mr. Harding was examined by counsel for CRA. I have interpolated his evidence where it has fit the narrative above.

[32] He admitted that his tax practices did not change in any meaningful way after his second bankruptcy, that is to say his pattern of non-filing and non-

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[11] See *Gavel, supra* and *McInnis, supra*, as well as *Re MacRury*, 2019 NSSC 146.

[12] For clarity, I offer no comment at present on circumstances in which the Court may revisit inspector-approved calculations when that inspector does not represent the only, or near-only, creditor.

[13] As I opined in *Sorochan*, as a general rule I consider it inappropriate to 'just' order what would be outstanding obligations under s. 68 and s. 158 BIA when s. 172.1 applies, as it would penalize the compliant debtor since I cannot grant an absolute discharge and would require them to do something additional; while rewarding the non-compliant debtor by requiring them 'only' to do the things giving rise to non-compliance.

payment. Although he "mentally estimated" that he needed to earmark 35% of his revenue for tax remittances, he did not in fact do so and did not consider paying by installments (which in fact was an actual legal requirement upon him).

[33] Against this background, and with apologies for any duplication, I turn to the four factors noted in s. 172.1(4). That subsection reads:

> **(4)** In making a decision in respect of the application, the court must take into account
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> **(a)** the circumstances of the bankrupt at the time the personal income tax debt was incurred;
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> **(b)** the efforts, if any, made by the bankrupt to pay the personal income tax debt;
>
> **(c)** whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and
>
> **(d)** the bankrupt's financial prospects for the future.

172.1(4)(a) – the circumstances of the bankrupt at the time the personal income tax debt was incurred

[34] Mr. Harding had significant income; his second and to a lesser extent his current third bankruptcy included tax debt which accrued while he allocated his notable resources to his legal battles. Again, while one may empathize with this prioritization, it amounts to a public subsidy of a private dispute. Doing so is the territory of legal aid, not the tax or insolvency system.

[35] I have already noted his investment in his spouse's business, and their properties.

[36] And, I have noted his chronic failure-to-file.

[37] Against that, I recall and bear in mind that this is not a case in which Mr. Harding has denied or hidden income; although he has taken an ostrich approach to filing and remittance obligations, there is no indication that he is a tax protestor or that he considered his offshore income not to be subject to Canadian taxation. He also did not minimize or argue with the tax liability, or assert that it was not justly owing by him at the time of the bankruptcy. He simply and ill-advisedly allocated almost all of the funds he "mentally earmarked" for taxes, elsewhere. In some ways, Mr. Harding is akin to the comments of Registrar Thompson in *Re Zhao*, 2020 SKQB 187, at para. 4:

> [4] In all of my years presiding over the bankruptcy court, Mr. Zhao stands out as a man of significant value to Canadian society and a man of integrity. It is in no small measure Mr. Zhao's high character that puts this court in a position to provide some guidance with regard to the process of s. 172.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] bankruptcies in this court.

[38] Mr. Zhao was not delinquent in his filings although they were found wanting after audit[14]; however, the circumstances in Zhao were somewhat "opaque," to use

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[14] For clarity, I reiterate the comments in *Sorochan* and *Smith* that the bankruptcy process is not the place for a collateral attack on the reassessment.

the term employed by Registrar Thompson, and did not appear to be a case of tax avoidance or evasion. That is the case here, in the sense that Mr. Harding does not deny his income; his shortcoming is in failure to file and failure to remit.

[39] To put it another way, Mr. Harding's circumstances at the time he incurred his debt reflect his priorities and tax management while earning a persistently significant income, as opposed to his morality. I suspect, but do not know, that this is reflected in the fact that the interest and penalties attributed to the account are substantially lower than in other cases I have seen.[15]

[40] Or, to put it yet another way, while Mr. Harding is not an "honest but unfortunate debtor"[16] in the sense that he had the knowledge and ability to pay, and did not do so, he is not a cash-on-the-dash evader who calls for especially strong sanction as part of the rehabilitation process or balancing of interests.

172.1(4)(b) – the efforts, if any, made by the bankrupt to pay the personal income tax debt

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[15] I say "interest and penalties" as there is no breakdown before me; interest reflects amounts overdue and unpaid, while penalties reflect wrongdoing on the part of the taxpayer. If I had this breakdown, I expect the penalties would comprise only a moderate proportion of the $137,740.67 total for "interest and penalties."

[16] See *Sorochan* at paras. 17-31

[41] Mr. Harding did not dispute the contents of the MacAulay affidavit, namely that he paid $16,631.44 for 2016 (a reassessment resulted in a $5,096.58 refund, which was allocated to a support payment – improperly so, according to Mr. Harding). $20,000 was paid in February 2020 towards the 2017 return, which has an outstanding balance of $28,282. No other payments are in evidence.

[42] It is also telling that the 2018 and 2019 post-bankruptcy returns yield up a substantial continuing accrued post-bankruptcy liability, and these are unpaid. In that respect Mr. Harding's remittance practices, and late filing practices, are an instance of "déjà vu all over again."

172.1(4)(c) – Whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt

[43] I have discussed most of this already; to summarize, Mr. Harding prioritized his legal bills, home acquisition and improvements, spousal credit card payments (for comingled debt), and at least partial subsidization of his spouse's business enterprises. While the exact amounts are unclear, they were substantial. Apparently his stepson lives in the second home without rent. While these amounts, in the aggregate, may not have fully retired the tax liability, they would have gone a long way.

[44] It will be noted that at least some of these are property acquisitions and payments rather than "other debts" as noted in s. 172.4(4)(c). However, this is something of a false dichotomy. As I noted in *Sorochan, supra*:

> [108] Although the section directs me to consider "payments in respect of other debts," it is also appropriate to ask whether Mr. Sorochan <u>did not incur</u> other debt by virtue of using funds which should have been earmarked for the Tax Man as his working capital. By his own admission, this was the case for at least part of the time frame. It is a distinction without a difference to ask whether tax funds were used for his own expenses, or whether he ran up the credit card and then paid it with tax funds. [emphasis in original]

[45] Unlike with Mr. Sorochan, there is no evidence of consequence – aside perhaps from a modest boat which was later repurchased from the Trustee – that Mr. Harding has been frivolous or squanderous with the tax man's money. He has simply put it elsewhere, some of which may be considered more discretionary than others. To the extent that it has gone to extant assets, it has been repurchased on the parameters discussed above.

174.1(4)(d) – the bankrupt's financial prospects for the future

[46] In my view, this is the most significant factor at bar.

[47] Mr. Harding is now in later middle age. However, he impressed as a hard-working and talented individual. When working in his vocation, he makes very good money indeed. And as I have said with approval, he doesn't sit moribund when his vocation does not call. By all appearances, he continues to be robust and

quite capable of working globally and indeed to his credit was awaiting geological prospects at the time of hearing. There was no indication that his professional qualifications, or his ability to discharge their functions, have any imminent best-by date.

[48] He also has paid for meaningful equity in properties, repurchased from the estate. It does not appear that his financial prospects will be positively influenced much by his spouse's business, although in ordinary tourist times it appears at least to be self-sustaining.

Case Law

[49] Each case turns on its own facts. However, some general principles and guidance can be derived from other cases.

[50] As a starting point, it is worth remembering that the BIA attempts to balance a strong rehabilitative mandate with creditor protection and system integrity. In *Attorney General of Alberta v. Moloney*, 2015 SCC 51, Gascon, J. stated for the Court:

> [32] Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867*. The *BIA*, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, at para. 7).

[33] The first purpose of bankruptcy, the equitable distribution of assets, is achieved through a single proceeding model. Under this model, creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in one collective proceeding. This ensures that the assets of the bankrupt are distributed fairly amongst the creditors. As a general rule, all creditors rank equally and share rateably in the bankrupt's assets: s. 141 of the *BIA*; *Husky Oil*, at para. 9. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22, the majority of the Court, per Deschamps J., explained the underlying rationale for this model:

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise.
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> Avoiding inefficiencies and chaos, and favouring an orderly collective process, maximizes global recovery for all creditors: *Husky Oil*, at para. 7; R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 3.

[34] For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding. Section 69.3 of the *BIA* thus provides for an automatic stay of proceedings, which is effective as of the first day of bankruptcy:

> **69.3** (1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

(See *R. v. Fitzgibbon*, 1990 CanLII 102 (SCC), [1990] 1 S.C.R. 1005, at pp. 1015-16.)

[35] Yet there are exceptions to the principle of equitable distribution. Section 136 of the *BIA* provides that some creditors will be paid in priority. These creditors are referred to as "preferred creditors". There are also creditors that are paid only after all ordinary creditors have been satisfied: ss. 137(1), 139 and 140.1 of the *BIA*. Furthermore, the automatic stay of proceedings does not prevent secured creditors from realizing their security interest: s. 69.3(2) of the *BIA*; *Husky Oil*, at para. 9. A court may also grant leave permitting a creditor to begin separate proceedings and enforce a claim: s. 69.4 of the *BIA*. These exceptions reflect the policy choices made by Parliament in furthering this purpose of bankruptcy.

[36] The second purpose of the *BIA*, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the *BIA* provides:

> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

From the perspective of the creditors, the discharge means they are unable to enforce their provable claims: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at para. 21. This, in effect, gives the insolvent person a "fresh start", in that he or she is "freed from the burdens of pre-existing indebtedness": Wood, at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109, at p. 120. This fresh start is not only designed for the well-being of the bankrupt debtor and his or her family; rehabilitation helps the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society: Wood, at pp. 274-75; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), at p. 6-283. In many cases of consumer bankruptcy, the debtor has very few or no assets to distribute to his or her creditors. In those cases, rehabilitation becomes the primary objective of bankruptcy: Wood, at p. 37.

[37] Although it is an important purpose of the *BIA*, financial rehabilitation also has its limits. Section 178(1) of the *BIA* lists debts that are not released by discharge and that survive bankruptcy. Furthermore, s. 172 provides that an order of discharge may be denied, suspended, or granted subject to conditions. These provisions demonstrate Parliament's attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy: Wood, at pp. 273 and 289.

[38] Discharge is the main rehabilitative tool contained in the *BIA*, but it is not the only one. As Professor Wood, at p. 273, observes:

> The bankruptcy discharge is one of the primary mechanisms through which bankruptcy law attempts to provide for the economic rehabilitation of the debtor. However, it is not the only means by which bankruptcy law seeks to meet this objective. The exclusion of exempt property from distribution to creditors, the surplus income provisions, and mandatory credit counselling also are directed towards this goal.

[39] Another means of rehabilitation is the automatic stay of proceedings contained in s. 69.3 of the *BIA*. The stay not only ensures that creditors are redirected into the collective proceeding described above, it also ensures that creditors are precluded from seizing property that is exempt from distribution to creditors. This is an important part of the bankrupt's financial rehabilitation:

> The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence.
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> (*Vachon v. Canada Employment and Immigration Commission*, 1985 CanLII 12 (SCC), [1985] 2 S.C.R. 417, at p. 430)

[51] It will thus be seen that although rehabilitation is a prime directive, it is not the only one. This is especially so where there is a confluence of a third (or subsequent) bankruptcy with high tax debt (both generally and, when applicable, s. 172.1 BIA). In such circumstances, the Court must be vigilant not to be the proverbial clearing house for debt. In my view, this takes the special form of inculcating into the bankrupt the fact that life's "two certainties" continue unabated by the insolvency process – and in the case of Mr. Harding, this is especially so given his post-bankruptcy tax practices. The breaking of this pattern is, *itself*, part of debtor rehabilitation.

[52] In addition, I have expressed the view that in keeping with a shifted emphasis that goes with a third or subsequent bankruptcy, it should not be treated by default as akin to a second in terms of the debtor's standard obligations. In *Burns, supra*, I reviewed a number of third-and-subsequent bankruptcy cases and said:

> [17] From this, I reiterate and summarize as follows:
>
> - Each case turns on its own facts and calls for a bespoke disposition.

- Once one is in a third or subsequent bankruptcy, the presumptive emphasis shifts from debtor rehabilitation to creditor protection and system integrity.

- A fourth or subsequent bankruptcy is a "very serious matter" (*Boivin, supra*) and calls for detailed inquiry, including an inquiry into the etymology of the prior insolvencies.

- *Mala fides*, misconduct, or turpitude are relevant in determining a proper disposition, but the lack of such elements do not in themselves entitle a third or subsequent bankrupt to token or no conditions as a prerequisite to their discharge.

[18] I would add the following:

- Repeat insolvencies of the same general nature, particularly overextension of consumer credit, call for a disposition which brings home to the debtor the need for responsibility going forward.

- As a general principle, I do not believe a third or subsequent bankruptcy should be any shorter than a second summary bankruptcy that has surplus income (that is, 36 months), whether or not that third (or subsequent) bankruptcy is one that itself has or is expected to have surplus income.

- When there *is* surplus income, I believe a "3+" bankruptcy should generally have a longer period in which that surplus is paid into and for the benefit of the estate. I believe that absent exigent circumstances, a 36 month insolvency period sends an incorrect message that a third (or fourth, or fifth) bankruptcy is "just like a second except that it has to go to Court." It isn't.

- While retirement may not be inevitable in today's world, ageing is. It is incumbent upon the debtor to realize that it is more likely than not that one's senior income, even without medical difficulties, will be lower than in one's peak years and to look to those days proactively rather than reactively. While one may have empathy for those who do not do so, age in itself does not get the debtor a "free pass" from the BIA's objects and principles, particularly in what *Willier, supra*, aptly termed a "recidivist" insolvency.

- That said, the debtor is not forgotten simply because s/he is a "third timer" or a "fourth timer." With their obligations still go rights, including the right to get on with their lives after performing the duties imposed by the Act and such additional obligations as may be appropriate to their particular fact situation.

- The statement by the debtor that "the Court is trying to penalise me because I filed bankruptcy 4 time" is wrong. Absent such misconduct as contained in certain (but not all) parts of s. 173(1), or culpable malfeasance under s. 168, 198, *etc.*, the BIA is not a penal statute, nor is it a punitive one; it is a commercial regime which sets out a regulatory framework for "the orderly liquidation of a bankrupt's estate and the distribution of the value of the assets of that estate to the bankrupt's creditors," and – to repeat the classic phrase – to permit "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business

> community." Houlden, Morawetz, and Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act*, ss. A1 and A2.
>
> - It is important that the Court, on a discharge application, has some indication of the debtor's path ahead (*Hiebert, supra*); either through evidence of the repeat debtor's recognition of her or his shortcomings and efforts to address them, or through the Court's own disposition, or a combination of both. [emphases added]

[53] So here we are. Bearing in mind this confluence of a third time bankruptcy, a second tax-driven bankruptcy, the statutory requirements of s. 172.1, and the circumstances of this particular debtor, I turn to what I have considered to be relevant cases for guidance, roughly in inverse chronological order.

[54] In *Re Babkis*, 2019 SKQB 144, the bankrupt appeared to believe, erroneously, that as an immigrant he was eligible for a five year Canadian "tax holiday." When he learned to the contrary, he embarked on a voluntary disclosure to CRA; his subsequent proposal was unsuccessful. While his bankruptcy conduct was less than exemplary, and his income substantial (approximately $250,000 per year during the time the tax accrued), he had "come clean" and testified that some $300,000 to $400,000 went to assist family members. Registrar Thompson said at para. 20, "I also accept that he did not intend to avoid paying the CRA."

[55] He had paid some $125,000 towards his liability, plus $63,000 in surplus income. Another $167,000 in asset realization was anticipated. The Registrar ordered a payment of $58,000 which included about $40,000 in outstanding

surplus income obligations, to total the amount sought by the CRA in its submissions. In doing so, the Registrar paid attention to the bankrupt's post-assignment lack of cooperation but balanced it with the receipts in the bankruptcy and also an additional $140,000 paid prior to the assignment.

[56] *Re Bhatti*, 2018 BCSC 213, involved false returns (under a tax scheme described by the bankrupt as embarked upon because "I got greedy"). His income for 2014-16 ranged from $141,754.12 to $167,816. Registrar Cameron stated:

> [14] High personal income tax debts are the only category of debt in a bankruptcy where Parliament has explicitly precluded a bankrupt from receiving an automatic discharge. It is also the only category of debt where a bankrupt is specifically precluded from receiving an absolute discharge.
>
> [15] The Court of Appeal has summarized the general principles of discharge, whether tax driven or not, which include the following:
>
> 1. In considering the question of discharge, the Court must have regard not only to the interests of the bankrupt and his creditors, but also to the interests of the public. . . ;
>
> 2. The Legislature has always recognized the interest that the State has in a debtor being released from the overwhelming pressure of his debts, and that it is undesirable that a citizen should be so weighed down by his debts as to be incapable of performing the ordinary duties of citizenship. . . ;
>
> 3. One of the objects of the *Bankruptcy Act* was to enable an honest debtor, who had been unfortunate in business, to secure a discharge so he might make a new start. . . ;
>
> 4. The bankruptcy courts should not be converted into a sort of clearing-house for the liquidation of debts irrespective of the circumstances under which they were created. . . ;
>
> 5. The success or failure of any bankruptcy system depends upon the administration of the discharge provisions of the Act. . . ;
>
> 6. The Court is not to be regarded as a sort of charitable institution. . . ;

7. It is incumbent upon the Court to guard against laxity in granting discharges so as not to offend against commercial morality. It is nevertheless the duty of the Court to administer the *Bankruptcy Act* in such a way as to assist honest debtors who have been unfortunate. . . ;

8. The discharge is not a matter of right. . .

Westmore v. McAfee, (1998) 1988 CanLII 187 (BC CA), 67 CBR (N.S.) 209 (B.C.C.A.) at 216.

[16] The amount to be repaid on a conditional discharge depends on a number of factors, including:

a) the conduct of the bankrupt which led to the bankruptcy,

b) the bankrupt's conduct during the bankruptcy administration,

c) the net amount of surplus income available to repay a certain amount of the debts accumulated,

d) the future prospects of the bankrupt,

e) the amount of recovery in the bankruptcy, and

f) the amount of exempt property retained by the bankrupt or his family following bankruptcy.

Re, Kaleniuk, July 7, 2004, Vancouver Registry 220612**.**

[17] The purpose of the *BIA* is to permit an honest but unfortunate debtor to obtain a discharge from his debt subject to reasonable conditions and to permit the debtor to rehabilitate himself free from the overwhelming burden of debts. The terms "honest" and "unfortunate" are conjunctive. A debtor must be both honest and unfortunate to receive a discharge from his debts. A debtor who is not honest or who is not unfortunate is treated differently than one who is both honest and unfortunate. *Bank of Montreal v. Giannotti*, [2000] 21 CBR (4th) 199; and *McRudden (Re)*, 2014 BCSC 217.

[18] The courts have repeatedly held that failure to pay income tax on income is misconduct and cannot be classified as a misfortune. *Zinkiew (Re)*, 2004 BCSC 1831; and *McRudden (Re), supra*. It is a principle of long standing that a discharge is not conferred as a matter of right but is determined by the facts of the case with consideration being given to the cause of the bankruptcy, the forthrightness of the insolvent person, the performance of the duties required by the *BIA* and whether the discharge and the conditions imposed, if any, are congruent with the integrity of the bankruptcy process and the public perception of this integrity. *Furlotte (Re)*, 2007 NBQB 37.

[57] The Registrar ordered $170,000 (plus $20,000 already paid into the estate) on a total debt of approximately $234,000 (of which $210,608 was to CRA; in turn $159,040.83 of that was interest and penalties). While Mr. Bhatti had comparable income to that of Mr. Harding, his conduct was substantially different and called for a more meaningful denunciation with conditions accordingly.

[58] *Re Hertz,* 2017 SKQB 224, involved a tax bill of almost $500,000, representing 93% of proven unsecured claims (GST accounted for almost another $20,000). As with Mr. Harding, the costs of domestic litigation took their toll. Also as with Mr. Harding, Ms. Hertz failed to file returns, or pay, for several years. She eventually only contributed $36,000 in the few months after her bankruptcy, which was her first. After factoring in the bankrupt's age (65), earning potential (average $122,000 between 2006 and 2014), and "need for specific and general deterrence," Registrar Thompson ordered an additional $30,000 payment (the estate had also received some funds from an inheritance).

[59] *Re Binning*, 2017 SKQB 207, is another decision of Registrar Thompson. The first-time bankrupt, a 52 year old drywaller, was a "terrible record keeper" whose average annual income for 2005 to 2014 was $110,530 (although the Registrar accepted this might be reduced by payments to subcontractors). He paid little on his tax bill ($581,807 outstanding at bankruptcy), but did not make

meaningful payments on anything else either (172.1(4)(c)), save for expenditures on a gambling habit. The Registrar ordered payment of the greater of $30,000 or s. 68 surplus income for 48 months after the date of the order (not the date of bankruptcy). In doing so, she stated:

> [18] In reference to the conditions of discharge, the Court of Appeal in *Toal #3* confirms that a s.172.1 bankrupt will need to satisfy the court that it would be unreasonable in view of his or her financial circumstances to order payments over a four to six year period. In reference to reasonableness, the court in *Toal #3* considered the bankrupt's health, future job prospects and earning potential. [emphasis added]

[60] I have cited that "four to six year" window with approval in *Sorochan*. Registrar Thompson also appears to have considered the feasibility of an order over a similar window (five years) in *Re Kreger*, 2016 SKQB 247.

[61] In making my order, I have taken into account what I think Mr. Harding, with prudence and appropriate sacrifice on his part, can accomplish in that approximate lustrum.

[62] *Re van Eeuwen*, 2013 BCSC 26, is another decision of Registrar Cameron (appeal dismissed 2013 BCSC 1113). In many respects the facts are similar to the case at bar. The bankrupt was a chronic non-filer (1993 to 2008) and non-payor. He had no explanation for much of this period; the latter years were concerned with family issues. His annual income for a nineteen year period averaged around $55,000. By the time of filing, the total taxes, interest, and penalties were

$661,474.93 (plus $110,261.97 in GST). Little was paid. The bankrupt pleaded guilty to and was fined for tax evasion (tax and GST). The Registrar concluded:

> [24] The principal amount of income tax not paid by the Bankrupt covering the period 1993 to the date of his assignment was approximately $272,000. In addition, there will be a tax liability for the nine month period of 2009 predating the assignment into the bankruptcy that will be determined once that return is filed. It is likely then that the total principal amount due for income tax will be $300,000 or more, taking into account the Bankrupt's historical earnings pattern.
>
> [25] In keeping with the law that I have considered and the circumstances of the Bankrupt as I have found them, I will grant the Bankrupt's discharge, conditional upon payment to the Trustee for the benefit of his creditors of the sum of $180,000, a sum which represents approximately 60 percent of the principal amount due to CRA for unpaid income taxes. This amount is at the high end of the range for “ tax driven” bankruptcies but the persistent failure by the Bankrupt over a span of more than 16 years to timely file his tax returns and make payment of the income tax owing requires that a strong message be sent that paying taxes must be a priority in the public interest.
>
> [26] The amount is not meant to be punitive as it reflects only a percentage of the principal owing for income tax and factors out the accrued penalties and interest on that tax liability. In setting these payment terms, I have considered that the Bankrupt has been levied a significant fine for his failure to abide by his obligations to pay income taxes and I have taken into account his earning history. As it stands, it appears he still has the ability to earn his discharge over the ensuing years before retirement. This amount of $180,000 is to be paid in an amount of not less than $2,500 per month, commencing January 15, 2013. The Bankrupt will have the right to prepay the amount due in whole or in part at any time.

[63] From the above, before turning directly to Mr. Harding, I reiterate my summary from *Sorochan*:

> [74] Tax-driven insolvencies, and for that matter those involving substantial public debt in other forms, are “not the same” as those involving mostly consensual creditors. This does not replace the rehabilitative aspects of the BIA, but calls for a more nuanced and balanced inquiry so as fairly to address all interests, including those of public equity and system integrity.

> [75] Section 172.1 prohibits an automatic or absolute discharge when the debtor has "high tax debt" within the meaning of that section.
>
> [76] The factors set out in s. 172.1(4) are mandatory considerations when s. 172.1 applies; they may be considered in other tax driven cases.
>
> [77] Factors other than those set out in s. 172.1(4) may be considered if applicable.
>
> [78] Repeat or especially egregious failures to file, or failures to file and pay, or cases of tax avoidance/evasion call for special consideration.
>
> [79] Part of debtor rehabilitation includes inculcating the responsibility for and ongoing nature of tax filing and remittances. This may often include an order requiring the debtor, as a condition of discharge, to file, be assessed for, and/or pay relevant returns over and above the requirements of s. 172.1(5).
>
> [80] A discharge is something that is earned; it is not an entitlement.
>
> [81] There is a presumption – a rebuttable presumption – that a high tax debtor is not "honest but unfortunate." There is an additional rebuttable presumption that the tax debt does not come under the 'saving' provision of s.173(1)(a) that it is not a debt for which the debtor cannot justly be held responsible. The burden of rebutting those presumptions is on the bankrupt.
>
> [82] The discharge hearing is not a substitute for a tax appeal.
>
> [83] The Court should, pursuant to s. 172.1(4)(d) and by common law, direct its mind to the debtor's prospects over the medium term in formulating a s. 172.1 disposition.
>
> [84] Conditions should generally be significant, but attainable over a reasonable period of time. They should not require the debtor to live in poverty, but also not permit a wholesale return to the debtor's old ways or old ways of life.
>
> [85] Those conditions should generally be over and above the minima provided for in ss. 68 and 158 of the BIA. No hard-and-fast rule should be set as to a percentage of debt or timeline.
>
> [86] The Court should have adequate evidence at hand to evaluate the specific matter at hand and to issue a bespoke disposition.

Summary and disposition

[64] The following may be said of Mr. Harding:

1. He has had a disturbing, persistent, chronic, and continuing pattern of non-filing and non-remittance;

2. While certain of his expenses may be understandable, particularly those incurred for the comfort and succor of his family, it is not for him to take it upon himself to service them by way of a unilateral tax subsidy;

3. In this way, he is not an "honest but unfortunate debtor," but does not rise to the level of turpitude or moral delinquency of the "underground economy" participant or tax protester;

4. He has, with calculations approved by the inspector who is representative of the only notable creditor, paid for his interest in non-exempt assets;

5. He has made, and continues to make, contributions towards his outstanding obligations;

6. He has not sought to "wait out" the bankruptcy through unemployment or underemployment, or abscond with assets in any way known to the Court;

7. His second and third-time filings were tax-driven;

8. He has very good and durable earning prospects, notwithstanding his advancing (but not yet advanced) years;

9. He should make a meaningful and substantial, but achievable, contribution towards his estate;

10. This should be "something more" than *pro-forma* 36 month s. 68 and 158 duties, both by reason of the tax debt and by reason of his third insolvency;

11. This should be achievable, with proper management, over a period of four to six years;

12. He needs to "get the message" that timely and accurate tax filings and payments are not optional.

[65] My default position on a third bankruptcy, absent exigent circumstances, is to require the bankrupt to file income and expense statements for a period of 36 months post-assignment; and if there is a surplus income obligation during that period, to file and pay for 48 months. I see no reason to depart from that here. I have considered expanding upon it, but do not do so in these particular circumstances.

[66] If the Trustee's assertions are correct, total receipts will exceed $300,000 on a $443,611 principal tax debt (and total unsecured creditors of just short of $590,000). When I add the requirement for Mr. Harding to get up to date on his

post-bankruptcy tax obligations, which I do, it becomes apparent that to add further financial impositions strains practicability.

[67] I also repeat these comments from *Sorochan*:

> [46] The requirement for continued filing of income/expense information and filing of tax returns under s. 172.1(5) only applies when the Court imposes a suspension (whether alone or in conjunction with some other condition). In fact, that may be one of the very few cases in which a stand alone suspension is not "always meaningless" (*Re Crowley* (1984), 66 NSR (2d) 390 (SC, TD) at para. 69, a decision which pre-dated s. 172.1). It will be noted that the requirement is to file, not to file and pay.
>
> [47] The Court may, but is not required to, order such filings in other cases. Indeed I frequently impose a requirement for the debtor to file, be assessed for, and pay post-bankruptcy returns as a condition of a discharge from a tax-driven bankruptcy.
>
> [48] In my opinion, in the case of chronic non-filing or non-payment, it should be a standard condition of discharge that a high-tax bankrupt be required to file, be assessed for, *and pay* relevant returns for a period appropriate to the facts of that case. This is over and above the other s. 68, 158, and if applicable s. 172.1 requirements on the bankrupt. Whether there are additional financial obligations on the bankrupt will vary more widely, bearing in mind all relevant factors and especially (but not only) those in s. 172.1(4). [emphasis in original]

[68] As a result of the requirement in a high tax debt case to file taxes during a suspension (s. 172.1(5)), I conclude that this is not the normal situation in which a suspension adds little or nothing to the practical consequences to the debtor or to the estate. I am imposing a concurrent suspension, plus an additional year, along with a requirement not only to file, but to file and pay, as per my jurisdiction under s. 172.1(3)(c) to require the bankrupt as a condition of discharge to "perform any acts, pay any moneys….or comply with any other terms that the Court may direct."

It will be recalled that I have concurrent jurisdiction to suspend and impose conditions: s. 172.1(7).

[69] I wish it to be clear that I consider this to be a “low water” case in terms of conditions, in the context of a third bankruptcy, second tax-driven bankruptcy, and first s. 172.1 bankruptcy. My 48 month surplus income period is my default “go-to” for a third bankruptcy with surplus income; my requirement to file, be assessed for, and pay relevant taxes is also a standard requirement I add to a conditional order in which the filing has a significant tax component (172.1 or not); the suspension with concurrent conditions terms is really my only add-on to less egregious third-time and/or non-172.1 tax cases. In doing so, I reiterate that I have taken into account the 172.1(4) factors discussed above, the receipts to date, the significant fact this is not an “underground economy” tax case, and Mr. Harding’s age and remaining professional “runway.”

Conclusion

[70] Mr. Harding’s discharge shall be suspended until, and conditional upon:

- Payment of surplus income, as calculated for the relevant household size from time to time pursuant to s. 68 BIA and directive 11R2 as in effect for the applicable year, for the 48 month period following his assignment; for

certainty, this shall include any income earned by or through a non-arm's length entity; if necessary, I may be called upon to adjudicate any determination necessary by virtue of s. 68(11) BIA. This shall be at the rate of at least $1,500 per month or 15% of his pre-tax taxable income, whichever is the greater; I will issue a s. 68 garnishment order if sought;

- Filing, assessment for, and payment of all relevant tax returns post-bankruptcy to the time of discharge, and proof of same to the Trustee; for greater certainty, this is not just the four year period following bankruptcy but for all periods post-bankruptcy to the time of discharge;

- A one-year added period of suspension following payment in full of the 48 months' s. 68 income; during that suspension, Mr. Harding shall provide the income and expense statements and returns of income required by s. 172.1(5); again, the requirement of filing, assessment and payment of tax returns noted above shall apply.

[71] There were no submissions as to costs. I am inclined, in these circumstances, to award none wherein the Court application was mandatory and Mr. Harding's participation and contribution to date has been notable. However, I

will receive brief written submissions within 30 days of release of this decision, should a stakeholder wish to make them.

[72] The Trustee shall prepare the draft order; counsel for the CRA shall indicate her agreement with, or dissent as to, form and content.

Balmanoukian, R.