

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**IN BANKRUPTCY AND INSOLVENCY**

**Citation:** Rose (Re), 2014 NSSC 292

**Date:** August 1, 2014

**Docket:** 37826

**Registry:** Halifax

District of Nova Scotia  
Division No. 1  
Court No. 37826  
Estate No. 51-1617375

In the Matter of the Bankruptcy of Kevin Paul Rose

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**D E C I S I O N**

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**Registrar:** Richard W. Cregan, Q.C.

**Heard:** May 15, 2014, in Halifax, Nova Scotia

**Counsel:** Tim Hill for bankrupt, Kevin Paul Rose  
Pamela Clarke for Trustee, PricewaterhouseCoopers

## **Introduction**

[1] Kevin Paul Rose made an assignment in bankruptcy on April 25, 2012. His Trustee is PricewaterhouseCoopers Ltd. He is seeking his discharge in this application.

[2] Mr. Rose was a member of the Canadian Forces between 1981 and 2005. In March of 2013 he was advised that he was entitled to a disability award under Section 45 of the *Canadian Forces Members and Veteran Re-establishment and Compensation Act*, S. C. 2005, c. 21 (the “*Forces Act*”). The award was \$87,992.53. He had the option of receiving the award as a lump sum or by monthly installments over a period of years. He chose the lump sum. The Trustee takes the position that this sum should be included in the calculation of “total income” referred to in Section 68 of the *Bankruptcy and Insolvency Act*, R.S.C. 1988, c. B-3 (“*BIA*”), with the result that he should pay into his estate one half of this sum, that is, \$43,996.27, as surplus income.

[3] His position is that the award should not be considered as part of total income, as it is in substance an award of general damages for injuries he had

received during his years of service. Such damages should not be available to his Trustee. The applicable principle is stated in *Houlden, Morawetz & Sarra*:

*Bankruptcy and Insolvency Law of Canada*, Fourth Edition, F § 241, Page 4-176:

Where a cause of action arises from bodily injury or mental suffering or from injury to reputation or character, the cause of action belongs to the bankrupt and does not vest in the trustee. ... It is not the policy of the law to convert into money for creditors the mental or physical anguish of the bankrupt.

[4] The Trustee has not made a claim for this award as being property under Section 67 of the *BIA*, presumably because the *Forces Act* Section 89 clearly exempts it from seizure and execution. Thus it is exempt property under the *BIA*. However, Mr. Rose's regular pension received pursuant to his years of service factors in his surplus income and is being collected.

### *Forces Act*

[5] I quote relevant sections of the *Forces Act*:

45. (1) The Minister may on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from

(a) a service-related injury or disease; or

(b) a non-service related injury or disease that was aggravated by service.

(2) A disability award may be paid under paragraph (1)(b) only in respect of that fraction of a disability, measured in fifths, that represents the extent to which the injury or disease was aggravated by service.

46. (1) An injury or a disease is deemed to be a service-related injury or disease if the injury or disease is, in whole or in part, a consequence of

(a) a service-related injury or disease;

(b) a non-service related injury or disease that was aggravated by service;

(c) an injury or a disease that is itself a consequence of an injury or a disease described in paragraph (a) or (b); or

(d) an injury or a disease that is a consequence of an injury or a disease described in paragraph (c).

89. (1) No compensation payable under this Act shall be assigned, charged, attached, anticipated, commuted or given as security.

(2) Compensation payable under this Act is exempt from seizure and execution, either at law or in equity.

[6] There are three components to his award.

[7] The first is compensation for his Diabetes Mellitus Type II condition. It was found that it was service-related as he was not checked for diabetes in service and not informed of the risk factor associated with the condition.

[8] I quote relevant passages from the official decision dated December 12, 2012:

### **Reasons for Decision**

- You served as a member of the Regular Force service between 1981 -2005.
- You presented with increased glucose levels in January 2004 and further increased glucose levels in May 2005.
- The Release Medical Exam of May 2005 provides a diagnosis of Metabolic Syndrome. However, the treatment plan for this condition was not identified.
- The submitted Medical Questionnaire of 2012 establishes a diagnosis of your claimed condition.
- Departmental Medical Advisory has reviewed the available medical evidence. The Medical Advisory Consultation Report dated November 2012 indicated that your elevated blood glucose readings between 2004-2005 were an indication of a deterioration and should have been treated. It is possible that an earlier diagnosis may have resulted in a management program that could prevent further complications.

### **Conclusion:**

- It is important to know that the Department does not officially investigate the medical care provided by the Canadian Forces. We do not regulate the practice of physicians.
- Our decision is based on a thorough (sic) review of the service health records and the information that accompanied the application.
- Based on the above evidence, we have determined that your military service did not cause your Diabetes Mellitus Type II. As a result, we are unable to grant full entitlement.
- Although not caused by service, we conclude that your Diabetes Mellitus Type II was aggravated to a severe degree by your Regular Force service. This is because it is possible that an earlier diagnosis may have resulted in a management program that could prevent further complications.
- A severe degree of aggravation is represented by four-fifths entitlement.

[9] The second component relates to hearing loss resulting from Special Duty Service in Bosnia and the third to tinnitus resulting also from this same service.

Both conditions were acknowledged as attributed to this service. I quote the relevant passages from the official decision:

**Reasons for Decision**

- You served overseas in Bosnia between January 1999 - August 1999.
- Your first audiogram following this period of service in October 1999 shows a hearing loss disability.
- You continued to show a hearing loss disability from 1999 until the present day.
- The most recent audiogram of March 2012 confirms your hearing loss disability.

Conclusion:

- The evidence shows that you were diagnosed with a hearing loss disability within 3 months of your return from Bosnia.
- As it is possible that your exposure to noise as a result of this service caused your condition, we resolve all doubt in your favour and conclude that you (sic) hearing Loss is attributable to your Special Duty Service (SDA Bosnia).

and with respect to tinnitus:

**Reasons for Decision**

- You served overseas in Bosnia between January 1999 - August 1999, where you would have been exposed to significant noise.
- Your first audiogram following your service in Bosnia shows the type and degree of losses where noise is a factor.
- You continued to show these losses on your (sic) all your audiograms following this period of service.
- A diagnosis of your tinnitus is noted on the submitted tinnitus frequency report.

Conclusion:

- Your exposure to noise during service may have been intense enough and long enough to have caused your claimed condition.
- As a result, we resolve all doubt in your favour, and conclude that your Tinnitus is attributable to your Special Duty Service (SDA Bosnia) service.

[10] A further claim respecting Obstructive Sleep Apnea was not allowed.

[11] The first condition was caused by deficiencies in the medical treatment he received while in service and not from the service activity. The second and third conditions, however, are acknowledged as having resulted from his service. There is no allocation of the award among the three components.

**“Total Income”**

[12] Prior to coming into force of several amendments to the *BIA* in September 2009, the definition of “total income”, being the basis for determining what bankrupts were expected to pay into their estates during their bankruptcy was found in Subsection 68(2)(a):

“total income” referred to in subsection (1) includes, notwithstanding paragraph 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source ... .

[13] In the 2009 amendments which apply in the present situation, the definition was amended to be:

“total income”

(a) includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt’s revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of bankrupt’s discharge, including those received as damages for wrongful dismissal, received as a pay

equity settlement or received under an Act of Parliament, or of the legislature of a province, that relates to workers' compensation; but

(b) does not include any amounts received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, as a gift, a legacy or an inheritance or as any other windfall.

[14] This amendment is intended to clarify what must be included in "revenue".

[15] This matter was considered in *Smith (Re)*, 2009 NSSC 261, a decision of this Court. It was found that a disability pension granted under the *Forces Act*, in recognition of the bankrupt suffering from Post Traumatic Stress Disorder was found not to be available for the calculation of surplus income. The reasoning following the principle quoted above in paragraph [3] was simply that, just as damages for bodily injuries are not property of a bankrupt, periodic allowances given for the same purposes are not income of a bankrupt to be factored in the calculation of surplus income.

[16] It is submitted by the Trustee that the amended definition of "total income" in effect overrules *Smith (Re)*, and that disability awards are just income and have no higher privilege than income specifically included in the definition.



## **Workers' Compensation**

[17] The definition of “surplus income” in Subsection 68(2) begins with a general description as revenues received by the bankrupt and specifically says it includes:

- those received as damage for wrongful dismissal,
- those received as a pay equity settlement, and
- those received under workers' compensation legislation.

The first two clearly relate to or are in substitution for income from employment and are not applicable in the present situation. However, the character of workers' compensation requires consideration.

[18] Each province and territory has a Workers' Compensation Act. As well, Federal employees are covered by the Federal legislation which provides similar protection, but is administered at the expense of the Federal Government by provincial or territorial boards.

[19] This legislation provides compensation for injuries incurred in the course of employment. The current Ontario Act, Section 1, which I quote from paragraph § 3.4 of *Butterworths Workers' Compensation in Ontario Service* provides:

The purpose of this Act is to accomplish the following in a financially responsible and accountable manner:

1. To promote health and safety in workplaces and to prevent and reduce the occurrence of workplace injuries and occupational diseases.
2. To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease.
3. To facilitate the re-entry into the labour market of workers and spouses of deceased workers.
4. To provide compensation and other benefits to workers and to the survivors of deceased workers.

[20] I presume that the other workers' compensation acts in Canada have similar purposes. They have a preventative function, but the thrust is to compensate for injuries and facilitate the return to work. It serves the civilian work force and the issues peculiar to it.

[21] The *Forces Act* on the other hand, serves a different constituency, namely those who are serving or have served in the Canadian Forces. Although many of the issues covered by it are similar to those covered by workers' compensation statutes, it addresses several issues peculiar to service in the Canadian Forces. There are different social and political concerns. One relates to injuries in the workplace. The other relates to injuries in the course of military service, not just in Canada, but in interventions throughout the world.

[22] In addition to compensation the *Forces Act* provides job placement assistance (Section 3), rehabilitation services and vocational assistance (Section 8), earnings loss benefits (Section 18), permanent impairment allowance (Section 37), disability awards (Section 45), death benefits (Section 57), detention benefits (Section 64), and health benefits (Section 66).

[23] It is submitted that these provisions are more complex and diverse than those found in the workers' compensation statutes. They address much more complicated social, personal, medical and political situations.

[24] These differences are so specific that, if Parliament had wanted to include in this definition benefits under the *Forces Act*, it should have specifically mentioned it.

[25] Accordingly, I find that the reference to workers' compensation legislation does not include the *Forces Act*.

## Income and Revenue

[26] Having decided that the money received does not relate to workers' compensation, one is still left with the question of whether it is income or compensation in the nature of general damages.

[27] The following definitions are taken from the *Canadian Oxford Dictionary*, Second Edition:

**income** *noun* the money or other assets received, esp. periodically or in a year from one's business, work, investments, etc.

**revenue** **1 a** income, esp. of a large amount from any source, **b** (in *pl*) items constituting this. **2** a government's annual income from which public expenses are met.

[28] The dominant idea is that income and revenue are received and used periodically, or accrue with time or are a function of time. This is in contrast to items of a property or capital nature. General damages normally are of a capital nature. They are awarded to replace what is lost. In this case a degree of health and of hearing capacity were lost, not the income by which Mr. Rose supports himself.

[29] There are many cases concerning whether receipts of a bankrupt are to be considered as income subject to Section 68. Relevant cases and commentary were well summarized by Registrar Schwann in **Julyan v. Deloitte & Touche**, 2009 SKQB 321, 59 C.B.R. (5<sup>th</sup>) 243. It was decided while the previous definition was still in effect. However, it applies equally well to the current definition. I quote from it the following:

15 The surplus income regime enshrined in s. 68 of the *BIA*, amplified by Directive No. 11R, refers to the portion of total income which exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living. “Total income” is defined broadly to include “all revenues of a bankrupt of whatever nature or source”. (*BIA*, s. 68(2) (a)) The courts have repeatedly held that the term ‘total income’ is to be interpreted broadly. (see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.); *Beatch, Re*, 2005 SKQB 3, 7 C.B.R. (5<sup>th</sup>) 41 (Sask. Q.B.)).

16 The courts have also repeatedly decided this issue by examining the nature or character of the asset to determine the treatment accorded under the *BIA*. “In order to come within the definition of ‘total income’ in s. 68(2)(a) of the *BIA*, the relevant funds must be a substitution for income, akin to income or in the nature of income or must have retained their previous character of income”. [Houlden & Morawetz, *Bankruptcy & Insolvency Law of Canada*, 4<sup>th</sup> ed. vol. 2, looseleaf, (Toronto: Carswell), F§111(3), p. 3-324.

17 The following types of payments were found to be ‘income’ for purposes of s. 68:

- Post bankruptcy income tax refund (*Marzetti v. Marzetti*)

- An award of damages for wrongful dismissal (*Wallace v. United Grain Growers Ltd.*)
- Disability benefits (*Laybolt, Re* (2001), 27 C.B.R. (4<sup>th</sup>) 97 (N.S.S.C.); *Ali, Re* (1987), 62 C.B.R. (N.S. 64 (Ont. S.C.))
- Severance pay (*Giroux, Re* (1983), 45 C.B.R. (N.S.) 245 (Ont. Bkcty.))
- Settlement funds for loss of future income (*Anderson, Re*, 2004 ABQB 349, 2 C.B.R. (5<sup>th</sup>) 27 (Alta. Q.B.))
- Payments under a farm income support program (*Beatch, Re*)

18 In contrast, settlement funds for future loss of earning and loss of earning capacity were found to be property not income. (see: *Bell, Re* (1996), 39 C.B.R. (3d) 236 (B.C. S.C. [In Chambers])); *MacLeod, Re* (2008), 45 C.B.R. (5<sup>th</sup>) 214 (Ont. S.C.J.))

19 I have no hesitation concluding that a WCB payment for income loss replacement, being a substitute for lost wages, is by its very nature ‘income’ and retains the character as income for purposes of s. 68 of the *BIA*. The lump sum received by Randy Julyan from WCB was intended to compensate him for lost wages from injury and therefore is subject to the s. 68 regime for surplus income.

[30] One must look carefully to the decisions in Mr. Rose’s case made under the *Forces Act*. There is nothing in them which suggest that the awards were made as a substitution for income or as compensation for lost income past or future. They were based on the degree of injury or loss he suffered to his person, not his ability to earn a living.

[31] The award is described in the *Forces Act* as a “disability award”. The inclination is to associate compensation for a disability with income replacement.

If that is what it is, then it most likely is income. However, I think an award for disability is not so limited. Rather an award may be referred to as a disability award to compensate for a loss which has nothing to do with the things one normally refers to as income. Such an award is of a capital nature and thus not income.

[32] I am satisfied that the award is not part of his total income, which is the basis for calculating surplus income. It is an award of general damages to compensate him for injury to his health during his service with the Canadian Forces.

### **Payment to Estate other than Surplus Income**

[33] The Trustee submits that, even if the award is not income, Mr. Rose should nevertheless be required to make a significant payment to his estate as a condition of his discharge.

[34] As of January 21, 2014, the date of the Trustee's Amended Section 170 Report, \$6,011.39 had been realized for his estate. This consisted of \$4,440.00 surplus income paid and about \$1,100 in other assets. The estimate of further

payments was \$50,050.21, which I presume includes half of the \$87,992.53 award. The source of the balance is not stated, possibly it is in the balance of the already settled surplus income.

[35] The report notes that his assets are not 50 cents on the dollar of unsecured liabilities. Thus, a fact pursuant to Section 173 has been proved. Section 172(2) governs the terms of his discharge. This allows that a sum of money be paid as a condition of discharge.

[36] In evidence is Mr. Rose's bank statement from April 1, 2013 to October 31, 2013. It begins with a balance of \$1,363.72. On April 8, 2013 it show the deposit of the award of \$87,992.53. There follows the particulars of his pension, pay, living expenses, etc., none of which are exceptional, but it also shows money advanced to his brother over the next five months totalling \$48,745.37, leaving a balance in the account as of October 31, 2013 of \$5,153.59.

[37] The advances to his brother have been spoken of as loans. There is no indication of the purpose, the terms or the expectation of repayment. I assume they are still assets in his hands. The suggestion of the Trustee is that they are



indications of lack of responsibility on his part. This may be so. The point, however, is that he became insolvent because to quote the S. 170 Report, “Over Extension of Credit and Mismanagement” subsequent to his retirement from the Canadian Forces.

[38] The award is exempt from execution and thus not property in his estate. I have ruled that it is not of the nature of income which is a factor in determining surplus income. He has spent a substantial portion of it and loaned a greater portion of it to his brother on terms not before me.

[39] This issue again is well considered by Registrar Schwann in *Biblow (Re)*, 2009 SKQB 76, 51 C.B.R. (5<sup>th</sup>) 303. Here the bankrupt had had a gambling problem. He held substantial RRSP's which were exempt. The problem was to balance the interests. On the one hand, there is good reason why RRSP's are exempt, namely to assure that in the future the bankrupt will have assets to maintain himself so that his maintenance does not fall on society. On the other hand, there is the offence that reasonable people may take towards a bankrupt being allowed to keep substantial assets. Let me quote paragraph [35]:

35. Balancing the interests at play, I find that the third factor - the integrity of the bankruptcy system - must take precedence in the unique facts before me. I conclude that reasonable people would be offended if this bankrupt, given these facts, were to exit bankruptcy with such a sizeable amount of exempt assets. The integrity of the bankruptcy system would be seriously undermined in the minds of fair minded people if I were to give greater weight to his rehabilitation.

[40] I can understand that Mr. Rose's creditors may be offended by his having received a substantial amount of money, half of which he loaned to his brother with no apparent assurance having been given that it will be repaid, and by spending most of the remainder of it notwithstanding that he has some regular income.

[41] His present income is modest, but I think that some acknowledgement of the requirement for the integrity in the bankruptcy system must be made. In the circumstances, he should be required to pay a significant sum into his estate.

[42] Mr. Rose will be entitled to his discharge upon payment to his estate of the sum of \$5,000 and completion of any outstanding duties under the *BIA*.

R.

Halifax, Nova Scotia  
August 1, 2014