

# SUPREME COURT OF YUKON

Citation: *English (Re)*, 2016 YKSC 38

Date: 20160802  
S.C. No. 15-A0074  
Registry: Whitehorse

IN THE MATTER OF THE BANKRUPTCY

OF

DEBRA JANE ENGLISH

And

S.C. No. 15-A0075

IN THE MATTER OF THE BANKRUPTCY

OF

PAUL GLENN CHARLIE

Before Mr. Justice R.S. Veale

Appearances:  
Eden Alexander  
Kelly Chow

Counsel for Canada Revenue Agency  
Trustee in Bankruptcy

## REASONS FOR JUDGMENT

### INTRODUCTION

[1] These are reasons with respect to two applications for discharge from bankruptcy by Debra Jane English and Paul Glenn Charlie (the “Bankrupts”). The discharges are opposed by the trustee, BDO Canada Limited (“BDO”), and the Canada Revenue Agency (“CRA”). The cause of bankruptcy, according to the Bankrupts and BDO is “a

business failure” with “personal guarantees and director liability for company debts”.

This is the first bankruptcy of Ms. English and Mr. Charlie.

[2] Both BDO and the CRA ask for conditional discharge of the Bankrupts. BDO seeks payment from the Bankrupts for outstanding surplus payments and unredeemed assets. The CRA seeks payment of roughly half of the proven tax debts from each Bankrupt for the benefit of all creditors on a *pro rata* basis.

### **BACKGROUND AND POSITIONS OF THE PARTIES**

[3] The Bankrupts are common law partners. They individually filed for bankruptcy on November 20, 2013. At that time, they were the sole directors and shareholders of a construction corporation called PC Construction Ltd. (the “Company”). In 2012, the Company ceased operations and was dissolved in 2015. In March 2013, the CRA re-assessed the Bankrupts for income tax purposes and discovered unreported earnings of \$519,448 for Ms. English and \$450,184 for Mr. Charlie. These funds were withdrawn from the Company by the Bankrupts as shareholders’ loans and never repaid.

[4] The CRA has claims against the Bankrupts representing a significant proportion of the total proven unsecured claims. Ms. English’s tax debt amounts to \$191,189.88 and represents 87% of the proven unsecured claims against her. Mr. Charlie’s tax debt amounts to \$176,912.89 and represents 72.7% of the proven unsecured claims against him.

[5] It is the CRA’s position that these are tax driven bankruptcies and it opposes discharge of the Bankrupts on the basis of s. 172(2) of the *Bankruptcy and Insolvency Act*, RSC 1973, c B-3 (the “BIA”). In support of a conditional discharge under s. 172(2)(c), the CRA alleges that facts in s. 173 apply, principally s. 173(1)(a), the

Bankrupts' assets "are not of a value equal to fifty cents on the dollar on the amount of [their] unsecured liabilities". In the alternative, the CRA takes the position that ss. 173(1)(d) and (e) apply to Ms. English, and ss. 173(1)(b), (d), and (e) apply to Mr. Charlie.

[6] BDO opposes discharge of the Bankrupts on the basis that they failed to perform duties under the *BIA*. Specifically, it is BDO's submission that the Bankrupts failed to report to BDO as required by the *BIA* and have outstanding surplus payments and unredeemed assets.

[7] The Bankrupts have filed a joint affidavit with the Court primarily outlining their current financial situation. They also dispute the amount of the CRA's reassessment but conceded they did not previously challenge the reassessment. In the hearing, Ms. English also specifically disputed the amount of the unredeemed assets, specifically the value of a 2009 GMC Acadia, as put forward by BDO.

## **ANALYSIS**

[8] One of the central objectives of the *BIA* is to provide for the financial rehabilitation of insolvent individuals. An "honest but unfortunate debtor" may be permitted a discharge from bankruptcy so that he or she can become a contributing member of society, free from the burden of her debts and creditors. It is also of the utmost importance that public confidence in the insolvency system be upheld. This requires that rehabilitation of a bankrupt be balanced with the expectation of creditors to be repaid. Accordingly, the conduct of a bankrupt is an important factor to consider in every application for discharge from bankruptcy (*Hagerman (Re)*, 2014 SKQB 185, at para. 9).

[9] I agree with the CRA that the Bankrupts are not honest but unfortunate debtors. Although they are not “personal income tax debtors” as defined in s. 172.1 of the *BIA*, their tax debt to the CRA comprises a significant portion of their overall debt. Together, Ms. English and Mr. Charlie failed to report \$889,418 in earnings to the CRA. The Bankrupts have made no attempts to pay their tax debts thus far.

[10] According to s. 153(8) of the *Income Tax Act*, RSC 1985, c 1 (5<sup>th</sup> Supp), an assessment is binding unless it is objected to or appealed. The Bankrupts did not challenge the CRA’s re-assessment disclosing the unreported earnings. Therefore, the Bankrupt’s current disagreement with the amount of the tax debt has no bearing on the amount of the CRA’s proven claims.

[11] As the Bankrupts do not meet the definition of personal income tax debtors, ss. 172 and 173 of the *BIA* must be considered. Section 172(2) prescribes that a court shall not grant an absolute discharge if any of the facts referred to in s. 173 are proved. The facts in s. 173 relevant to this case are:

- (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt’s unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt’s unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
- (b) the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

...

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

(e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;

[12] I find that the CRA has met the onus of proving s. 173(1)(a), that the assets of the Bankrupts are not of a value of at least fifty cents on the dollar of their unsecured liabilities. The Bankrupts have not disputed this fact, nor have they offered an explanation as to why they cannot be held justly responsible for this fact. The Bankrupts attribute their insolvency to business failure. While their business may have indeed failed, the Bankrupts contributed to their own insolvency by neglecting to pay their taxes and thus can justly be held responsible for their debts. The Bankrupts withdrew large amounts from the Company and never repaid them. They subsequently chose not to report these earnings to the CRA and did not pay income tax on these earnings.

[13] As noted in *Zinkiew (Re)*, 2004 BCSC 1831, at paras. 58-59, and cited in *McRudden (Re)*, 2014 BCSC 217, at para. 32, those who deliberately do not pay their taxes are not honest but unfortunate debtors,

58 CCRA relies on Master Funduk's decision in *Toal, Re*, [1993] A.J. No. 442 (Alta. Q.B.). That decision affirms the fact that bankruptcy courts do not look kindly on those who deliberately fail to pay income taxes and then look to the bankruptcy system for relief. As Master Funduk succinctly puts it:

...Nobody likes paying income tax. But I resile from the position that a taxpayer should not pay income tax when he incurs it... and when the liability reaches a large amount go into bankruptcy and piously say the he cannot now pay that large debt and it has caused his bankruptcy. Debts do not cause bankruptcy. In this case,

it was the unacceptable conduct of the bankrupt which created this situation. (at para 14).

59 Master Funduk revisited this issue in *Emmerton, Re*, [1995] A.J. No. 4 (Alta. Q.B.):

The failure to pay income tax on income as it is earned is misconduct. The failure to pay income tax on income as it is earned cannot be classed as a misfortune.

... Self-employed income earners cannot be allowed to evade their legal obligation to pay income tax through resort to the BIA. Tax dodging is not acceptable, especially in these times when the country is facing a crushing debt burden and those who do pay are being asked to pay even more. It is not an answer to say that the bankrupt cannot now pay the income tax. He could have when he incurred that liability. He chose not to do so. (at paras 22 & 24)

[14] My finding that s. 173(1)(a) has been proved by the CRA is sufficient to refuse an absolute discharge, as s. 172(2) requires proof of only one s. 173 fact. Nonetheless, based on materials filed with the court, I also find that ss. 173(1)(d) and (e) are proved in the case of Ms. English and ss. 173(1)(b), (d), and (e) are proved by the CRA in the case of Mr. Charlie.

[15] Deterrence and denunciation are important considerations in tax-driven bankruptcies. There is a significant public interest in ensuring that everyone pays their taxes. The bankruptcy system is designed to give honest but unfortunate debtors a second chance, not to absolve tax avoiders of their public responsibilities. A conditional discharge of the Bankrupts in this case appropriately balances the rehabilitation of the Bankrupts and the protection of their creditors while taking into account the circumstances of this case.

[16] Although the Bankrupts claim they are not currently generating very much income, this does not prevent the imposition of a conditional discharge. In *Zinkiew*, at para. 63, Registrar Bouck noted that historical earnings of a bankrupt are sufficient evidence of their ability to make payments toward a conditional discharge. The Bankrupts are capable of earning an income. Ms. English is a qualified and experienced teacher. Mr. Charlie has shown he is capable of earning significant income through his trade and entrepreneurship.

[17] The CRA has suggested the Bankrupts pay roughly half of their tax debts *pro rata* for the benefit of all creditors. This amount is fair and reasonable based on case law of other tax driven bankruptcies (see *Pinc (Re)*, 2007 BCSC 380; *Paine (Re)*, 2001 BCSC 309), the Bankrupts' future earning prospects, and the need to uphold the integrity of the bankruptcy and tax regimes. Holding the Bankrupts responsible for their tax debts is also essential to their rehabilitation and to the deterrence and denunciation of all tax avoiders.

[18] BDO has proved its claim against Mr. Charlie for outstanding surplus payments and unredeemed assets in the amount of \$14,400. They have also proved their claim against Ms. English for outstanding surplus payments and unredeemed assets in the amount of \$15,500.

[19] There is a dispute about the value of an unredeemed asset of Ms. English, namely a 2009 GMC Acadia valued at \$10,000 by BDO. There was a written agreement that Ms. English repurchase BDO's \$10,000 interest. Ms. English has recently had the vehicle valued at an amount of \$2,500-\$3,500. Ms. Laura Compo, a representative for BDO in this bankruptcy matter, had oral discussions with Ms. English agreeing to

amend the value of the vehicle. The Trustee's supplementary report acknowledges this discussion but submits it was done in error. I find that Ms. Campo's agreement was in error and the value of the GMC Acadia should remain at \$10,000, which brings her total balance for unpaid surplus and unredeemed assets to \$15,500.

## **DISPOSITION**

[20] I order that discharge of the Bankrupt, Ms. English, is suspended conditionally upon the following terms:

1. The Bankrupt shall pay to her trustee, BDO, a total of \$15,500 to be paid in instalments of \$500 per month over a term of 31 months;
2. The Bankrupt shall pay, *pro rata* to the benefit of all creditors, 50.1% of the tax debt owed to the CRA over a term of 60 months – an amount equalling \$1,589.38 per month, or \$93,000 in total;
3. Until the payment condition above is satisfied, the Bankrupt shall provide proof she has filed with the CRA her post-bankruptcy Income Tax returns in accordance with the *Income Tax Act*, and if applicable, her Goods and Services/Harmonized Sales Tax returns in accordance with the *Excise Tax Act*, RSC 1985, c E-15, for every subsequent tax year, and further provide proof of payment for any amount due to the CRA for those taxation years in accordance with the *Income Tax Act* and *Excise Tax Act*.

[21] I order that discharge of the Bankrupt, Mr. Charlie, is suspended conditionally upon the following terms:

1. The Bankrupt shall pay to his trustee, BDO, a total of \$14,400 to be paid in instalments of \$500 per month over a term of 28.8 months;



2. The Bankrupt shall pay, *pro rata* to the benefit of all creditors, 52% of the tax debt owed to the CRA over a term of 60 months – an amount equalling \$1,576.39 per month, or \$90,000 in total;
3. Until the payment condition above is satisfied, the Bankrupt shall provide proof he has filed with the CRA his post-bankruptcy Income Tax returns in accordance with the *Income Tax Act*, and if applicable, his Goods and Services/Harmonized Sales Tax returns in accordance with the *Excise Tax Act*, for every subsequent tax year, and further provide proof of payment for any amount due to the CRA for those taxation years in accordance with the *Income Tax Act* and *Excise Tax Act*.

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VEALE J.