

District of Nova Scotia  
Division No. 02 - Truro-Pictou  
Court No. 25857  
Estate No. 51-103345

Date: October 6, 2003  
Docket: B 25857  
Registry: Halifax

IN THE SUPREME COURT OF NOVA SCOTIA  
IN BANKRUPTCY

Citation: Morrissey (Re), 2003 NSSC 200

In the Matter of the Bankruptcy of Christina Marie Morrissey (Lavoie)

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DECISION

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Registrar: Richard W. Cregan, Q.C.

Heard: 17 and 24 July 2003

Counsel: Bankrupt, Christina Marie Morrissey (Lavoie) representing herself  
Paul G. Goodman, FCA, FCIRP, representing the Trustee, Goodman  
Rosen Inc.

## **Introduction**

[1] Christina Marie Morriscey (Lavoie), “Mrs. Lavoie” made an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, the “Act”, on June 18, 2002. Goodman Rosen Inc. was appointed as Trustee.

[2] On February 18, 2003, the Trustee submitted a Report of the Trustee on Bankrupt’s Application for Discharge, pursuant to Subsection 170(1) of the *Act*. It recommended that her discharge be conditional on the payment of \$4041.60 by monthly payments of not less than \$336.80. This recommendation was based on the Superintendent’s Standards and applied to Mrs. Lavoie’s finances at that time.

[3] Mrs. Lavoie did not agree with the Trustee’s recommendation. A mediation hearing was held on April 24, 2003, chaired by Mr. Darrin Ulley of the Office of the Superintendent of Bankruptcy. The mediation was not successful.

[4] On May 23, 2003, Mrs. Lavoie provided the Trustee with budget work sheets for the months of January 2003, through to May 2003. This enabled the Trustee to update its analysis of her income and expenses. It was noted that she had commenced paying \$236.00 per pay to reinstate her pension rights for past

service with her present employer, Canada Customs and Revenue Agency. The Trustee recalculated her income and expenses to add the amount being paid to reinstate the pension rights and to recast her income as though it were paid by 24 instalments *per annum* rather than the actual 26. It took into account her income from the Canada Pension Plan and her special medical expenses. This resulted in the Trustee's revised recommendation based on the Superintendent's Standards that her discharge should be conditional on her paying \$5,076.00 by 12 monthly payments of \$423.00.

[5] Her application for discharge came before the Court on July 11, 2003. The application was adjourned to July 17<sup>th</sup> at which time evidence was received from the Trustee and from Mrs. Lavoie. It was further adjourned to July 24<sup>th</sup> to hear further evidence and submissions.

### **Mrs. Lavoie's Position**

[6] Mrs. Lavoie does not accept the Trustee's recommendation. She says the Trustee should consider the following factors:

1. She should be entitled to buy back her pension credits and the cost thereof should be allowed as an expense in determining whether she has surplus

income under the Superintendent's Standards.

2. She is an artist. During the post bankruptcy period of 2002 she had sales of her art of \$1643.00. Against this she claimed expenses of \$7265.79, resulting in a business loss of \$5622.79. Included in these expenses were motor vehicle expenses of \$2897.50 and capital cost allowance of \$833.68. She says that this business loss should be set off against her regular employment income in determining whether she has surplus income.

3. The costs of her motor vehicle are attributed between her artistic business and her personal use. She needs a motor vehicle for her employment as an income tax auditor, and in particular needs a motor vehicle of fair size so as not to aggravate certain physical problems which resulted from injuries in a motor vehicle accident some years ago. She had an old Cutlass, but in the past year it became no longer repairable. She now has a sports utility vehicle which is financed by monthly payments of \$480.00.

She claims half the expense for the motor vehicle by way of loss from her artistic business as mentioned in subparagraph 2 and she claims the other half as expenses the Trustee should acknowledge as legitimate expenses over and above the normal expenses the Superintendent's Standards allow for transportation to work along with the other general expenses of living. She says they are necessary

expenses, because she has to have the motor vehicle available for her work, although she is reimbursed by her employer, and for her physical comfort in traveling back and forth to work and in the course of her work. She says that public transportation and small automobiles are too uncomfortable.

4. The Trustee has allowed her \$238.00 per month for special medical expenses. She has been advised that she needs substantial dental work which will cost in excess of \$6,000.00. She has recently started to make monthly payments to her dentist of \$300.00 in anticipation of having this work done. This matter had not been brought to the Trustee's attention until the hearing. She claims that these payments should be allowed in determining surplus income.

[7] Mrs. Lavoie submits that, if these expenses are allowed she will have no surplus income and therefore should now receive an absolute discharge. The Trustee submits that these expenses cannot be considered in applying the Superintendent's Standards.

**Mr. Ulley's Evidence**

[8] Mr. Darrin Ulley, the Senior Bankruptcy Analyst of the Office of the

Superintendent of Bankruptcy in Halifax was called as a witness by the Trustee.

[9] Among Mr. Ulley's responsibilities are those of supervising Trustees and ensuring that they act in accordance with the Superintendent's Directives, in particular, Directive No. 11 - Surplus Income, and Directive No. 12 - Terms of Discharge. He noted that these directives are issued under the authority of s.5(4)(c),(d), and (e), of the *Act*. Their purpose is to provide directions to the Trustees and the insolvency community as a whole as to how the *Act* should be interpreted and applied so that there will be consistency across Canada. Trustees are bound to follow these directives. To do otherwise would invite disciplinary proceedings.

[10] Mr. Ulley told of how Trustees previous to the issuance of these directives had difficulty in determining the guidelines for surplus income. They had been relying on guidelines from Stats Canada which were interpreted by Trustees in widely different ways. These directives now provide certainty and uniformity.

[11] Mr. Ulley explained the philosophy behind the nondiscretionary expenses allowed by s.4 of Directive No. 11. There are certain expenses or payments which

must be made by a bankrupt which no one would seriously question, child support payments, expenses connected with health conditions, to name a couple. These the Trustee is to take into account in calculating surplus income. Although Mr. Ulley did not specifically mention it, s.4(2) says that the bankrupt must provide the Trustee with proof of payment of these expenses.

[12] He expressed the view that losses from self-employment as calculated under the Income Tax Act are not intended under s.4(1) of Directive 11 to be set off against income from employment.

[13] Mr. Ulley explained how the principles in Directive 11 are incorporated into Directive 12 in determining the Trustees' recommendations for conditional discharges. He acknowledged that there can be mitigating circumstances where it would be proper for the Trustee not to seek payments as a condition of discharge, notwithstanding the bankrupt has surplus income. Examples he gave were the bankrupt anticipating being unemployed shortly after the discharge period and the bankrupt having serious health problems.

[14] In response to Mrs. Lavoie's examination, with respect to health expenses,

he explained the need for the Trustee to verify health expenses with medical certificates, receipts, etc.

[15] He acknowledged that for a self-employed person, if the need is properly substantiated, the expense of having an automobile could be deducted from income. Where an employee is required to provide her own automobile, and is reimbursed, such reimbursement would reduce the expenses.

[16] He expressed the view that pension buy backs were voluntary payments and concluded, “I would question the general body of creditors subsidizing something like that.”

[17] The reason the Trustee called Mr. Ulley as a witness was to explain what the Office of the Superintendent of Bankruptcy expects of a trustee in applying Directive 11 and 12 and thereby provide evidence to the court that it was right for the Trustee to have taken the position it did on these points of contention in its s.170 Report and to have not compromised its position, notwithstanding Mrs. Lavoie’s disagreement with it and the failure of the mediation process. The purpose of his evidence was then not to tell the court how it should interpret the

*Act* and the Directives under it. Such would have been improper.

**Representations alleged to have been made by Trustee**

[18] Mrs. Lavoie led some evidence about discussions she had with Mr. Goodman of the Trustee's office and his assistant Mr. Redmond regarding her entitlement to buy back her pension, the deducting of expenses, the use of a larger automobile because of medical necessity and her dental requirements. The inference which she draws from these discussions is that she had Mr. Goodman and Mr. Redmond's agreement in incurring these expenses during her bankruptcy and thus they should be allowed as expenses in determining whether she has surplus income.

[19] Mr. Redmond in cross-examination could not recall such discussions with her respecting business expenses and pension buy back. She asked him about discussions about vehicle expenses being considered a medical expense. He admitted that she had provided a medical certificate. He was asked about whether she told him about her proposed dental expenses. He replied that there was no reference to them in her budget sheets.

[20] What may or may not have been represented or promised at the time of the assignment cannot bind a trustee when several months later it prepares its recommendation under s.170 of the *Act*. If a trustee at the beginning misled the bankrupt, so that the bankrupt took a certain course of action, such as making an assignment, which the bankrupt would not have taken, if not misled, this could be the subject of a disciplinary complaint or of a negligence action, but it cannot justify the trustee deviating from the Superintendent's Directives in preparing the s.170 recommendation.

[21] The evidence is not conclusive on just what was represented by Mr. Goodman or Mr. Redmond. However, for the reasons in the preceding paragraph, there is no need for me to make any finding in this regard.

### **Pension Credits Buy Back**

[22] Mrs. Lavoie was given the opportunity to buy back pension credits relating to her previous employment with Canada Customs and Revenue Agency. She was required to commence these payments in December 2002. Obviously this will be of great advantage to her in the future. She in effect is saving money from her

current income for later life. I find, however, that in substance such payments are no different than her simply setting aside the money in a savings account for future use. The Act does not contemplate a bankrupt being able to save money for personal use without first making payments to the Trustee in line with the Superintendent's Standards. If it did, it would be wise for bankrupts to make deposits to savings accounts sufficient to eliminate their surplus income. To allow otherwise would mean that the creditors could be asked to contribute to a bankrupt's well being in old age. I think this is not consistent with the intent of the *Act*.

### **Business Loss**

[23] Mrs. Lavoie has a responsible and reasonably good paying position as an income tax auditor. In the midst of her bankruptcy she is developing her artistic interests into a business. Her argument is that the loss from this business in the past two years, which is substantial considering the limited sales, should be set off against her income from employment as is allowed by the Income Tax Act. The Trustee's position and that of Mr. Ulley is that Directive No. 11 does not allow such set offs for determining surplus income. Again for it to be otherwise would be inconsistent with the purpose of the *Act*.

[24] The creditors cannot be expected to bear what appears to be disproportionate expenses in setting up a business with limited immediate potential based on her hobby, where she already has a reasonable income from employment.

### **Motor Vehicle**

[25] The intent of Directive 11 is that the ordinary expenses of living, food, lodging, clothing, and transportation are covered in the allowances made in the Standards. They are not normally to be allowed as special expenses. This addresses the claim respecting the motor vehicle. She receives expenses from her employer for the motor vehicle when she uses it. The remaining cost of the motor vehicle is covered by this allowance for general living expenses. It is not to be considered an additional non-discretionary expense.

### **Dental Work**

[26] She gave evidence of the need for extensive dental work. Unfortunately she provided neither the Trustee nor the court with a report from her dentist. Without such a report the Trustee according to Directive No. 11 cannot take such expenses into consideration. Without it, the court is not presented with the best evidence of this intended expense.

**Effect of s.170 Report**

[27] Considering Directives 11 and 12 and the commentary on them given by Mr. Ulley, the recommendation made by the Trustee in its s.170 Report is appropriate. However, to the court it is only a recommendation. The court is at liberty to accept it or reject it in whole or in part after consideration of all the factors which should affect its discretion in imposing conditions on a bankrupt's discharge.

**Conclusion**

[28] I agree with the Trustee that the pension buy back, the business loss and most of the vehicle expenses should not be considered in determining Mrs. Lavoie's net income.

[29] She is allowed certain medical expenses which have been properly substantiated. There remains whether something should be allowed for the extra cost of maintaining her present motor vehicle over the cost of a more modest vehicle because of the discomfort of using a smaller vehicle, and there remains whether something should be allowed for her intended dental expenses. I accept that these are both legitimate claims. It is very difficult to quantify them. As for the dental work, it is important that Mrs. Lavoie have a good appearance. She will

benefit from this dental work for several years.

[30] The Trustee recommends a payment of \$5076.00 as the condition of discharge. Against this sum I allow for the extra expense of a larger motor vehicle and for the dental work the sum of \$1500.00.

[31] An Order will issue granting a discharge conditional upon the payment of \$3576.00 by monthly payments of \$ 298.00 over the next 12 months.

[32] There will be no costs.

Registrar in Bankruptcy

Halifax, Nova Scotia

October 6, 2003