SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Mason (Re)*, 2024 NSSC 25

Date: 20240123
Docket: No. 25-078472
Estate Number: 45399
Registry: Halifax (transferred from Calgary)

In the Matter of the Bankruptcy of Kenneth Allen Mason

DECISION

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	November 24, 2023, in Halifax, Nova Scotia
Counsel:	Matthew J.D. Moir and Jessica Rose, for the Applicant bankrupt

By the Court:

[1] "Boris sometimes seems affronted when criticized for what amounts to a gross failure of responsibility. I honestly believe he thinks it is churlish of us not to regard him as an exception, one who should be free of the network of obligation which binds everyone else."

– Martin Hammond, writing of his 17-year-old student, Boris Johnson.

[2] Kenneth Allen Mason, now 49, filed for his first bankruptcy in 2000, when he was not quite 26. He was deemed discharged on January 1, 2001.

[3] A scant ten months later, on November 8, 2001, he filed a second time – based on, says he, advice from a Trustee. He filed with a different Trustee from the first. His declared debts totalled $13,145, all but $1,000 of which were unsecured. $4,200 was to CCRA (now CRA). He said he was unemployed and his only income was $340 per month in child support payments.

[4] Almost eight months after filing, the second Trustee issued its report under s. 170 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA"). It disclosed that Mr. Mason had not attended his second counselling; had not filed income and expense information; and had not provided information

required to file pre-and-post bankruptcy 2001 tax returns. The Alberta Court adjourned the bankruptcy discharge application *sine die* and granted the Trustee leave to seek its discharge. That order is dated September 20, 2002.

[5] The Trustee submitted its notice of deemed taxation and deemed discharge (Form 15) on December 12, 2003 – about 15 months later, and over two years after Mr. Mason's filing. It disclosed that there were zero receipts (and in fact the Trustee was "down" $200 from filing fees), and that there was still no information by which to file tax returns.

[6] There matters sat for many years – almost 20 years, in fact. Mr. Mason went on with life – including, so says he, owning at least two homes and by the time of hearing having a credit rating that puts him in an optimum category. He says that is because Alberta lenders appear to use Equifax primarily or exclusively for credit inquiries; the bankruptcy was only listed, at least at his relevant times, on the competing TransUnion network.

[7] It was not until he came to Nova Scotia that the matter raised its head again, apparently as the result of a TransUnion credit report. He had the bankruptcy file transferred to Nova Scotia pursuant to s. 187(7) of the BIA.

[8] By March 2023, Mr. Mason was making approximately $98,000 a year – according to the evidence, about $71,400 after tax, against pre-tax expenses of about $59,500. His debts were $31,800, consisting of a truck loan ($26,000) and two modest credit card balances totaling $5,800 (the $59,500 in pre-tax expenses includes $3000 in credit card payments). He has subsequently been laid off and has recommenced self-employment as a carpenter, initially estimating his income to be about $60,000 but that this may be expected to go up in short order given the demand for his trade, as he freely admitted.

[9] He seeks his discharge now, with only a nominal one day's suspension and with no further payment or action. He cites the passage of time, the disinterest of creditors (some of whom may no longer exist), the discontinuance of the corporate Trustee (possibly as a result of a merger), the modest amount in issue in the bankruptcy to begin with, and the cost and difficulty of compliance with his BIA obligations now (a minimum of $5,000 and proof of tax compliance from 2001 to date, according to the quote he received from at least one possible successor Trustee) as reasons therefor.

[10] At the hearing, counsel could provide me with no authority in which the Court exercised its discharge discretion in this fashion, and agreed with me that while a Trustee may seek proof of tax compliance as noted above as an internal

policy or as a condition of taking the file as replacement Trustee, the current notice of assessment (showing nothing owing as of the 2021 tax year, and a modest balance outstanding for 2022) together with a direction from the Court would be sufficient to address the fact that Mr. Mason cannot access records before around 2011 (that is, as there was no subsequent insolvency event, the 2021 and 2022 notices of assessment would capture any "carry forward" from years after 2001).

[11] The question becomes, therefore, whether the factors cited by Mr. Mason outweigh the systemic interests in debtor compliance with the duties imposed on him by the BIA.

[12] I conclude that they do not. I also find that compliance is not unduly onerous upon Mr. Mason, with appropriate direction from the Court, and an alternate disposition sends an inappropriate message that "if you wait long enough, you can get a 'free' bankruptcy[1]."

[13] Houlden, Morawetz, and Sarra, *The 2023 Annotated Bankruptcy and Insolvency Act* puts the issue succinctly at 7:69:

> A bankrupt earns the right to a discharge by his or her forthrightness and by performing the duties imposed on him or her by the BIA: *Re Khosla* (2000), 19 C.B.R. (4th) 240; 2000 CarswellAlta 824 (Alta. Q.B.). If a debtor can go into bankruptcy as a convenient

[1] I appreciate Mr. Mason has likely incurred legal fees with this application; I am speaking of financial and statutory intersect with a Trustee, and in the event of a dividend, to creditors.

> means of evading just obligations that he or she has incurred and obtain a discharge without difficulty, bankruptcy becomes an abuse: *Re Posner* (1960), 3 C.B.R. (N.S.) 49 (Ont. S.C.) [emphases added]

[14] In *Re Sorochan* 2021 NSSC 200, I summarized the general principles underlying bankruptcy discharges, as follows:

> [5] But first, I will emphasize that the BIA, in general, attempts to provide a rehabilitative framework for deserving debtors to have a "fresh start," within limits. Registrar Thompson, one of if not *the* most prolific jurists on s. 172.1, recently put it thus in *Re Zhao (sub. nom. R. v. BDO Canada Ltd.)*, 2020 SKQB 187:
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> > [14] The policy of the *BIA vis-à-vis* individual bankrupts is generally designed to promote the financial rehabilitation of the bankrupt through the discharge of his or her unsecured debts, unless the discharge might be construed as abuse of the bankruptcy system or some other more pressing policy objective outweighs the need for rehabilitation in a case.
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> > [15] Gascon J. explains the purpose of the *BIA* with regard to bankruptcy discharge, as follows in paras. 32, 36, 37 of *Moloney*:
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> > > 32 Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867* [(U.K.) 30 & 31 Vict, c 3, reprinted in RSC 1085[2], App II, No. 5]. 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*, [*Husky Oil Operations Ltd. v Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 SCR 453] at para. 7).
> > >
> > > ...
> > >
> > > 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.

[2] [sic]

> 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, [Wood, Roderick J., *Bankruptcy and Insolvency Law*, Toronto: Irwin Law, 2009] at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109 (S.C.C.), 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. (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.
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> 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. [emphasis that of Registrar Thompson]

[6] In the tax context (which I would extend to public debt in general), Registrar Nielsen said in *Re Perrier*, 2016 BCSC 912:

> [17] The courts have identified two underlying principles governing the discharge of a bankrupt. They are the rehabilitation of the bankrupt, as well as the integrity of the bankruptcy system. The principles governing were summarized by the B.C. Court of Appeal in *Westmore v. McAfee* (1988), 1988 CanLII 187 (BC CA), 67 C.B.R. (N.S.) 209 (B.C.C.A.), and they are quoted in *Zinkiew (Re)*, 2004 BCSC 1831 at para. 55:
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> > 1. In considering the question of discharge, the court must have regard not only to the interest of the bankrupt and his creditors, but also to the interests of the public;
> >
> > 2. The Legislature has always recognised 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 has been unfortunate in business, to secure a discharge so he might make a new start;
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> 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;
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> 5. The success or failure of any bankruptcy system depends upon the administration of the discharge provisions of the Act;
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> 6. The Court is not to be regarded as a sort of charitable institution;
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> 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;
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> 8. The discharge is not a matter of right. [emphases added]

[15] Although *Sorochan* dealt with a high tax debt situation, the generalized comments cited above apply equally to discharges *simpliciter*. In a second bankruptcy on the heels of a first discharge, more so.

[16] I expressed a similar sentiment in the context of an unrepentant debtor who effectively blamed everyone-but-himself for his problems in *Re Rodgers*, 2022 NSSC 312:

> [13] This *is* a discharge hearing, in which I must weigh the competing interests of debtor rehabilitation, creditor protection, and system integrity. Or, as I put it in Rodgers 2020, whether the facts before me constitute "stupidity or treason" are relevant to s. 173; however, what (if anything) happens in other Courts or regulatory authorities are for their respective lanes.
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> [14] It is thus with the greatest of reluctance that I find myself compelled to the conclusion that, for bankruptcy purposes, the rehabilitative objectives are primary to the disposition before me. I have been deliberately abrupt in these opening comments, and

will make others, lest Mr. Rodgers take my disposition in this case as a vindication. Let me be clear. It is not. It is an exercise in holding my nose and instructing myself in the proper exercise of my discretion, and jurisdiction. As Justice Platana put it in *Touhey v. Barnabe*, [1995] OJ 2337, cited by BridgePoint:

> 43 The law is clear that a discharge is not a matter of right and that each case must be determined upon its own particular facts. In exercising my discretion I must look carefully at the causes of the bankruptcy and the attitudes and actions of the bankrupt both before and after bankruptcy in determining whether a discharge should be granted. Further, the law should not be converted into a clearing house for the liquidation of debts without regard to the conduct of the debtor. In *Re Stroud* 1995 CanLII 7372 (ON SC), [1995] O.J. No. 1199, MacPherson J. stated at paragraph 31 of his decision:
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> > It is important to consider the interests of both the debtor and his creditors in deciding whether a discharge should be granted. As expressed by Adams J. in Re Goodman, [1995] O.J. No. 72, at paragraph 1:
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> > > The rehabilitative purpose of bankruptcy legislation is well understood. See Re Willey (1981), 38 C.B.R. (N.S.) 24 (Ont. S.C.) Individuals and society generally benefit from a process by which the crushing burden of financial debt can be lifted, thereby permitting a bankrupt to resume the life of a useful and productive citizen. See Re Shakell ... (1988), 70 C.B.R. (N.S.) 270 (Ont. S.C.). Equally important, however, is the integrity of the bankruptcy process itself. While the central purpose of the statute is to enable the honest but unfortunate debtor to make a fresh start, parity of treatment between debtors and fairness to creditors need to be kept in mind.
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> 44 In *Re Cohen* [1994] O.J. No. 3147, Adams J. noted at paragraph 11:
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> > The purpose of the Bankruptcy and Insolvency Act is to permit an honest but unfortunate debtor to obtain a discharge from his debts subject to reasonable conditions and to permit the debtor to rehabilitate himself free from the overwhelming burden of debts. The attitude and actions of the bankrupt, both before and after the bankruptcy, are relevant considerations. Every application for discharge of a bankrupt must be determined upon its own facts and by due exercise of a judicial discretion in relation thereto. [emphases added]

[17] In *Rodgers*, the bankrupt had performed his statutory duties, and sought an absolute discharge. I did not give it, on the facts of the case, providing instead for a conditional order with a notable but serviceable payment obligation. Those facts

are distinct from Mr. Mason, who has not performed his statutory duties (for all intents and purposes, at all), but has considerably less turpitude than Mr. Rodgers. However, the general concepts cited above still apply, particularly in the context of a second back-to-back bankruptcy and which the Court's function is to balance the interests at stake. Put another way, Mr. Mason has the common element of not having derived the valuable lessons the insolvency process seeks to instil, but seeks his discharge based on the factors he has put forward, above.

[18] The passage of time, or surmountable inconvenience, does not relieve the debtor of the obligations which bind others who file in like circumstances. Those obligations are not onerous. ***They apply to all***. They involve verification of income for the requisite period, payment of applicable surplus, realization of non-exempt assets, attendance at counselling sessions, filing of year-of-bankruptcy tax returns, and other duties as the circumstances of the estate require (generally but not exclusively contained in ss. 68 and 158 of the BIA). In Mr. Mason's case, there are no alleged non-exempt assets, and his income – while indeterminate – appears to have been below the applicable threshold for the period applicable to a second bankruptcy.

[19] It is especially telling that despite Mr. Mason's bankruptcies essentially being on the heels of each other, he claims he did not realize the obligations

incumbent upon him. He says that his (then) spouse took care of what was needed in his first bankruptcy, and "thought" the second was taken care of as well. The basis for that was and is indeterminate given that he separated from his spouse in late 2000 or early 2001[3] and filed his second assignment in November 2001. He cites the financial and personal stressors of this separation as the basis for receiving advice to make the second assignment – so obviously his spouse didn't take care of the second bankruptcy[4]. More to the point, he did not embark on the rehabilitative road either time if someone else did his work the first time and he didn't do it all the second. There is no reasonable basis for his assertion that he "thought he did what he needed to do." It was wilful blindness at best, and dereliction to the point of abdication at worst.

[20] He did not demonstrate, nor did he assert any historical, cognitive limitations, aside from the stress of his marital breakdown.

[21] It is worth reiterating that this is not a case of *incomplete* compliance. It is a case of virtually *no* compliance. The debtor did nothing after his initial filing (aside, it appears, from attending a first counselling); in fact, the former Trustee is

[3] Paragraph 3 of ffidavit of bankrupt sworn September 8, 2023 says the separation was 2001; the statement of affairs at Tab B of the affidavit of the bankrupt sworn March 10, 2023 states the separation as being November 2000.
[4] Affidavit of bankrupt sworn September 8, 2023

out of pocket. Nothing could be further from what *Goodman, supra,* aptly refers to as "parity of treatment between debtors."

[22] It is also inaccurate to maintain, as alleged in Mr. Mason's brief, that he has "endured the hardship of having remained in bankruptcy for over twenty years.[5]" Nor is it accurate to say he has been under the "duress of bankruptcy for over twenty years."[6] His life was just fine until the TransUnion report came along. Ultimately, Mr. Mason does not seek his discharge to "square up" with his obligations; he seeks his discharge to expunge a credit bureau datum that has not before, but now does, constrain him.

[23] He also, at the time of the initial application in March 2023, made just shy of $100,000 a year. He cites considerable expenses, discussed above, but I am satisfied that a new Trustee's fee of $5,000 would not be arduous or disproportionate. While his decision to go out "on his own" followed a layoff, he has a trade that is in high demand and by his own admission his pay cut will diminish (or, I expect, disappear). If anything, being self-employed underscores the need for the rehabilitative lesson that financial "paperwork matters."

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[5] Applicant's brief, paragraph 10.
[6] Affidavit of bankrupt sworn March 10, 2023, para. 14.

[24] His assertion that a potential trustee would require tax returns from 2001 to date is thornier, given his claim that records are not available prior to 2011. I believe that this can be surmounted – if not at the Trustee level, then at the Court's through a conditional order or direction – by the evidence that Mr. Mason is (or at 2021 was) "square" with CRA. The evidence I have is that he had a refund in 2021, which counsel admits would constitute evidence that his post-bankruptcy income tax obligations to that date were met; he had a $2,174.04 balance owing for 2022; the 2023 year has just completed (after the date of hearing).

[25] The lack of financial records for the bankruptcy period of 2001-3 present a difficulty, not in my view from a tax return perspective, but from the ability to calculate surplus income. Given my disposition, I believe it is surmountable.

[26] First, the evidence is that Mr. Mason had minimal income while going through his seven-year divorce.

[27] Second, the income level is at least arguably subject to adjustment depending on the extent of his child care obligations during the relevant period (he cites a dispute over maintenance, as well as incurring legal fees).

[28] Third, I have a discretion to vary from the s. 68 "table" amount if the circumstances warrant, on the application of the Trustee (once one is in place) or on the application of any interested person (ss. 68(10), 68(12)).

[29] I believe that a conditional order is appropriate here. It will be necessary for Mr. Mason to find a Trustee prepared to take his file. I understand that such exists, but on terms unsatisfactory to him. That will be for him to work out. I further believe that payment of $5,000 to the estate, or such greater amount as agreed by Mr. Mason and a Trustee, is an appropriate balancing of interests – and preservation of systemic integrity - in these circumstances.

[30] In so saying, I bear in mind the size of the bankruptcy and the disinterest (and in some cases, non-existence) of the declared debtors. That is not the primary driver in this case. It is the underlining that the rules don't cease to apply because you ignore them (or by saying for reasons amorphous that you "thought" you complied with them) for a long enough period. It is, as I put it in *Re Jewkes*, 2020 NSSC 287 (a case in which a first-time debtor did nothing after filing his assignment):

> [20] Mr. Jewkes takes up Court resources. He takes up the Trustee's resources. His inaction throws the administration of justice into disrepute. And if unjustified, those inactions besmirch the majority of bankruptcy files in which the proverbial and literal "honest but unfortunate debtor" does a level best to be fair and equitable to all stakeholders.

> [21] As with Justice Saunders, I find it "troubling" the number of times the public interest is not being met.
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> [22] If Mr. Jewkes seeks to avail himself of the BIA's protections, he doesn't get to do so with a mere filing and a token deposit.
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> [23] Nor am I prepared, absent a rational explanation, to simply put a radio silence file on ice with an adjournment. I have seen too many simply disappear from corporate memory without any rehabilitative objective having been achieved, or the integrity of the process being respected.
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> [24] There is nothing apparently onerous in Mr. Jewkes' file. He has to file documentation to verify income and expenses – at the time of filing, at least, simply an EI payment which would not trigger a s. 68 surplus payment obligation. His payment agreement remains outstanding, excepting the initial payment. He has to account for comparatively minor dispositions. He has to provide information required to file tax returns. He has to attend both counselling sessions (s. 157.1).
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> [25] At filing, at least, he had the financial wherewithal to do all of these things.
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> [26] These do not call for a Stakhanovite effort. They are the bare minimum in both anticipated timeline (nine months) and duties (ss. 68 and 158) set out in the Act. If Mr. Jewkes, for whatever reason, thinks "the rules don't apply to him," he is profoundly mistaken. [emphases added, footnote omitted]

[31] This is on "all fours" with the case at bar, except that Mr. Mason's case went on for much longer[7]; and if he did not have the financial wherewithal to perform his obligations at the time of filing, he certainly did from time to time in the many years since.

[7] And I am pleased to record that, after the decision, Mr. Jewkes decided to "come to the table" and I presided over issuing his absolute discharge several months later.

[32] In *Re Tanchak*, 2014 SKQB 151, the applicant had been in bankruptcy for ten years; he had disposed of an asset on the eve of bankruptcy, but this was not pursued by creditors. Registrar Thompson said:

> [41] I agree with the Trustee that a conditional order of discharge is warranted in this case. In view that the bankrupt failed to disclose the disposition of shares valued at $32,000.00 and his decision to direct payment of his share of the proceeds to his father, within days of his bankruptcy assignment, is not something that can simply be forgiven with the passage of time. Although the bankrupt has no surplus income, he is young and working. While I am satisfied that a condition of discharge is required to deter Mr. Tanchak and anyone else from this type of conduct in the future, the condition should not be so punitive that he will be forced to make another assignment in bankruptcy [emphasis added]

[33] In Mr. Mason's case, we are not dealing with an undisclosed transaction, but instead with a lack of statutory compliance. The underlying principle, however, is that neither the passage of time nor the disinterest of creditors absolves the debtor from his obligations under the BIA.

[34] Mr. Mason will therefore not be discharged until he has engaged a Trustee; that Trustee has been appointed under s. 41(11) BIA; he completed his two counselling sessions[8], and he has paid at least $5,000 into his estate. When those steps have been completed, he will receive an absolute discharge.

[8] I recognize that Mr. Mason appears to have attended his first counselling in his second bankruptcy; given the fog of his recollection of events of the time, the passage of time, his perception of his current obligations, his current business endeavours, and his current claim of ongoing financial stress, combined with what he says a Trustee wants to charge him to bring his matters to an end, I believe a reprise of the first – and presumably updated – counselling is in furtherance of the rehabilitative objective.

[35] I will forward the order to counsel and to the OSB as prepared by this Court.

Raffi A. Balmanoukian, Registrar in Bankruptcy