

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thandi (Re)*,  
2017 BCSC 1201

Date: 20170713  
Docket: B150396  
Registry: Vancouver

## **In the Matter of the Bankruptcy of Ajmer Singh Thandi (aka Ajmer S Thandi, Ajmer S S Thandi, Ajmer Thandi, Thandi Ajmer Singh)**

Before: The Honourable Madam Justice W.J. Harris

### **Reasons for Judgment**

#### **Application to Expunge Proof of Claim and Application for Discharge from Bankruptcy**

Counsel for Applicant: R. Pollard

Counsel for the Creditor Minister of National Revenue: N. Johnston

Counsel for Trustee Campbell Saunders Ltd.: H. Saunders

Place and Date of Trial/Hearing: Vancouver, B.C.  
December 9, 2016

Place and Date of Judgment: Vancouver, B.C.  
July 13, 2017

## **I. INTRODUCTION**

[1] The applicant in these proceedings, Ajmer Singh Thandi, made a voluntary assignment into bankruptcy on August 1, 2014. On assignment, the Canada Revenue Agency (the “CRA”) submitted a proof of claim for Mr. Thandi’s outstanding personal income tax debt, penalties, and interest totalling \$758,261.78 for the 1991, 1992, 1993, 1994, and 1999 taxation years (on a principal amount of \$88,317.32), representing over 89% of Mr. Thandi’s total proven unsecured liabilities at the time of bankruptcy (the “Proof of Claim”).

[2] Mr. Thandi now brings two applications: one, seeking an order under s. 135(5) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “*BIA*”) that the CRA’s Proof of Claim be expunged, and, the other, seeking an absolute discharge from bankruptcy. Her Majesty the Queen in right of Canada as represented by the Minister of National Revenue on behalf of the CRA opposes both applications.

[3] The trustee had opposed the discharge because Mr. Thandi had failed to perform several of his duties under the *BIA* in relation to his income reporting requirements. However, Mr. Thandi is now compliant and the trustee takes no position on the applications.

## **II. BACKGROUND FACTS**

[4] Mr. Thandi is 57 years old and has not been previously bankrupt. He has been separated from his wife since around 1999 and currently lives with his daughter and son-in-law in Surrey, British Columbia.

[5] Mr. Thandi moved to Canada in 1973 from India. Despite only having completed grade 8 while in India, Mr. Thandi was able to secure employment in the forestry sector after moving to Canada. Mr. Thandi worked for a sawmill in Prince George from 1974 to 1992. From 1987 to 1989, he owned a truck that was used to haul lumber for the sawmill.

[6] The circumstances that lead to Mr. Thandi's tax debt are unclear. Mr. Thandi does not recall the specifics of the assessments that gave rise to his debt. In his filed affidavit, he explains:

4. I do not recall the specifics of the assessments that gave rise to my existing income tax liability. To the best of my memory, I recall that when I owned a truck involved in the trucking industry in 1989, the provincial government only granted a limited number of licenses to trucking businesses. Because my business had such a license, other truckers who wanted to work asked me if they could work for my business and I agreed to let them haul using my licence provided they paid me 5% of the profits. However, because all of the hauling done by the other drivers was done under my license, the CRA held me responsible for tax on all of the income that was generated under my licence number in 1989, even though I only received 5% of the income from the other drivers. I remember that I was assessed for approximately \$70,000 in tax in the 1989 tax year due to this issue, but that is the only problem I remember having with the CRA.

[7] He does recall that, in the early 1990s, the CRA garnished his wages for a period of time and that he had difficulty finding work during this period due to "employers' reluctance to engage someone who was being pursued by the CRA". Mr. Thandi was also an alcoholic during this period which he claims further affected his memory of events and his ability to retain employment after he left the forestry sector.

[8] The CRA filed several affidavits in these proceedings in which it claims that the tax debt is a result of Mr. Thandi's failure to report his income appropriately. Howard Goldberg, a collections officer with the CRA and the officer with conduct of the CRA file concerning the bankruptcy of Mr. Thandi, deposed that the debts relate to the 1991, 1992, 1993, 1994, and 1999 taxation years. One of his affidavits exhibits collection diary notes made by various CRA agents over the years that indicate that the debt was largely a result of a reassessment of the 1991 tax year that occurred in or around 2000 that added business and RRSP income.

[9] Mr. Goldberg deposed that Mr. Thandi objected to his tax assessments in respect of the 1991, 1992 and 1993 years and that the objections in respect of the 1992 and 1993 years were unsuccessful but that his objection in respect of the 1991 year was allowed in part.

[10] Mr. Goldberg deposed that Mr. Thandi's debt was certified with the Federal Court of Canada and judgments were registered against two properties owned and used as rental properties by Mr. Thandi and his former wife — one in Surrey and the other in Prince George. The CRA proceeded to garnish wages from the rental incomes generated off of these properties from 2002 until 2004. When Mr. Thandi and his former wife sold the property in Surrey in 2004, the CRA received over \$30,000 from the sale. In 2005, foreclosure proceedings were initiated by CIBC Mortgage Corporation against Mr. Thandi in respect of the property in Prince George. The CRA participated in those proceedings until their conclusion in 2006 when Mr. Thandi and his former spouse were permitted to sell the property on their own behalf.

[11] Since this period, Mr. Thandi has not maintained consistent employment and has had limited means. From 2009 until 2016, Mr. Thandi deposed that he was living with his son who supported him financially. Mr. Thandi attended to his son's children but did not do any other full time work. Occasionally, he worked as a delivery driver for Sonny's Pizza, a restaurant which is owned and operated by his former wife.

[12] In 2011, Mr. Thandi began working regularly for Sonny's Pizza as a delivery driver. However, in October of 2011, he was in a motor vehicle accident while driving impaired by alcohol. Mr. Thandi does not recall the nature of the injuries that were sustained in the accident, but, as a result of his inability to pay approximately \$44,000 owed to the Insurance Corporation of British Columbia due to the accident, he was unable to renew his driver's licence and, therefore, unable to retain his employment as a delivery driver.

[13] Since April 2014, Mr. Thandi has been employed in the kitchen at Sonny's Pizza. He moved in with his daughter and son-in-law in January 2016.

[14] In April of 2014, Mr. Thandi spoke to Harold Saunders, a licensed insolvency trustee, who recommended bankruptcy as a means of dealing with Mr. Thandi's tax debt. Mr. Thandi deposed that he was not familiar with the bankruptcy system in Canada prior to this discussion.

[15] In respect of Mr. Thandi's assignment into bankruptcy on August 1, 2014, the CRA filed with the trustee the Proof of Claim on January 19, 2015, which was amended on March 5, 2015. The Proof of Claim was admitted by the trustee.

### **III. ANALYSIS**

[16] I will first consider the expungement application, and then I will turn to the application for discharge.

#### **A. Expungement under s. 135(5) of the *BIA***

##### ***Mr. Thandi's Position***

[17] Mr. Thandi submits that the Proof of Claim, which relates to assessments made prior to March 4, 2004, is statute-barred as exceeding the limitation period under s. 222(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (the "ITA"). That section provides a limitation period of 10 years beginning on March 4, 2004 for the collection of a debt arising from an assessment that was issued prior to March 4, 2004. Mr. Thandi submits that he made his assignment into bankruptcy on August 1, 2014, more than 10 years after March 4, 2004 and that the claim should therefore be expunged.

[18] Mr. Thandi also contends that he was not in a position to challenge the 1999 reassessment when it was completed as it occurred some years after the taxation years at issue and he did not have the relevant documentation. He claims he was not required to retain the documents for the relevant period.

##### ***The CRA's Position***

[19] The CRA submits that, under ss. 222(5) and (6) of the *ITA*, the limitation period for the collections was restarted and has been extended beyond the original 10 years. It submits that the CRA's participation in the foreclosure proceedings in 2006 and certain written communications received by the CRA from Mr. Thandi's lawyer during this period are sufficient to satisfy the provisions to restart the applicable limitation period. The CRA contends that the stay imposed on bankruptcy

would then have halted the limitation period: *Forsyth (Re)*, 2011 BCSC 1203 at paras. 15 and 16.

[20] The CRA also submits that, in seeking to expunge the claim, Mr. Thandi is attempting to re-litigate the foundation of his tax debt which is beyond the jurisdiction of this Court. Relying on the decision in *Jones (Re)*, 2012 BCSC 1146, the CRA contends that this is a collateral attack on the jurisdiction of the Tax Court of Canada and the Federal Court of Appeal. The CRA notes that while Mr. Thandi did object to his tax assessments, he chose not to appeal further to the Tax Court of Canada and/or the Federal Court of Appeal when the assessments were made. He therefore cannot now challenge the assessments through these proceedings.

### ***Discussion***

[21] The application to expunge is brought under s. 135(5) of the *BIA* which provides:

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

[22] Absent a successful challenge, a claim accepted by the trustee is deemed a provable claim in the amount accepted by the trustee, and this determination is "final and conclusive": *BIA* s. 135(4); *Green v. Green*, 2015 ONCA 541 at para. 70.

[23] The limitation periods for the collection of tax debts are found in s. 222(4) of the *ITA*, which provides:

(4) The limitation period for the collection of a tax debt of a taxpayer

(a) begins

(i) if a notice of assessment, or a notice referred to in subsection 226(1), in respect of the tax debt is sent to or served on the taxpayer, after March 3, 2004, on the day that is 90 days after the day on which the last one of those notices is sent or served, and

(ii) if subparagraph (i) does not apply and the tax debt was payable on March 4, 2004, or would have been payable on that date but for a limitation period that otherwise applied to the collection of the tax debt, on March 4, 2004; and

(b) ends, subject to subsection (8), on the day that is 10 years after the day on which it begins.

[24] However, as the CRA notes, s. 222 goes on to read:

(5) The limitation period described in subsection (4) for the collection of a tax debt of a taxpayer restarts (and ends, subject to subsection (8), on the day that is 10 years after the day on which it restarts) on any day, before it would otherwise end, on which

- (a) the taxpayer acknowledges the tax debt in accordance with subsection (6);
- (b) the Minister commences an action to collect the tax debt; or
- (c) the Minister, under subsection 159(3) or 160(2) or paragraph 227(10)(a), assesses any person in respect of the tax debt.

(6) A taxpayer acknowledges a tax debt if the taxpayer

- (a) promises, in writing, to pay the tax debt;
- (b) makes a written acknowledgement of the tax debt, whether or not a promise to pay can be inferred from the acknowledgement and whether or not it contains a refusal to pay; or
- (c) makes a payment, including a purported payment by way of a negotiable instrument that is dishonoured, on account of the tax debt.

(7) For the purposes of this section, an acknowledgement made by a taxpayer's agent or legal representative has the same effect as if it were made by the taxpayer.

[25] Before considering the limitation period applicable in these circumstances, I will address the CRA's arguments concerning re-litigation and collateral attack. The CRA relies on the decision in *Jones* to support the proposition that the application is inappropriate as it is an attempt to re-litigate the foundation of the tax debt which is beyond the jurisdiction of this Court. In that decision, a trustee had disallowed a CRA proof of claim because, in the trustee's view, the tax debt was based on evidence seized by police in violation of the bankrupt's *Charter* rights. Justice Griffin rejected the trustee's arguments and held that the trustee had been wrong to disallow the claim as the bankrupt had previously exhausted all avenues available under the *ITA*, which provides a "complete code for a taxpayer to challenge any assessments levied": *Jones* at para. 78 citing from *Foote v. Canada (Attorney General)*, 2011 BCSC 1062 at para. 26.

[26] Here, Mr. Thandi's counsel raised issues about the lack of clarity of the tax debt underlying the Proof of Claim, referencing the CRA's failure to respond to their requests for evidence of the grounds for the 1991 reassessment and the delay in the reassessment that occurred in or around 2000. I accept the CRA's submissions that this is an inappropriate forum for Mr. Thandi to challenge the underlying assessments. Mr. Thandi chose not to further challenge his assessments and reassessments at the time they were completed through the Tax Court of Canada or the Federal Court of Appeal and cannot do so now.

[27] Turning to whether the claim is barred due to the limitation period in the *ITA*, as noted above, the general limitation period to collect debts under s. 222(4) is 10 years for collection of a debt arising from an assessment that was issued prior to March 4, 2004. However, the limitation period can be restarted under s. 222(5). The relevant parts of that section state that a limitation period restarts on any day on which "the taxpayer acknowledges the tax debt" or any day on which "the Minister commences an action to collect the tax debt". Under s. 222(6), a taxpayer acknowledges a tax debt if the taxpayer promises, in writing, to pay the tax debt; makes a written acknowledgement of the tax debt; or makes a payment on account of the tax debt. For the purposes of the section, an acknowledgement made by a taxpayer's agent or legal representative has the same effect as if it were made by the taxpayer: s. 222(7).

[28] Mr. Thandi submits that the CRA has failed to establish that the provisions have been satisfied such that the limitation period was restarted. While Mr. Thandi acknowledges that there were some proceedings taken by the Minister prior to 2004 to collect the debt, he argues that the only actions taken after 2004 was an appearance in CIBC's foreclosure proceedings in 2006 and that this is not sufficient to restart the limitation period under s.222(5)(b). Moreover, Mr. Thandi submits that the CRA has not provided sufficient evidence that he acknowledged the debt after 2004, specifically arguing that there is not sufficient evidence that he or his representative acknowledged the debt in writing.

[29] The CRA responds that its participation in the foreclosure proceeding is sufficient to be an “action” such as to restart the limitation period. Further, the CRA references the collection diary notes which contain an annotation that, in July 2006, the CRA received a letter from the lawyer for the bankrupt Mr. Thandi requesting confirmation that the CRA was prepared to release judgment so that the sale could proceed and the funds from the sale of the house could be sent to the CRA. It submits that this written acknowledgment is sufficient to restart the limitation period.

[30] After 2004, the Minister’s only action taken in relation to Mr. Thandi’s debt was the participation in the foreclosure proceedings. While circumstances of their participation are not fully described, the evidence of Mr. Goldberg was that the CRA filed an Appearance on December 12, 2005, a Response was filed by the Minister of National Revenue on December 23, 2005, and that the “CRA participated in those foreclosure proceedings until their conclusion in or about October 2006”.

[31] Counsel did not direct me to cases that have considered s. 222(5)(b), however, “action” is defined under the *ITA* in s. 222(1) to mean “an action to collect a tax debt of a taxpayer” and includes a proceeding in a court and anything done by the Minister under subsection 129(2), 131(3), 132(2) or 164(2), section 203 or any provision of this Part” [emphasis added].

[32] Applying the modern, purposeful and contextual approach to statutory interpretation as set out in *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42 at paras. 26 and 27, I do not read these sections as requiring the Minister to have been the one to have initiated the proceedings in which the action to collect the debt occurs. Such a requirement would not be in line with the objectives of the *ITA* to ensure individuals pay their required tax obligations. In my opinion, participation in the foreclosure proceedings with the express purpose of attempting to collect on the outstanding debt would be an “action to collect a tax debt” and is therefore sufficient to engage the section.

[33] Moreover, I find that there is sufficient evidence to support the CRA having established that they received a written acknowledgement of the debt by counsel for

Mr. Thandi in July 2006. The evidence provided in support is the notation found in the collection diary that states that Rai & Company, lawyer for Mr. Thandi at the time, sent a letter dated July 18, 2006 requesting confirmation that the CRA would release judgments once any excess funds come to CRA. This evidence is not contradicted by Mr. Thandi in his affidavit and in the absence of evidence to the contrary, I find that in July 2006, Mr. Thandi acknowledged his debt in writing such that the limitation was restarted.

[34] Given the above, I would dismiss the application to have the CRA's Proof of Claim expunged.

### **B. Discharge from Bankruptcy**

#### ***Mr. Thandi's Position***

[35] Mr. Thandi seeks an absolute discharge from bankruptcy, or, in the alternative, a discharge suspended for one week. He submits that there is no evidence of misconduct on his part other than the failure to pay his taxes and that, in the event a conditional order is imposed, the case law supports a condition that he repay on the lower end of 1% to 5% of the tax debt.

[36] Mr. Thandi provides several authorities where partial repayment has been imposed as a condition of bankruptcy. These include: *Stanzel (Re)*, 2014 SKQB 187; *Wutzke v. Minister of National Revenue*, 2011 SKQB 270; *McRudden (Re)*, 2014 BCSC 217; *Gelpke (Re)*, 2012 BCSC 1770; *Baran (Re)*, 2013 ONSC 7501; *Desai (Re)*, 2014 ONSC 136; *Paine (Re)*, 2011 BCSC 309; *Birnie (Re)*, 2015 BCSC 1350; *McKinney (Re)*, 2013 BCSC 1311; *Mulyk (Re)*, 2014 BCSC 351; *Perrier (Re)*, 2016 BCSC 912; and *Tjelta (Re)*, 2012 BCSC 984.

#### ***The CRA's Position***

[37] The CRA opposes an absolute discharge and instead seeks an order that Mr. Thandi's discharge be made conditional on a payment of the sum of \$125,000 payable in monthly installments of not less than \$500 with the right to prepay either

in whole or in part. This represents approximately 16% of the outstanding debt. Further, the CRA requests that any discharge be conditional on Mr. Thandi completing all outstanding income tax and GST returns and paying any post-bankruptcy taxes owing.

[38] The CRA provides several grounds for their opposition to an absolute discharge for Mr. Thandi. It submits that: as Mr. Thandi's assets are not of a value equal to fifty cents on the dollar on the amount of his unsecured liabilities, he is justly responsible for the shortfall under s. 173(1)(a) of the *BIA*; Mr. Thandi has brought on or contributed to the bankruptcy by unjustifiable extravagance in living or by culpable neglect of his business affairs as defined in s.173(1)(e) of the *BIA*; and that this is a tax-driven bankruptcy as defined by section 172.1 of the *BIA* where Mr. Thandi is attempting to use the bankruptcy process to avoid payment of his tax liabilities. It submits that the principles of commercial morality, deterrence, and denunciation mandate a substantial condition for Mr. Thandi's discharge.

[39] The CRA relies on the following cases: *Kalenuik (Re)* (7 July 2004), Vancouver Registry, 220612 VA01 (B.C.S.C.); *Paine (Re)*, *Pinc (Re)*, 2007 BCSC 380; *Wagner (Re)*, (27 October 2015) Kelowna B52887 (B.C.S.C.); *Williams (Re)*, 2005 BCSC 289; *Van Eeuwen (Re)*, 2013 BCSC 1113 aff'g, 2013 BCSC 26; and *Luoma (Re)*, 2012 BCSC 922.

### ***Discussion***

[40] Mr. Thandi's bankruptcy is subject to s. 172.1 of the *BIA* which applies to individuals who have an outstanding personal income tax debt in excess of \$200,000, where the amount owing represents 75% or more of the bankrupt's total unsecured proven claims. The section provides:

172.1 (1) In the case of a bankrupt who has \$200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims, the hearing of an application for a discharge may not be held before the expiry of

(a) if the bankrupt has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction,

- (i) 9 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 9 months, or
  - (ii) 21 months after the date of bankruptcy, in any other case;
- (b) if the bankrupt has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction,
  - (i) 24 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 24 months, or
    - (ii) 36 months after the date of bankruptcy, in any other case; and
- (c) in the case of any other bankrupt, 36 months after the date of the bankruptcy.

(2) Before proceeding to the trustee's discharge and before the first day that the hearing could be held in respect of a bankrupt referred to in subsection (1), the trustee must, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application for the bankrupt's discharge.

(3) On the hearing of an application for a discharge referred to in subsection (1), the court shall, subject to subsection (4),

- (a) refuse the discharge;
- (b) suspend the discharge for any period that the court thinks proper; or
- (c) require the bankrupt, as a condition of his or her discharge, to perform any acts, pay any moneys, consent to any judgments or comply with any other terms that the court may direct.

(4) In making a decision in respect of the application, the court must take into account

- (a) the circumstances of the bankrupt at the time the personal income tax debt was incurred;
- (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.

(5) If the court makes an order suspending the discharge, the court shall, in the order, require the bankrupt to file income and expense statements with the trustee each month and to file all returns of income required by law to be filed.

(6) If, at any time after the expiry of one year after the day on which any order is made under this section, the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the

terms of the order, the court may modify the terms of the order or of any substituted order, in any manner and on any conditions that it thinks fit.

(7) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

(8) For the purpose of this section, personal income tax debt means the amount payable, within the meaning of subsection 223(1) of the Income Tax Act without reference to paragraphs (b) to (c), by an individual and the amount payable by an individual under any provincial legislation that imposes a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, including, for greater certainty, the amount of any interest, penalties or fines imposed under the Income Tax Act or the provincial legislation. It does not include an amount payable by the individual if the individual is or was a director of a corporation and the amount relates to an obligation of the corporation for which the director is liable in their capacity as director.

[41] A court hearing is required for these individuals to obtain a discharge and, by s. 172.1(3), the court has the power during the hearing to: refuse the discharge; suspend the discharge; or require the bankrupt, as a condition of his or her discharge, to perform any acts, pay any moneys, consent to any judgments or comply with any other terms that the court may direct. In an application for discharge under the provision, courts must consider the factors found in s. 172.1(4). These factors closely align with the factors courts considered in tax-driven bankruptcies prior to the enactment of the provision: see *Pincat* para. 14.

[42] The section is aimed at ensuring that bankrupt individuals with significant income tax debt do not take advantage of the bankruptcy system by paying their other creditors to the exclusion of the government and by not paying their fair share of the public expenses. This was emphasized by the Ontario Superior Court of Justice in *Baran* where the court noted the following:

[18] The general approach on discharge applications taken by courts in tax-driven bankruptcies can be gleaned from two sources. In *Re Johnson*, [(1987), 62 C.B.R. (N.S.) 108 (Ont. S.C.)] Saunders J. stated:

The remarkable feature of this particular application is the failure by the bankrupt to pay any significant amount towards income tax for the years 1983 and 1984 notwithstanding the substantial income earned in those years. While it is proper to arrange one's affairs to attract the minimum amount of tax, once tax has been assessed it is the duty of all Canadian taxpayers to pay the tax imposed. While family responsibilities are, of course, important, there is, apart from

emergency medical expenses, no debt more important than the payment of taxes by persons enjoying a good income. If a taxpayer does not pay his fair share, the burden arising from that failure falls on the other members of the community. Most Canadians have their tax collected at source or pay what is owing when they file their return.<sup>6</sup>

Also, in the more recent case of *Re Rivers* [2013 BCSC 324], Master Baker quoted from *Bennett on Bankruptcy*:

Most of the cases provide that a tax avoider should not be able to use the bankruptcy system as a means to escape payment. A bankrupt who does not pay taxes is not an honest and unfortunate debtor. Where the sole or principal creditor is the Canada Revenue Agency, the court has made orders requiring payment somewhere between 40 and 65 per cent of the claims as a deterrent.

[43] This deterrence objective was emphasised in the decision of Master Young in *Tjelta*:

14 ... the court has noted that the bankrupt who persistently ignores tax obligations is not a bankrupt who has suffered through an unhappy accident or unfortunate event which overtook him, but he or she is one who is indifferent to sharing the tax responsibility with other Canadians and who scoffs at the tax system, leaving other Canadians to pay for the benefits that this bankrupt also enjoys. This indifference towards tax obligations is considered misconduct, and in each case, the courts have imposed an obligation on the bankrupt to pay a percentage of the outstanding debt as a condition of discharge of bankruptcy.

[44] Based on these cases, a condition of repayment is required that advances the objective of deterrence and the condition should be "sufficiently burdensome to make the point that the bankrupt's conduct cannot be tolerated, but should not be unduly hard to the bankrupt to bear on a "go forward" basis": *Desai* at para. 94. That said, the authorities vary on the appropriate amount.

[45] For example, in *Baran*, the court dealt with an appeal of a decision of a registrar to decline to impose any condition on the discharge of a bankrupt in a tax-driven bankruptcy. The court held that the registrar had erred by not imposing a condition of repayment and imposed a condition on the bankrupt to repay approximately 1% of the principal given the bankrupt's obligation to care for her young children and her husband's gross yearly salary of \$50,000. The court noted:

[19] The survey of the case law filed by the appellant disclosed that in the last four years courts most usually impose, as a condition of discharge, payments

in the range of 5% to 15% of the tax debt, with only two cases resulting in payments of 50% or more of the tax debt.

[46] Several other authorities provided by Mr. Thandi also support a lower repayment condition. In *Tjelta*, Master Young (as Registrar) ordered payment of approximately 5% of an outstanding tax debt. Further, in *Wutzke*, Schwann, J. ordered repayment of approximately 1% of the income tax claim in a “tax driven” bankruptcy. In reaching the amount, Schwann J. considered the bankrupt’s young age; his working experience; the many earning years ahead of him; and his high tax debt, concluding that an order of payment was required to protect the integrity of the bankruptcy system.

[47] The CRA referred to several cases in support of a higher payment than requested by Mr. Thandi. In *Wagner*, Master Baker commented at para. 16 that cases in this Province reflected a range of 20% to 70% depending on the circumstances of the individual. In *Williams*, Registrar Bouck ordered a bankrupt to pay 40% of an outstanding CRA debt. In *Van Eeuwen* this court upheld a decision of Registrar Cameron that ordered a bankrupt to pay 60% of the principal amount outstanding.

[48] While these judgments provide guidance for determination of an appropriate amount, I do not accept the CRA’s suggestion that they establish a strict rule that where the sole or principal creditor is the CRA, the lower range for a conditional order is 20%. In reviewing these cases, it is clear that, while the goals in ordering partial repayment include deterrence, these orders must take into account the circumstances of the bankrupt and their ability to pay on an ongoing basis. For example, in *Williams*, the bankrupt was a medical doctor that had historically enjoyed a net yearly income in excess of \$70,000 and had been able to pay spousal and child support; purchase an RRSP; pay rent; and lease a vehicle during the bankruptcy. In *Van Eeuwen*, this court upheld the amount imposed by the Registrar specifically because the registrar “gave consideration to the ability of the appellant to meet the conditions imposed” which included a finding that the bankrupt had the ability to earn “substantial income”: para. 28.

[49] Here, I find that Mr. Thandi has limited means to repay his tax debt going forward. He is 57 years old and has a grade 8 education from India and has not earned a significant income since sometime before 2009. Mr. Thandi's tax assessments since 2009 show no reported income and the trustee reports that his average net monthly income for the nine month bankruptcy period was approximately \$700 a month. Mr. Thandi also has a history of alcoholism and is only currently working at a business owned by his former wife. I recognize that intentional under or non-employment should be considered and given weight in assessing ability to pay: *Luoma* at para. 18. I am satisfied that Mr. Thandi does not have any significant assets and that Mr. Thandi is currently employed in as good of a position as he will likely be able to find - given his limited skills and history of alcoholism.

[50] A lower repayment amount is also supported by consideration of the factors found in s. 172.1(4) of the *BIA*. As noted above, the factors mandate consideration of the circumstances of the bankrupt at the time the personal income tax debt was incurred; the efforts, if any, made by the bankrupt to pay the personal income tax debt; whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and the bankrupt's financial prospects for the future.

[51] Mr. Thandi was negligent in managing his financial affairs in the 1990s in relation to his tax liabilities. He had an obligation to pay his taxes and bear his portion of the public cost or to pursue the available remedies at the time if he felt he was being treated unfairly. He did not do so. However, there is no evidence of maliciousness or fraudulent activity by Mr. Thandi. He previously took steps to deal with his tax obligations. Mr. Thandi voluntarily sold his home in Surrey in 2004, with a significant amount of the sale proceeds going to the CRA. I do not accept that Mr. Thandi has lived a lavish lifestyle before or during the bankruptcy. There is also no evidence that Mr. Thandi has incurred any post-bankruptcy debt.

[52] Given his circumstances, I find that requiring a payment of \$40,000, which is approximately 5% of the tax debt, as a condition of discharge would satisfy the policy objectives of s. 172.1 of the *BIA*.

#### **IV. CONCLUSION**

[53] Mr. Thandi is granted a discharge from bankruptcy, conditional on payment of the sum of \$40,000 with minimum monthly payments in the amount agreed to by the parties based on Mr. Thandi's income as it may change from time to time until paid in full, with liberty to pre-pay all or part of the full amount.

[54] There will also be an order requiring Mr. Thandi to comply with his post-bankruptcy income tax obligations as reported by the CRA to the trustee, such that all personal income tax and GST returns be filed by their due dates, with payments in full if tax is owing.

[55] As success in this application is divided, there will be no order as to costs.

“Harris, J.”