IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Cook (Re), 2010 NSSC 224

Date: June 14, 2010
Docket: B 34482
Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 34482
Estate No. 51-963372

IN THE MATTER OF THE BANKRUPTCY OF
LISA ANN COOK

D E C I S I O N

Registrar:	Richard W. Cregan, Q.C.
Heard:	April 23, 2010
Present:	Lisa Ann Cook, bankrupt, representing herself.
	Mark S. Freeman, representing the Attorney General of Canada.

Background

[1] This is an application by Lisa Cook under Subsection 178(1.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA) for an order that Subsection 178(1)(g) does not apply to her student loan debts. The Attorney General of Canada appeared through its counsel, Mark S. Freeman, to oppose this application.

[2] Ms. Cook studied at St. Mary's University from 1991 to 1996. She received the BA degree. Her studies continued at Mount Saint Vincent University from where she obtained the B.Sc. degree and the B. Ed. degree. She ceased being a student in May 2003. She is 37 years of age.

[3] To finance this education she obtained a number of student loans. These are with balances as of her assignment in 2007:

CIBC Canada Student Loans	$17,785
RBC Student Loan	32,960
RBC Student Loan	24,855
Province of Nova Scotia	5,150
	$80,750

It appears that only the first and fourth of these loans are owed to Canada and thus it is with respect to them that Mr. Freeman has appeared. They each presently carry interest at 4.75% per annum. She advises that the other two loans carry interest in the area of 8%.

[4] The total of all loans when she finished her studies was approximately $74,000. With accrued interest the total debt is now in the area of $90,000.

[5] After completing her studies she continued her part time employment with the Naval Reserves and found some work as a substitute and term teacher. She obtained permanent employment as a teacher in 2008 and retired from the Naval Reserves having served seventeen years.

[6] She has a son who is 15 years old. She has received minimal support for him.

[7] She made an assignment in bankruptcy in 2007, having accumulated debts of $56,000 in addition to the student loan debts. She was discharged in February 2008.

[8] Her gross salary is now $53,000. With her present professional classification it will rise in time to $67,000. Presently her net monthly income consists of:

Salary	$2,910
Child Tax Credit	95
Support Payment	300
	$3,305

[9] She provided a list of her usual monthly expenses. They total $3,122. She was cross-examined regarding these expenses. None of them appear to be unreasonable. Her son's involvement in hockey is a significant expense. She expressed concern as to whether she could continue to afford it. In my view, it is a small item when considered in the total picture.

[10] The Superintendent's Standard for a household of two is $2,328 per month. Her monthly net income as noted above is $3,305. If she were in bankruptcy, her surplus income would be $977. She would be required to pay into her estate during bankruptcy one half of that, namely $488.50.

[11] According to an internet mortgage payment calculator, provided by one of

the chartered banks, the monthly payment to pay off $90,000 at 4.75 % is $510.72 with a 25 year amortization and $941.61 with a 10 year amortization, and at 8% is $686.89 and $1,085.77, with the same amortizations, respectively. It should be noted that simple interest on $90,000 at 4.75% is $4,275 per annum and at 8%, $7,200.

[12] If this application is refused, Ms. Cook will no doubt have to consider making a second assignment in bankruptcy. However, under Subsection 168.1(1) her discharge would not normally be available until 36 months have passed. During this period she would most likely have to pay into her estate surplus income of $500 each month. This would total $18,000. It might well be that her discharge would be also subject to further payments to reflect the special nature of student loans, particularly the special sense of obligation one should have to pay for one's education when it has provided one with the ability to make a living better than one could without the education. It is not for me to predict whether such would be invoked or, if invoked, would result in significant additional payments being required for discharge.

[13] I quote Subsection 178(1.1):

> At any time after five years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that
>
> > (a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and
> >
> > (b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

[14] I am satisfied on the evidence which I need not review that Ms. Cook has acted in good faith. As well this is admitted by the Attorney General. As a result, I only need to make a determination as to whether she will continue to experience financial difficulty.

Law

[15] Counsel for the Attorney General brought to my attention three cases on this point.

[16] First is *Re Kelly* (2000), 20 C.B.R. (4th) 251 (Ont. Deputy Registrar Sprout). The bankrupt had student loans totalling about $23,000 which were used to qualify her to be a teacher. Her studies ended in 1996. Being unable to

secure employment as a teacher, she obtained work in the insurance industry.

At the time of the application she was working as an underwriting assistant and earning $37,000 with reasonable expectations that she would advance in her qualification and income level. Of particular help is paragraph [22] which I quote:

> The issue as to whether a bankrupt "will continue to experience financial difficulty" will in most cases pose the biggest obstacle for bankrupts bringing a subsection 178(1.1) application. The BIA does not provide any guidance to the court as to the appropriate duration of time into the future wherein the bankrupt must experience this financial difficulty. I agree with Registrar Herauf that the time period cannot be established with certainty and is dependent upon the facts of the particular case.
>
> (underlining added)

The reference to Registrar Herauf is to what he said in *Re Minto* (1999), 14 C.B.R. (4th) 235 (Sask.).

[17] In the circumstances of this case the Deputy Registrar noted that the bankrupt had surplus income of $221 per month, an RRSP of $4,500 and yearly tax refunds of $1,300. The calculation suggests that at 6% the debt could be paid off in seven years. She concluded that the bankrupt would not experience financial difficulty. In comparison, Ms. Cook would require a

much longer period, possibly taking the greater part of her remaining working life.

[18] The second is my decision in *Hankinson (Re)*, 2009 NSSC 211. Beginning with Paragraph [26], I commented on the second test making reference to the quotation already quoted from *Re Kelly*. As well I quoted from *Re Wood* (1998), 7 C.B.R. (4th) 23 (Man., Registrar King), Paragraph [47]:

> The bankrupt's claim that he acted in good faith was not seriously challenged and is accepted by the court. The continuing financial difficulty is more difficult to assess but the court is satisfied that the bankrupt's income will remain close to its present modest level for the next two to three years.

I went on to say at Paragraph [29]:

> I take from these cases that one has to be careful in determining how far one looks into the future.

The bankrupt only had employment for the following four months. Although he was a very resourceful and intelligent person, nothing was very firm about his future prospects and he did not have any particular other qualifications which would assure him being in a financial position to discharge these obligations in the next few years. He was granted relief.

[19] The third is *Re Cardwell and Rederburg*, 2006 SKQB 164 (Registrar

Herauf). It concerned a school teacher who had previously performed a consumer proposal. The bulk of the decision relates to problems arising from the proposal. These are not of concern here. The Applicant was denied relief. However, the decision does not indicate the amount of the student loan sought to be discharged. The case then is not helpful for the purpose of making comparison with the facts in this application.

[20] I also reviewed *Rendely, Re* (2003), 3 C.B.R. (5th) 136 (Ont. Ground, J.) which concerned an architect who was not fully qualified and who owed $43,095 in student loans. She was being asked to pay $575.00 against this loan. She was making at the time $65,000. She was single with no dependents and had reasonable expectations of earning substantially more upon becoming fully qualified. I think it helpful to quote paragraph 8:

> I have considerable difficulty with the second test which the Applicant has to meet. Although I agree that, in the first few years after graduation, she would have had great financial difficulty in making the payments of $575.00 a month on her student loans, I am not satisfied that as of today she would be unable to make such payments. In addition, she has been regularly employed over the last few years with a regularly increasing income and she intends to become a fully qualified architect. Although there was no evidence before the court as to the average income of architects in this province, the onus is on the Applicant to satisfy the court that she "will continue to experience financial difficulty to such an extent that [she] will be unable to pay the liabilities" under her student loans. The only evidence before this court would lead to a contrary conclusion and I find that the Applicant has not met the

onus on her to satisfy the court as to financial difficulty.

Ms. Cook is much older, does not have near the income nor expectation of substantial future income, has a son to support, and has twice the debt.

[21] Another decision of mine, *Re Pyke*, 2005 NSSC 33, is relevant to the present case in that I commented on the time factor. The bankrupt had understood that when he was discharged in 1999, he was relieved of his student loans. In fact he was not as his assignment was made a few days too early. I thus had to consider whether he could obtain relief under Subsection 178(1.1). I considered the six years it took the collection authorities to tell him that the student loans remained outstanding. His immediate prospects of permanent employment which would enable him to pay the loan were slight. I was of the view that except in special circumstances one should not be subject to the penalties of bankruptcy for a long period of time.

[22] I have reviewed the commentary in the large edition of *Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada*, at H§63(9). I do not see that it contains any useful discussion that I have not already noted.

Analysis

[23] The main point is how long Ms. Cook should continue to be burdened with this debt. At worst it could take her up to 25 years to pay these loans with her current surplus income. I do not think that absent some issue of moral turpitude in incurring the debt, such as in motor vehicle judgment cases, the law expects one to be burdened for 25 years. Ms. Cook will be 62 then and retired, or seriously thinking of retiring. Again I do not think, absent such an issue, one should expect her to be paying more than the surplus determined by the Superintendent's Standards. They are set to assure fairness for both the bankrupt and the creditors as to required contributions to estates during bankruptcy and as conditions of discharge. I think they should equally apply as guidelines in making determinations under Subsection 178(1.1). A similar degree of fairness should be applied. I appreciate that her surplus income will probably increase as her salary increases and when her son becomes independent. However, it is likely that she will be supporting him to a degree for the next five to ten years.

[24] Any improvement in her circumstances which can be reasonably expected will not change the fact that paying this debt will take many years.

[25] One should consider the policy of the *BIA* and of bankruptcy practice generally with respect to how long bankrupts should be expected to be bound by conditions of discharge. The *BIA* is there to help the honest debtor who has experienced misfortune to be reestablished freed of debts of the past which have become unmanageable. The bankrupt may be expected to make contributions to creditors, but it normally is for a short period of time. This is reflected in the provisions for discharge, particularly in paying surplus income during bankruptcy and as a condition of discharge, and in consumer proposals being required to be performed within five years (Subsection 66.12(5)). As well Division I proposals normally anticipate completion within five or fewer years.

[26] The history of Subsection 178(1.1) has some bearing. Originally, student loans were preferred loans, being debts to the Crown. The preference was lost. They became ordinary debts, but the courts soon imposed special considerations, finding a high moral duty to pay such loans particularly where one has benefitted from the education. This benefit is correctly looked upon as an asset. This was followed by a two year waiting period between ceasing to be a student and making an assignment for the loan to be

dischargeable in bankruptcy. This was increased to ten years, then reduced to seven years as it now is. The waiting periods in Subsection 178(1.1) have changed in tandem with the foregoing changes in Subsection 178(h). Now it is five years.

[27] This subsection has addressed the concern that bankrupts have sought to rid themselves of these loans too soon after completing their education. It imposes a waiting period. It gives them time to establish themselves professionally, socially and financially. Once established most will be able to pay their loans. Others during this time may not be so successful and not be able to manage their loans, even with the best will. They may need to use Subsection 178(1.1).

[28] I have to interpret "financial difficulty" and being "unable to pay". In doing so I must operate within the context of the *BIA*, its objects, the practice in how it is applied, and the legitimate culture surrounding it.

[29] As well it must be remembered that I must consider the entire debt, all $90,000. Whether Ms. Cook can make manageable contributions against the

debt, and I think she could, is not a relevant question. Subsection 178(1.1) does not provide for such a resolution. Such is only possible with a subsequent bankruptcy. I can only relieve her of the debt in full or deny the application.

[30] Contributing in periodic payments using the surplus income approach could take her up to twenty-five years. This would take her close to the age where she would be closing her career as a teacher. As mentioned earlier, rarely is one required, except in cases involving moral turpitude, to continue to make payments under the *BIA* beyond a five year period. To require her to fully discharge this debt in full is, I think in the circumstances, far beyond the spirit of the *BIA*.

Conclusion

[31] I have used the surplus income provisions as a good guide to what is expected of one who needs to avail of the *BIA* and this is a good guide to determine ability to pay. Notwithstanding that by the general standards of society, teachers are considered as well paid and should be able to handle their debts, I think it not so simple. Ms. Cook is 37 and is only now

established in her profession. She is entitled to a modest life style, to being able to provide a good upbringing for her son, and to participate in the institutions of society. The waiting period has not put her in a position where she can reasonably handle this debt. It is fair to say that she is an honest debtor who has experienced misfortune. To laden her with this debt for most of her remaining working life or to require her to make a second assignment in bankruptcy is more than what should be expected of such a person. That these are the only alternatives I think proves that she will continue to experience the financial difficulties referred to in Subsection 178(1.1) (b).

[32] Ms. Cook is entitled to an order under Subsection 178(1.1) relieving her of her student loan debt.

R.

Halifax, Nova Scotia
June 14, 2010