SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Aymar (Re)*, 2017 NSSC 328

Date: December 15, 2017
Docket: *Halifax*, No. 41375
Registry: Halifax

In the Matter of **Lianne Marie Aymar**

Registrar:	The Honourable Registrar A. David MacAdam, Q.C.
Heard:	December 8, 2017, in Halifax, Nova Scotia
Decided:	December 15, 2017
Counsel:	Kaitlyn Duggan, for the Department of Justice

By the Court:

Introduction

[1] The applicant, Ms. Aymar, attended Universite Sainte-Anne from 2003 to 2006 and 2007 to 2009, graduating with two degrees: a Bachelor of Science and a Bachelor of Education. By the time she graduated she had accumulated $27,940.68 in student loans. She has a current balance of $19,193.49. On July 20, 2016, she filed for bankruptcy with a total indebtedness of $356,203. She says she was advised that if she had filed for bankruptcy seven years after ceasing to be a student, the student loan portion of her indebtedness would be included in the bankruptcy. At the time of filing she had been out of school for 6.5 years.

[2] The applicant was discharged as a bankrupt in April 2017 and is now seeking to also be discharged of the balance of her student loan indebtedness.

The applicant's circumstances

[3] In her application for discharge the applicant says that in November 2014 she and her common-law partner started a mink farm, which unfortunately failed the following year due to the crashing of the fur industry.

[4] In January 2010 the applicant started her first teaching position with the Annapolis Valley Regional School Board. This was a long-term substitute position that ended in May 2010. She then signed a contract, in August 2010 with the Conseil Scolaire Acadien Provincial (CSAP), receiving a permanent contract in 2011. This is her current position. She nets $1500 biweekly.

[5] The applicant lives with her common-law partner and two children. Her budget for the month of July 2017 showed income of $5940 between herself, her partner, and the Child Tax Benefit. She says their expenses averaged $6000 a month. However, following CRA's submission, she filed an additional submission stating that her common-law partner, who had been working on a fur farm where he earned approximately $800-$1000 bi-weekly, was laid off due to the fur industry crash. She says he was receiving Employment Insurance of $626 bi-weekly, and that his education and experience made it difficult for him to find employment other than working on a farm. Subsequent information indicates that the applicant's partner is now employed, earning between $400 and $450 for weeks when he works.

[6] The applicant's submission continues, noting, in respect to filing for bankruptcy in July 2016:

> A lot of this debt was included into the bankruptcy but some were not. We had borrowed money from my family, which we have to repay (around 10 000$) and also we owed property taxes (5700$) that was not included into the bankruptcy. We have paid the property taxes in early September 2017 (in order not to lose our house), which we had to borrow some money from my family. [These] debts will take a lot of time to repay because at the end of each month we are not left with any surplus, especially now that my common law partner is without work.

[7] The applicant notes that she made student loan payments for several years, until "we hit financial trouble." The original payment of $304.96 was calculated based on being single with no dependents but, she notes, "life is changed a lot since then although the payment has not." She says she has always paid her bills and student loan payments until faced with this financial position, and asks for relief by way of a discharge of her student loan obligation. She agrees she is currently not making any payments with the help of the Repayment Assistance Plan (RAP), but says it "is still very stressful to think that eventually that will end and we will be forced to come up with the $304.96/month that we do not have."

Arguments

[8] The CRA, in objecting to her application for discharge of the student loans, says the applicant does not meet the criteria set out in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 178. The relevant provisions of the BIA are as follows:

> 178(1) Debts not released by order of discharge

> An order of discharge does not release the bankrupt from
>
> …
>
> (g) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred
>
> (i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or
>
> (ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student;
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> …
>
> (h) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1).
>
> 178(1.1) Court may order non-application of subsection (1)
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> At any time after five years after the day on which a bankrupt who has a debt referred to in paragraph (1)(g) or (g.1) ceases to be a full- or part-time student or an eligible apprentice, 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.

[9] The CRA states that as of September 14, 2017, the outstanding balance of the applicant's student loans is $19,144.62, including principal of $19,104.02 and interest of $40.60. The applicant applied for and was approved for the RAP, commencing in August 2010, and she has utilized it for 42 months. It appears that she was recently approved for continued assistance up to and including September 30, 2017, with an expected monthly payment of $0.00.

[10] The test for the relief sought is conjunctive, requiring proof that the bankrupt has acted in good faith with respect to the loan and that the bankrupt has experienced, and will continue to experience, financial difficulties to the extent that she will be unable to pay the loan. CRA takes no position with respect to the conduct of the applicant in respect to the first part of the test.

[11] Under the RAP program, in stage one, the interest on the debtor's loan is paid. A new application is required every six months, with approval for six-month periods, to a maximum of sixty months. Under stage two, which begins after the end of stage one, both interest and principal are paid by the Government of Canada. Again, an individual can qualify for a maximum of sixty months. During this stage, the student loan debt is paid down gradually. Should an applicant continually qualify for stage two, their student loan would be paid out completely during the sixty-month period.

[12] As CRA notes, payments of principal and interest by the government are only required under the RAP if the debtor does not have the financial ability to make the payments themselves. Only when the debtor's financial ability to make payments improves are they obligated to make payments, and the quantum of the payments is based on their financial ability to make them. In effect, if an individual qualifies for RAP assistance for the first five years, they would not be required to

make any payments, and the federal government would pay the interest during this period. If the debtor continues to qualify under stage two, both interest and principal payments are made by the government, and the indebtedness, if this continues for the full five years, is paid down in full.

[13] The position of CRA is that the applicant has utilized the program for some forty-two months and is currently benefiting from the affordable payment of $0.00. The Agency submits that she should continue to utilize this program rather than seeking to be discharged from her student loans.

[14] CRA references a number of cases where courts have declined to discharge a bankrupt from their student loan obligation. In *Re Renderly*, [2003] O.J. No. 4678 (Ont. Sup Ct. J.), the court considered it manifestly unfair to taxpayers to assess all of the applicant's future potential earnings based on their previous experience, particularly in the light of evidence of current employment status and the potential earnings associated with that employment. In *Re Burke* (1992), 114 N.S.R. (2d) 160, 1992 CarswellNS 50 (S.C. In Bankruptcy)), Saunders J. (as he then was) refused to discharge the debtor of their student loan obligations despite their economic difficulties at the time of the application, on the basis of the evidence suggesting significant earning potential.

[15] CRA also refers to a number of authorities suggesting that continued eligibility for RAP precludes an applicant's discharge of their Canada Student Loans. This position appears to contradict the current language of s. 178(1)(g), where Parliament has mandated that if a bankrupt files more than seven years after ceasing their education, their student loan indebtedness is subject to discharge, like other indebtedness, excepting only any debts referred to in s. 178. If discharge of student loans was not possible until the ten-year expiry of the RAP assistance program, s. 178(1.1) would be meaningless.

[16] In their submission, CRA further suggests that the application is premature, submitting:

> 36. The respondent submits that this application pursuant to section 178 (1.1) of the BIA is not in keeping with the purpose of the BIA. The applicant is not required to make payments on her loan at this time. A discharge would not "facilitate a return to stable participation in social and economic life." A discharge would not relieve any financial hardship being experienced by the Applicant as there is no hardship at this time. With respect to her student loans, the Applicant is not facing continued financial hardship.
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> 37. It should also be considered that should the Applicant's future earnings not be sufficient to make payment of her student loan, she is eligible to apply for further RAP. As outlined previously if the bankrupt qualifies for RAP stage 2, she will not be expected to make payment on her student loan and the principal balance will begin to be paid down by the Government of Canada.

[17] In my view this position does not accord with the spirit and intent of the BIA. Section 178(1)(g) was enacted by Parliament to prevent student loans being released by a bankruptcy discharge in the ordinary course. However, Parliament

declined to prevent release indefinitely, as it has done with the other indebtedness referred to in s. 178(1), which are not released by a bankruptcy discharge. Instead, s. 178(1.1) originally provided that ten years after they cease to be a student, a bankrupt's student loans may be discharged on demonstrating good faith and financial hardship. Parliament reduced the ten-year period to five years in July 2008, apparently considering it to be too long. The applicant ceased to be a student in December 2009, more than eight years ago. The fact that she remains eligible under the RAP program should not bar her from access to s. 178(1.1). The issue is whether, in her circumstances and in view of her conduct, she is entitled to relief under that provision.

[18] I note that the subsection in question refers to "financial difficulty to the extent that he or she will be unable to pay the loan." Paying $0.00, as she would if she qualified under the two stages of the RAP program, is not, in my view, "paying" the loan. The federal government would be paying, not the applicant. CRA's interpretation is not consistent with the wording of s. 178(1.1) of the BIA. If it were otherwise, then those with student loan indebtedness would either be required to make payments or obtain RAP relief. As such, s. 178(1.1) would be meaningless, since there would never be a circumstance where a person's financial position would cause them difficulty in paying their student loans.

[19] In Hon. Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, and Dr. Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th edn. (Westlaw: online), the authors state, at H§63(9)(ii):

> The factors to be considered on a s. 178(1.1) application are: whether the money was used for the purpose loaned; whether the applicant competed the education; whether the applicant derived economic benefit from the education; whether the applicant has made reasonable efforts to pay the debt; whether the applicant has made use of available options such as interest relief; the timing of the bankruptcy; whether the student loan forms a significant part of the bankrupt's overall indebtedness at the date of bankruptcy; the lifestyle of the applicant; whether the applicant has sufficient income for there to be surplus income under the Superintendent's standards; what proposals the applicant has made to the loan administrators and responses received; and whether the applicant has been, at any time, disabled from working by illness: *Re Hankinson* (2009), 2009 CarswellNS 381, 55 C.B.R. (5th) 254 (N.S.S.C.) (Registrar); *Re Cote* (2010), 2010 CarswellBC 868, 66 C.B.R. (5th) 45 (B.C. Master).

[20] As to the conditions for granting relief under s.178(1.1), Houlden and Morawetz summarize the New Brunswick decision in *Re Doucet* (2009), 57 C.B.R. (5th) 245, 2009 CarswellNB 306 (N.B.Q.B.), at H§63(9)(i):

> The registrar dismissed the application of a discharged bankrupt who sought to be released from liabilities associated with her student loans. The registrar noted that in order to grant an order under section 178(1.1), it must be satisfied, on a balance of probabilities, that the bankrupt has acted in good faith in connection with his or her liabilities under the debt, and that the bankrupt "has and will continue to experience financial difficulty" to such an extent that he or she will be unable to satisfy the loans. The onus is on the applicant to satisfy the registrar of these conditions. There are a number of factors to consider in determining whether the bankrupt has acted in good faith, including: whether the loan proceeds were used for a purpose other than the intended one; what efforts, if any, has the applicant made to repay the loan; whether the applicant adopted any effort to avoid repayment when it was possible to pay; whether the applicant has given a preference to the payment of other liabilities over the student loan liabilities; and whether there has been any unreasonable denial of liability. The registrar held that to permit a student who has not completed a course of study to be discharged

> without repaying student loan debts when he or she has the financial capacity to do so would represent an abuse of the BIA to avoid liability for student loans that the bankrupt has contracted to pay independently of the final outcome. In this case, the applicant admittedly spent her loaned funds as if she was already a doctor, neglected to honour her obligation to repay her loans when she had the financial means to do so, and the bankrupt failed to act in good faith. Given the bankrupt's age, current assets and income and future prospects, the registrar was not persuaded that the bankrupt would continue to experience financial difficulty to such an extent that she would be unable to pay her student loans. The application was dismissed: *Re Doucet*…

[21] Houlden and Morawetz also state, at H§63(9)(i), referencing *Re Hildebrand* (2010), 71 C.B.R. (5th) 73, 2010 CarswellSask 577 (Sask Q.B.):

> … In order to succeed with a hardship application, the bankrupt must establish a track record of good faith with regard to his or her bankruptcy and student loan debts; and that he or she has and will continue to experience financial difficulty to the extent of being unable to repay the loans. Here, the bankrupt met the first part of the test, but not the second: *Re Hildebrand*…

[22] Based on the authorities, individuals with outstanding student loans who are suffering financial hardship with no foreseeable prospects for improvement, have two options. They may choose to file for bankruptcy and seek to qualify under s. 178 (1.1) to have their student loans treated in the same manner as other debts. Alternatively, they may seek relief under the RAP. Each option requires a determination as to whether the individual is incurring financial hardship. In the case of bankruptcy, this involves consideration of the superintendent's guidelines in determining whether there is surplus income. If there is not, there has effectively been a determination of financial hardship. Under the RAP, there is a determination of whether the debtor's financial circumstances entitles them to the

relief by the federal government. At stage one, this involves paying the interest on the outstanding student loans, and stage two (on completion of stage one) involves paying both interest and principal.

[23] If an individual has no surplus income for the purpose of the superintendent's guidelines, and they qualify under RAP, these are at least *prima facie* determinations of financial hardship. The superintendent's guidelines are intended to require payments to a bankruptcy estate where the bankrupt has the financial means. Relief under the RAP is not intended for persons who have the ability to make payments on their student loans. These payments by the Government of Canada, whether of interest at the first stage, or principal and interest at the second stage, are not payments by the individual on their loans. They are payments by the government, made because the individual does not have the financial means to make them themselves.

[24] Subsection 178(1.1) of the BIA permits a hardship application after the individual has ceased being a student for more than five years. It entitles them to have their student loans treated in the same manner as other unsecured indebtedness. The court must be satisfied that the individual "will continue to experience financial difficulty" in order to have their student loans discharged along with other unsecured indebtedness. Otherwise, the entitlement to relief from

the student loans is subject to the conditions in s.178(1)(g), namely that the bankruptcy occurs more than seven years after they have "ceased to be a full or part-time student."

[25] In respect to the first part of the test, as it pertains to Ms. Aymar, CRA takes no position and, on the evidence, there is nothing to suggest she acted with bad faith in respect to the student loans, particularly considering that when she was financially able to do so she made the required payments. However, in view of the subsequent information that her common-law spouse was no longer employed, and the family unit was relying on EI, it would appear she was experiencing financial difficulty to the extent that she was unable to repay the student loans. Even in view of the new information that her spouse is now employed, earning some $400-$450 per week when working, their financial circumstances have not materially changed. On the evidence, their financial difficulty will continue into the future, as there is no evidence of a sufficiently increased earning potential.

Conclusion

[26] Accordingly, I am satisfied that the bankrupt has and will continue to experience financial difficulty to such an extent that she will be unable to pay the debt. The application to discharge her student loans is therefore granted.

, Registrar in Bankruptcy.