SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Handspiker (Re)*, 2018 NSSC 333

Date: 20181224
Docket: No. 42487
Registry: Halifax

In the Matter of: The bankruptcy of Alyssa Ashley Ann Handspiker

Judge: Raffi A. Balmanoukian, Registrar

Heard: November 30, 2018, in Halifax, Nova Scotia

Final Written Submissions: December 13, 2018

Counsel: Kimberley A. Burke, for the Trustee, BDO Canada Limited
Alyssa Ashley Ann Handspiker, not appearing

Balmanoukian, Registrar:

[1] *Re Burke* (1992), 114 NSR (2d) 160 (SC) is still good law. How does it apply, in 2018, to the applicant?

[2] Ms. Handspiker is now 30 years of age. She finished her studies in 2009, having made an assignment in bankruptcy in 2017. She is a member of a three-person household, and she does not have, as her own earnings, surplus income within the meaning of s. 68 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). Her household income is just below that surplus income threshold. Her estate had no meaningful assets distributable in bankruptcy.

[3] Her sole liabilities are provincial and federal student loans, amounting in all to some $23,000. She cited as her reason for bankruptcy "inability to pay student loans on current income."

[4] As her assignment was eight years after cessation of study, the student loans are subject to discharge and are not "preserved" by s. 178(1)(g) of the BIA. Accordingly, if I issue an order for absolute discharge, as sought by the Trustee, she will have no remaining obligation under these loans.

[5] These days, it is much more common for student loans to be in issue in one of the following contexts:

1. They are part of debt dischargeable in a bankruptcy, by virtue of an assignment being more than seven years post-study, but as part of a larger package of other liabilities; or

2. A specific application under subs. 178(1.1) of the BIA, the so-called "hardship" provision, available to a bankrupt at any time five years post-study, when the assignment was less than seven years post-study.

[6] This situation is different. It is clear that the assignment had, as its sole purpose, the extinguishment of the student loans.

[7] Ms. Handspiker's matter, a summary administration first bankruptcy, came before me initially as the bankrupt had not fulfilled certain duties and, like most such estates, the assets did not amount to 50 cents on the dollar of unsecured liabilities. The bankrupt subsequently fulfilled the relevant duties, and the Trustee now seeks the bankrupt's absolute discharge.

[8] However, the "50 cents on the dollar" issue remains. It is unlikely that this would have come before me on that basis alone; nevertheless, the Trustee's Section

170 BIA report accurately cites this provision (para. 173(1)(a) BIA). That provision reads:

> **(1)** The facts referred to in section 172 are:
>
> **(a)** the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible; [emphasis added]

[9] As will appear from my reasons herein, I believe that in most cases a student loan that would otherwise be dischargeable in bankruptcy is the epitome of a debt for which a person *should* "justly be held responsible." "Hardship" applications under subs. 178(1.1) BIA have a separate regime and, by definition, apply when the loan has not been discharged under s. 178(2) BIA.

[10] In its initial salient fact – that the student loan is dischargeable in bankruptcy and the only liability in the estate - this case is factually on all fours with *Burke, supra*. I will discuss Ms. Handspiker's differences in due course.

[11] *Burke* involved a young man, age 28. His only creditor was a federal student loan, of around $15,000 plus accrued interest. At that time, all student loans were unsecured creditors; as is noted above, subss. 178(1)(g) and 178(1.1) BIA have changed that. I will return to that point. Saunders, J. (as he then was), was thus faced with two environments:

1. All student loans were the same, *regardless of age*; and

2. All student loans were unsecured creditors and subject to treatment as such under the BIA.

[12] Justice Saunders explicitly rejected the submission that this meant, at that time, that "student loans are just like any other debt."

[13] He memorably said:

> While I accept Justice Wimmer's comment that there is no specific provision in the bankruptcy legislation exempting Canada Student Loans, I take a different view of the manner in which such obligations ought to be treated.
>
> People borrow money with the expectation that they will be obliged to pay it back. Students are no different. The 'asset' obtained with the loan - an education - will last a lifetime.
>
> Canadian student loans are loans advanced by Canadian taxpayers to students who would otherwise be unable to finance a post-secondary education.
>
> The responsibility rests with the student to honor that obligation after she or he has completed the education which the taxpayers' benevolence has provided. The obligation is not postponed, or suspended, because of inconvenience or the fact that other responsibilities nave intervened, any more than such protests would excuse other categories of borrowers. While a sluggish economy and poor employment prospects may be mitigating circumstances they do not in any way constitute or promote a forgiveness of a debt.
>
> I approve of the approach that such a loan and such an indebtedness ought to be considered as being of a high moral nature and should be ranked accordingly. There should continue to be an obligation upon the bankrupt to repay the Canada Student Loan. Mr. Burke is 28 years of age. He has a long life ahead of him, and potentially, considerable earning capacity, notwithstanding today's present economic difficulties. [emphases added throughout]

[14] At face value, those comments apply completely to Ms. Handspiker. She is a young adult, whose sole liability is an unsecured student loan.

[15] After *Burke*, Parliament amended the BIA as noted above. Initially, the only student loans that were not discharged were those for which an assignment was less than two years post-study. That was later extended to ten years, and is currently seven (although a “hardship relief” application under subs. 178(1.1) may be made by a bankrupt at any time after five years post-study).

[16] Some jurists believed, as a consequence, that the elimination of the “rush from convocation to bankruptcy” meant that unsecured student loans were to be treated as the same, or nearly the same, as any other unsecured debt. The rationale was that, since a bankrupt could no longer extinguish the debt on the heels of the cessation of study, the process would not be abused in this fashion.

[17] That may have been true when the “waiting period” was ten years. In my view that is not the case when, since 2008, the “hiatus” for practical purposes is half that.

[18] In *Re Brunt*, 2006 NSSC 237, Registrar Cregan distinguished *Burke* in light of the subs. 178(1.1) amendments which, at that time, required a ten year post-study “wait time,” both for discharge-in-bankruptcy and for “hardship”

applications. He stated, at para. 12 that *Burke* "must be qualified by the subsequent amendments to the Act." He was clearly concerned with the decade-long wait, at para. 22:

> The only creditors are the holders of the two student loans, one represented by the Attorney General; the other, a provincial program, not represented in these proceedings. She has no other significant debt. On the surface, it may appear that she is just using bankruptcy proceedings as a simply convenient way to rid herself of these loans. The suggestion is that, if there is no strict control on the single creditor bankruptcies, there is a great prejudice to the program. That may well have been the case in 1992. Again, the amendment to the *Act* mentioned above were specifically passed to address this problem. With a ten year waiting period most of the convenience in using bankruptcy as a way of ridding one of these loans is eliminated. [emphasis added]

[19] Registrar Cregan expressed a similar sentiment in *Re Cochran*, 2006 NSSC 242:

> [15] I think that one cannot so simply dismiss the 1997 amendments to the *Act*. I think they were clearly passed not so much to override the case law mentioned but to address in another way the problem which these cases addressed. The evils intended to be remedied by these amendments I would simply characterize as the abuse of the *Act* to avoid liability for student loans which the bankrupt, given reasonable time, should be able to pay.
>
> [16] The extend [sic] to which the amendments are effective in addressing this evil should be considered in discharge applications and may well qualify the impact of this case law.
>
> [17] The waiting for ten years before one can make an assignment in bankruptcy can seriously affect one's course of action. If one is ambitious and reasonably successful, one will make efforts to pay off the loans, knowing that bankruptcy is not desirable on one's record. On the other hand evidence that one has not during these ten years made sufficient income to be reasonably expected to have made payments is very relevant in determining whether in the future there will be sufficient income to impose a conditional order. [emphases added throughout]

[20] To recap, the "waiting period" is now effectively half that, five years.

[21] This change in the law appears to have been reflected by Registrar Cregan in a later decision, *Re Gilbert*, 2013 NSSC 404, by which time the "five year rule" was in effect. In the context of a subs. 178(1.1) application, he said:

> XVI. Counsel for the Attorney General referred me to two cases. One is a decision of mine, **Pyke, Re,** 2005 NSSC 33 (CanLII); the other, **Fournier, Re**, 2009 CarswellOnt 3522.
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> XVII. In the first case I said at paragraph 59:
>
> > There is a principle underlying the *Act* that except in special circumstances <u>one shall not be subject to the penalties of bankruptcy for a long period of time</u>.
>
> I have repeated this point in a number of cases.
>
> XVIII. Counsel also noted my reference in this case to **Burke, Re** (1992), 14 C.B.R. (3d) 216 (N.S.T.D.), in which Saunders, J. said at page 218:
>
> > The responsibility rests with the student to honour that obligation after she or he has completed the education which the taxpayers' benevolence has provided.
>
> XIX. <u>In principle, I agree with this</u>, but the difficult task is to apply it after twenty-one years of amendments to the *BIA* on this point and the continued developments of social and financial policy. [emphasis added throughout]

[22] It therefore appears to me that the limitations on the scope of *Burke* that may have been the law when subs. 178(1.1) required a ten year gap between study and relief are no longer germane in a five year gap environment. Registrar Nettie put it well, again in the context of a subs. 178(1.1) application, in *Re Fournier*, 2009 CanLII 31606 (Ont. SC), at para. 20.

> <u>It is trite law to point out special nature of student loans</u>, such as their involuntariness in being granted without credit considerations, the net benefit to society, and the fact that the funds are those of all Canadians; and the special expectation of repayment enunciated

> by Parliament in ss. 178(1)(g) and 178(1.1) BIA, however, I note them, and that I have carefully considered them in coming to my conclusions herein. [emphasis added]

[23] As well, I note the decisions of Registrar Hill at a time when the subs. 178(1.1) rule was two years, but in which the particular loan by virtue of the date of assignment fell into the pre-1992 rules. He clearly was of the opinion, as am I, that even when a student loan is dischargeable as part of the general scheme of the Act and outside 178(1)(g), they are not the same as just any other pedestrian unsecured creditor: In *Re Martin*, 1997 CanLII 773 (NSSC) he stated:

> While these amendments do not apply they do indicate that Parliament has now acted to make it crystal clear that student loans are in a special category.
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> In my view, the vast bulk of the cases dealing with applications for discharge where student loans are a factor either explicitly or implicitly recognize the very high moral obligation associated with such a debt. A debt for a student loan is, in essence, a debt owed to all the taxpayers of Canada. Student loan programs, both that of Canada and those of the provinces, are necessary in order that there be at least some vestige of equality of access to higher education. Those who avail themselves of the opportunity to partake in these loan programs and then fail to honour the obligations they have incurred at the very least put the programs in jeopardy.
>
> The fact that student loans carry with them this high moral obligation for repayment does not mean that in appropriate circumstances such debts cannot and should not be discharged by bankruptcy. It does mean, however, that the approach taken by the courts in assessing what, if any, conditions to impose on such applications for discharge must take into account a number of factors which might not be appropriate if no student loan debt was involved. [emphases added throughout]

[24] He expressed a similar sentiment earlier the same year in *Re Andrea*, 1997 CanLII 2955 (NSCC).

[25] Lastly, in the context of a “five year wait” environment, Justice Pearlman had this to say in *Re Slanina*, 2007 BCSC 1881 at paras. 30 *et seq*:

> In *Re Minto*, 1999 CanLII 13045 (SK QB), [1999] S.J. No. 798, Registrar Herauf of the Saskatchewan Court of Queen's Bench addressed the purposes of the *Bankruptcy and Insolvency Act* and s. 178(1)*(g)*. At para. 16(5), the learned registrar said this:
>
>> The broad purpose of the Act is to permit honest but unfortunate debtors to obtain a discharge from their obligations in order to facilitate a return to stable participation in social and economic life, while balancing this objective against the interests of creditors. Section 178(1)(g) reflects a policy decision which accords with this objective and recognizes that student loans involve a situation where funds are advanced when there is no existing capacity of the debtor to repay the debt, but education obtained will hopefully enable the debtor to begin active and fruitful participation in the economy at some later date. Realization of earning potential associated with education can take some period of time after leaving school, so Parliament saw fit to disallow the immediate discharge of student loans, in this case for two years after ceasing to be a student. This measure addressed the perceived abuse of students using the Act to obtain a discharge of student loans prior to making reasonable efforts to realize upon their earning potential achieved through education.
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> Then, in para. 17, the registrar continued:
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>> Thus, having regard for the scheme of the Act and giving the section such large and liberal interpretation as to best ensure the attainment of the objective of the Act, it appears that "bankrupt" should be interpreted to include both discharged and undischarged bankrupts. The abuse that s. 178(1)(g) was designed to avoid is still adequately addressed because applicants must meet the criteria in s. 178(1.1) and the application can only be brought after two years, regardless of when the discharge occurs.
>
> I would add to that, parenthetically, that the application now may only be brought after five years.
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> In my view, the same public policy considerations which informed the judicial formulation of the moral obligation or special considerations prior to the enactment of what are now ss. 178(1)*(g)* and 178(1.1) of the *Bankruptcy Act* are carried forward in those provisions as Registrar Herauf explained in the *Minto* judgment. In other words, the same public policy considerations that postulated the moral obligation of the bankrupt to repay public funds loaned to assist the borrower in enhancing his or her earning power

at a time when the borrower had no capacity to finance their own education really lie at the heart of the purpose and intent of ss. 178(1)*(g)* and 178(1.1) of the *Act*.

[26] I therefore summarize as follows:

1. The policy, public, and social considerations in *Burke* remain good law;

2. These considerations apply in the current environment where there are both dischargeable and undischargable student loans; and where subs. 178(1)(g) and 178(1.1) contain special rules depending on their age and the timing of the bankruptcy assignment;

3. The limitations on *Burke* that were of concern in *Brunt* and other cases decided during the "ten year wait" environment are mitigated now that a hardship application can be made after five years;

4. Subs. 178(1.1) applications are different from "general discharge" applications (such as the one before me) and have different statutory factors to consider. However, the existence of that regime does not mean that there was any legislative intent to treat loans that fall outside 178(1)(g) as the same as any other unsecured creditor and without regard to general social or policy considerations. If anything, the opposite is true.

5. It will be recalled that although 178(1.1) is an “all or nothing” proposition – the application may be allowed, dismissed, or adjourned, but the Court has no jurisdiction to modify or adjust the loan amount or its terms – the same is not the case when the student loan under consideration is dischargeable in an overall bankruptcy; the Court has the much wider set of tools available under ss. 172 or 172.1, as the case may be.

[27] While not wishing to set out an exhaustive list of factors to be considered, I believe the following to be relevant in cases such as Ms. Handspiker’s:

- Is the student loan the sole, or major, debt to be discharged?

- If not, what proportion is it of the total dischargeable debt? I do not wish to place any hard-and-fast rule on how much should be a tipping point, but if the bankruptcy appears to be for the sole or dominant purpose of clearing student loan(s), the ‘special consideration’ status of the loan should be of attention to the Court;

- What, if any, effort has been placed on repayment, given the means and circumstances over time, and from time to time, of the debtor?

- Has the payment been voluntary, involuntary, or a combination?

- What is the lifestyle of the bankrupt and could s/he have made other, additional, or better efforts to service the debt?

- How much of the obligation consists of funds advanced to the bankrupt, and how much is accrued and unpaid interest?

- How much was the original principal amount at issue?

- Has there been any attempt to reamortize, refinance, or otherwise (such as interest relief) service the loan outside of regular payment terms?

- What use, if any, has the bankrupt made of the education for which the loan was advanced?

- What is known of the bankrupt's prospects over the next reasonable period of time? This may include a consideration of the bankrupt's age and comparative need to avail him/herself of the financially rehabilitative functions of the BIA with enough time to pursue legitimate career, family, and retirement needs;

- Are there other obligations of public status, such as income or other tax liability, which evidence that the debtor considers the public purse to be his or her own?

- What, if any, position or objection has been taken by the applicable creditor?

- Does the debtor, individually or through her/his family unit, have or may reasonably expected to have “surplus income” within the meaning of the Superintendent’s guidelines? I do not wish to be taken at this point to be accepting or rejecting the income guidelines as the be-all and end-all of debt servicing ability in this context, but I believe that they are relevant on a case-by-case basis;

- Are there extraordinary factors of which the Court should be aware, such as individual or family illnesses or special needs?

- What has been the overall approach of the bankrupt to the process and has there, in particular, been a neglect of duties or other facts under s. 173 of the BIA? Without limiting the foregoing, could the bankrupt have made a viable proposal (s. 173(1)(n))?

- Is this a first or subsequent bankruptcy?

[28] Once again, I emphasize that this is not an exhaustive list. It will be seen that there is similarity to, and in some cases overlap with, the “good faith/hardship” test in subs. 178(1.1). However, I wish to reiterate that the test under s. 178 and

the available remedies under ss. 172/172.1; and the test under subs. 178(1.1) are analytically and legally distinct and each case will turn on its own facts.

[29] Against that background, I now turn to Ms. Handspiker. I have recounted her basic circumstances above.

[30] As I have said, *in its initial salient fact*, Ms. Handspiker is on all fours with Mr. Burke. But one must look more deeply.

[31] It is trite that each case turns on its own facts. This is not a Court of rote.

[32] I thus asked the Trustee for additional information on the student loans in question; namely the initial amount when they entered repayment; the amounts paid on each prior to the bankruptcy, and how payment was effected (voluntary or by way of garnishment, execution, set-off, or otherwise). I received the following information:

[33] The Provincial loan entered repayment for $6,155.04. A total of $4,196.93 was paid by the bankrupt, all voluntarily. The balance in the Form 79 statement of affairs (December 2017) is $3,091.00.

[34] The Federal loan entered repayment for $16,677. $1,201.00 was paid by the bankrupt voluntarily; an additional $3,539.71 was paid under one or more

involuntary processes (the bankrupt noted this as "garnished" but this may have been a shorthand for offsets or otherwise; suffice it to say these were not "voluntary"). The balance on the Form 79 is $20,003.00.

[35] What is therefore clear to me in the circumstances of *this* debtor are the following:

- Unlike Mr. Burke and some other cases I have cited, there has been at least a respectable effort, under the available income level shown to me, to service the debt;

- A meaningful amount of the outstanding balances is accrued interest, as opposed to principal amounts which directly flowed into the bankrupt's hands and to her direct educational benefit. This interest is a little under half of the Federal loan and about a third of the Provincial loan;

- The bankrupt's immediate financial prospects, at least as known to the Court, do not show any upward trend. She is a baker; her family and personal incomes do not exceed the Superintendent's standards;

- Her income and expense sheets, as filed with the Court, do not show any largesse or, in the words of Registrar Cregan in *Blunt*, "where the bankrupt treated the responsibility to repay with great highhandedness, lived

extravagantly, or engaged in high risk business ventures." (para. 16). While I have distinguished *Blunt* in light of the current legislative environment, I believe those comments, among other factors, are still relevant in determining how a debtor has treated the underlying obligation.

[36] While I do not have the answer to all of the factors I have above, and not all of them would apply to Ms. Handspiker, I have enough of them as outlined above to be satisfied that an order of absolute discharge is appropriate in her case. Although I in no way condone the rote extinguishment of student loans in this fashion, she has satisfied me that her means, income, family circumstances, prospects, and – perhaps most importantly in this case – history of payment of a total of $8,937.64 out of original principal balances of $22,832.04, warrant such a remedy.

Conclusion

[37] Ms. Handspiker shall receive an absolute order of discharge.

Balmanoukian, R.