**SUPREME COURT OF NOVA SCOTIA**
**IN BANKRUPTCY AND INSOLVENCY**

**Citation:** *Simon (Re)*, 2018 NSSC 332

**Date:** 20181224
**Docket:** No. 41400
**Registry:** Halifax

**In the Matter of:** The bankruptcy of Krista Edwina Simon

**Judge:** Raffi A. Balmanoukian, Registrar

**Heard:** November 16, 2018, in Halifax, Nova Scotia

**Counsel:** Krista Edwina Simon, appearing personally

**Balmanoukian, Registrar:**

[1] In the last five months, I have faced approximately a score of applications to discharge student loans pursuant to subs. 178(1.1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). I have granted a majority of them; a few, including this one, have been the subject of reserved decisions; the balance have been adjourned, either at the request of one of the parties, or by reason of untimeliness of service. One, I have adjourned due to developments in progress that are germane to that file. To date, none have been outright refused.

[2] That is because, in part, Subs. 178(1.1) presents me with what Master Baker in *Re Westwood*, 2005 BCSC 1575 referred to as a "Rhadamanthine choice." Less poetically, but equally accurately, Registrar Cregan stated in *Re Field-Currie*, 2010 NSSC 41 at para. 8 that subs. 178(1.1):

> gives me two options, one to refuse relief, the other to discharge the indebtedness in its entirety. There is no middle ground.

[3] I subscribe to the views of Registrar Schwann in *Re West*, 2009 SKQB 400 at para. 30 that "regrettably," this "all or nothing proposition" is, but for one

exception, the limit of the Court's jurisdiction in such an application. However, that is what Parliament in its wisdom has enacted.

[4] The third option to which I refer is to adjourn the application. In addition, I can refuse the application with leave to reapply: *Re Lau*, 2010 BCSC 274; *Re MacLean* 2012 NSSC 24. This is in effect a distinction without a difference since I have little doubt the applicant would avail herself of that leave to reapply, if I went that route.

[5] I will, in the interests of efficiency and given what I have to say about financial difficulty and certain comments made by the applicant at the hearing, choose the former course in this case and adjourn this application to the fall of 2019.

**Background**

[6] Ms. Simon declared bankruptcy in January 2015, just under seven years after she ceased full-time study. She was discharged in October 2016, from which I infer that she had some "surplus income" within the meaning of s. 68 of the BIA during the relevant time. Federal and provincial student loans were her sole debt. By reason of the date of the assignment, they were undischarged pursuant to

Section 178(1)(g) BIA. However, clearly they were the sole motivating factor behind the assignment.

[7] On August 8, 2017, the federal government, on behalf of Service Nova Scotia, wrote to Ms. Simon to indicate that her undischarged provincial student loan, then just under $22,000, would be subject to set-off against any tax rebates, credits, or other programs to which she may be entitled.

[8] On August 31, 2017, Ms. Simon applied for relief pursuant to Subsection 178(1.1) BIA. Registrar MacAdam of this Court issued an order giving effect to this, insofar as it pertained to the Provincial loan, on September 29, 2017.

[9] On September 4, 2018, the Canada Revenue Agency wrote to Ms. Simon with respect to her federal loan, which was by then just under $40,000.

[10] On October 12, 2018, Ms. Simon filed this application with respect to that loan.

[11] Her affidavit in support is very similar to her 2017 application.

**Subsection 178(1.1) - Overview**

[12] Section 178(1.1) of the BIA reads:

> **(1.1)** 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.

[13] It will thus be seen that this section is indeed binary – I have no authority to modify the terms or balance of the loan.

[14] Accordingly, there are three elements to the test Ms. Simon must meet:

1. Has she acted in good faith?
2. Is she experiencing and will continue to experience financial hardship "to such an extent that the bankrupt will be unable to pay the debt;" and
3. If tests 1 and 2 are met, should the Court decline to exercise its discretion (as the subsection reads "the court *may*, on application") not to effect the discharge of the relevant loan?

**Financial Hardship**

[15] I may quickly dispose of the second element. As with many of these cases before me, the minimum payment called for ($934.00) is quite simply

unserviceable to Ms. Simon based on the financial information before me. I need not pursue her financial affairs in detail except to say that it would be the majority of her gross income and the lion's portion of her net. Such a payment would be beyond management for a great many people even before taking anything else into account. Since I have no authority to structure a repayment regime that makes sense, the "take it or leave it" aspect compels me to conclude, without hesitation, that the "financial difficulty" test is met with ease.

[16] That has also been the case in several other applications that have been before me. It is unclear to me how these kinds of minimum payment requirements are calculated, but they have compelled me in at least some circumstances to find financial hardship when a more realistic payment (or the ability of the Court to formulate one) may have led to a different result.

**Good faith**

[17] This case is really about "good faith," and, secondarily, the Court's discretion even should Ms. Simon be successful in satisfying the Court of the same.

[18] The starting point of the "good faith" analysis in student loans is *Re Minto*, 1999 CanLII 13045 (Sk QB). Registrar Herauf wrote, at para. 62:

> I agree with counsel that in the context of student loans one can look at certain factors considered in determining whether a condition should be imposed on the discharge of a bankrupt with student loan liabilities; namely, whether the money was used for the purpose loaned, whether the applicant completed the education, whether the applicant derived economic benefit from the education (ie: is the applicant employed in an area directly related to the education), whether the applicant has made reasonable efforts to pay the debts and whether the applicant has made use of available options such as interest relief, remission, etc.

[19] Registrar Cregan adopted and expanded this list in *Re Hankson* 2009 NSSC 211:

> [18] Registrar Sprout in *Kelly, Re,* 2000 CanLII 22 497 (Ont., S.C.) after referring to these factors added:
>
> - the timing of the bankruptcy, and
>
> - whether the student loan forms a significant part of the bankrupt's overall indebtedness as of the date of bankruptcy.
>
> [19] I would add the following:
>
> - whether the applicant had sufficient work and income to be reasonably expected to make payments on the loan,
>
> - the lifestyle of the applicant,
>
> - whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards,
>
> - what proposals the applicant may have made to the loan administrators and the responses received, and
>
> - whether the applicant was at any time disabled from working by illness.

[20] He further elaborated, with perhaps some inevitable overlap but with a compendium worth quoting at length, in *Re Lundrigan*, 2012 NSSC 23:

Black's Law Dictionary (9th ed): gives the following definition:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to see unconscionable advantage. - Also termed *bona fides.*
>
>> "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; It excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.,

and Barron's Law Dictionary, 3rd edition, the following:

> GOOD FAITH a total absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations. In the case of a merchant, good faith refers to honest in fact and the observance of reasonable commercial standards of fair dealing in the trade. U.C.C. §2-103(1)(b). More generally, the term means "honesty in fact in the conduct or transaction concerned. "U.C.C. §1-201(19).

[15] In Frank Bennett: *Bennett on Bankruptcy,* 14th ed, at page 564 the following factors are suggested:

> ●whether the money was used for the purpose loaned;
>
> ● whether the bankrupt completed the education;
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> ●whether the bankrupt derived economic benefit from the education, namely whether the bankrupt obtained a job in the area directly related to the education;
>
> ● whether the bankrupt made reasonable efforts to repay the debts;
>
> ● whether the bankrupt had made use of available options such as interest relief, remission, etc.;
>
> ● the timing of the bankruptcy;
>
> ● whether the student loans form a significant part of the bankrupt's overall debts.

● whether the bankrupt has acquired a significant estate, property, savings, investments or has the bankrupt incurred and discharged other debts for non-necessaries, while continuing in default of the student loan;

●whether the bankrupt had sufficient work and income to be reasonably expected to make payments on the loan;

● the lifestyle of the applicant;

● whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards;

● what proposals the applicant may have made to the loan administrators and the responses received; and

● whether the applicant was at any time disabled from working by illness.

[16] The following is said in Roderick J. Wood: *Bankruptcy & Insolvency Law,* Irwin Law, 2009, at page 295:

> The good faith requirement means that the debtor must have acted honestly both in the bankruptcy and in obtaining the student loan.

[17] Houlden, Morawetz & Sarra: Bankruptcy and Insolvency Law of Canada, Fourth Edition, at H§40, page 6-185, says the following:

> "Good faith" implies honesty of intention. Failure to properly disclose the debtor's marital status on the student loan application shows dishonesty of intention: *Re Dustow* (1999), 1999 CanLII 13044 (SK QB), 14 C.B.R. ($4^{th}$) 186, 1999 Carswell Sask 831, 193 Sask. R. 159 (Sask. Q.B.).
>
> In determining whether the bankrupt acted in good faith, the following factors may be considered:
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> 1. Was the money used for the purpose loaned?
>
> 2. Did the bankrupt complete the education or make an honest effort to do so?
>
> 3. Did the bankrupt derive benefit from the education in the sense of gaining employment in an area directly related to the education?

> 4. Did the bankrupt make reasonable efforts to pay the loan or did the bankrupt make an immediate assignment in bankruptcy?
>
> 5. Did the bankrupt take advantage of other options with respect to the loan such as interest relief or loan remission?
>
> 6. Was the bankrupt extravagant or irresponsible with his or her finances?
>
> 7. Did the bankrupt fairly disclose his or her circumstances on the application for the loan in the sense of acting with an honest intention?

[18] In *Duke* v. *Nanaimo* (*Regional District*) (1998), 50 M.P.L.R. (2d) 116 (B.C.S.C.) at paragraph 52 one finds the following:

> Although the phrase "good faith" always contains a component of honesty, it often connotes additional qualities depending on the circumstance in which it is used. In my view, the requirement of good faith mandates genuineness, realism and reasonableness both subjectively and objectively.

[19] *Lowe, Re,* 2004 ABQB 255 (CanLII), 2004 ABQB 255 (Romaine J.) concerned a modest balance owing on a student loan of a bankrupt, the head of a family of eight. He ran a successful business. The family income was well in excess of $100,000. It was observed they lived very well - two cars, several computers, involvement in sports, the expenses for which were very high. He never made voluntary payments on the student loan in question. He spent his money on family priorities. The point made in this case is that, although it is important that children be given access to sports, cultural activities etc., good faith requires that one's priorities reasonably reflect community standards. Put another way, a certain life style is necessary to earn a living and be a part of a community, and children should be able to participate in community activities, sports, etc., but the expenditures must be reasonable; extravagance is not acceptable. This observation applies to both the bankrupt's good faith and ability to pay.

[20] In *Cardwell, Re*, 2006 SKQB 164 (CanLII), Registrar Herauf was first concerned with whether Subsection 178(1.1) relief was available to one who had made a consumer proposal. He determined that it did, but questioned whether making such was indicative of good faith. He said:

> 55.To put it bluntly, I have not been convinced that the applicant has satisfied the requirements in subsection 178(1.1) of the *Act*. The applicant made no attempt to make any payment until compelled to do so by enforcement action brought against him. He did not take advantage of any interest relief mechanisms. While I certainly appreciate the effort by the applicant to complete a Consumer Proposal I cannot equate that effort as a show of good faith. It was judgment enforcement that prompted the Consumer Proposal and not a genuine effort by the applicant to pay down this debt.

> 56. I also agree with the respondent's submission that the applicant is gainfully employed in a profession for which he received a student loan funded education. Furthermore, he will be employed in that area for the foreseeable future. The applicant earns substantial remuneration for this work. To allow the application in the present circumstances would make a farce of this provision.

[21] In *Fournier, Re*, 2009 Carswell Ont. 3522, Registrar Nettie considered the need for the applicant to have acquired a new automobile when it was apparent that she could be well served by public transit, as she lived and worked in central Toronto. He said:

> 14. When what apparently gives in her budget at the same time that the car is leased are the payments to the student loans, I find this not to be acting in good faith in respect of those loans. No evidence was offered of any real exploration of taking public transit, or of keeping the old car, either of which would have permitted continued or increased payments on the student loans, and I draw the adverse inference that either of those options could have resulted in money being paid under the loans, but that the Applicant chose to have a new car for reasons personal to herself, and not in keeping with her obligation to act in good faith to these two loan programs.
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> 15. Turning to the second part of the test, financial difficulty, I find that while the Applicant certainly appears to be in financial difficulty, her present difficulty is of her own choosing - the car. But for that new car, which increases her regular transit costs from approximately $200.00 per month for bus passes to $800.00 or more, she would be able to make her support payments and pay something to the student loans.

[21] Some cases implicitly or explicitly refer to an "absence of bad faith," or a lack of evidence that there has not been good faith. Respectfully, I believe these incorrectly reverse the burden of proof. The burden is upon the applicant.

[22] Clearly, not every factor will apply in every case. And in most if not all cases, the answer to some factors will be 'yes' and others, 'no.' The question is whether, on a balance of probabilities, the applicant has satisfied the Court that

s/he has acted in good faith, in the context of subs. 178(1.1). Ultimately, this is an exercise in "I know it when I see it."

[23] So what of Ms. Simon? To put it bluntly, I am not satisfied that *at the present time* she has acted in good faith.

[24] The federal student loan in question before me appears to have funded not only Ms. Simon's education, but living expenses as well. When I questioned the amount of debt in the context of her four year degree, I was advised that this included funding for child care expenses.

[25] The student loans were the sole debts in the bankruptcy. They are significant.

[26] She appears to have paid little or nothing on each loan, aside from that paid under garnishment in 2013-4. Her reaction to post-bankruptcy impending garnishments or offsets, both times, was to follow quickly with the Subs. 178(1.1) applications.

[27] Ms. Simon indicated that she had made no overture towards the authorities to reamortize, extend, compromise, or otherwise manage the loan.

[28] She applied for, and received, interest relief for less than one year. She could not recall why she was denied further relief, but was working full time at that juncture.

[29] Although Ms. Simon has medical issues, she has not been diagnosed as having a disability for the purposes of “Stage 2” student loan relief.

[30] In fairness, I repeat that Ms. Simon is in the workforce, with a modest income. She does not have an elaborate lifestyle, nor one which places meaningful discretionary financial priorities over the loan before me. She has medical issues, some of which have indeterminate long-term effects at present. Her job does not appear to make direct use of her education.

[31] I am very concerned that Ms. Simon’s first reaction to Crown activity to collect on the loans appears to have been first, bankruptcy and then, upon receipt of post-bankruptcy garnishment letters, near-immediate applications for subs. 178(1.1) relief. It will be recalled that these funded not only educational, but personal living expenses.

[32] I also note that she has already been relieved of some $22,000 in public debt.

[33] At the hearing, she first expressed interest in a compromise or arrangement with the authorities when “it doesn’t look like this is going to go my way.”

[34] As I said at the beginning, I have no authority to make such a compromise or arrangement. I invited Ms. Simon, at her questioning, to make such an overture to the authorities.

[35] Quite simply, the "good faith" test must have some meaning. I am unable to find the applicant has discharged the burden upon her in this instance, *yet*.

[36] In the alternative, I have a residual discretion even in the presence of good faith and hardship, not to discharge the loan in question. I would exercise that discretion and not discharge the loan, at the present time.

[37] I do not believe it would be fair to refuse the application outright, given the clear untenability of servicing the loan on the terms in evidence before me. It is important, however, to keep that untenability and the good faith test analytically distinct; otherwise, it is only a financial test and nothing more.

[38] In *MacLean* and *Lau*, both *supra*, the Courts refused the applications with leave to reapply. *MacLean* was a discharge application, in the context of a private student loan; *Lau*, a 178(1.1) application.

[39] I do not believe it would be an efficient use of the Court's or the applicant's resources to proceed in that fashion.

[40] I am adjourning this matter to the sitting of this Court at Halifax on September 27, 2019 at 2:00 pm. The applicant, the Trustee, the Superintendent, and the creditor shall receive copies of this decision to notify them accordingly, at the addresses set out in Ms. Simon's November 16, 2018 affidavit of service.

[41] During that interregnum, which I have deliberately left long enough to establish a factual good-faith matrix, I encourage Ms. Simon to make her best efforts to make serviceable arrangements respecting this debt, as per her overture and question raised at the hearing. If the parties are able to effect a resolution, that will be to everyone's benefit and the Court is to be informed of that fact; whereupon the matter may be further adjourned, or dismissed as the case may be.

[42] If they are unable to resolve the matter, the fact and nature of Ms. Simon's efforts (and the responses received) will be of very considerable interest to the Court when the hearing reconvenes.

**Conclusion**

[43] This matter is adjourned to September 27, 2019 at 2:00 pm.

Balmanoukian, R.