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

**Citation:** *Theriault (re)*, 2019 NSSC 300

**Date:** 20190927
**Docket:** No. 43532
**Registry:** Halifax
**Estate Number**: 51-1702437

**In the Matter of:** The bankruptcy of Ashley Anne Theriault

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

**Heard:** September 27, 2019, in Halifax, Nova Scotia

**Counsel:** Ashley Anne Theriault, personally

**Balmanoukian, Registrar:**

[1] This is an application under s. 178(1.1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA") to discharge a student loan which survived Ms. Theriault's bankruptcy.

[2] As I have outlined the statutory regime in several other cases (including *Re Hughes*, 2018 NSSC 189; *Re Simon*, 2018 NSSC 332; *Re Sullivan,* 2018 NSSC 334; and *Re McCrossin*, 2019 NSSC 71), I will do so only perfunctorily here. That section allows (but does not require) me to discharge a student loan if I am satisfied that

1. The loan is older than five years after the cessation of study (in a program to which the loan relates; going back to school in a different enrolment, after having ceased study, at least *without* another student loan, does not "reset the clock:" *Re McNutt*, 2008 NSSC 466. I mention this as an aside as I have seen this arise on several occasions; it is not necessary for me to opine at this juncture whether I agree with *McNutt* insofar as it pertains to successive non-contiguous programs *with* successive student loans, although the weight of authority so suggests);

2. The proper parties have received notice of the application;

3. The applicant has acted in good faith with respect to the loan (s. 178(1.1)(a));

4. The applicant faces, *and will continue to face*, financial difficulty "to such an extent that the bankrupt will be unable to pay the debt" (s. 178(1.1)(b)); and

5. There is no juristic reason for the Court to decline to exercise its discretion in favour of discharging the applicable loan.

[3] I have also weighed in on the "special nature" of student loans and that they are not "just another unsecured debt," whether dischargeable under s. 178(1) or not: *Re Handspiker*, 2018 NSSC 333; *Re Crocker*, 2019 NSSC 121.

[4] I have been surprised at the lack of participation of the student loan authorities in many instances. I have yet to have them appear to contest a s. 172 or s. 178(1.1) discharge hearing, even when it is quite clear that a s. 173 factor applies or the applicant is unlikely to meet the s. 178(1.1) test, respectively. I do understand that in the past many more applications for discharge were contested when student loans were preferred under s. 136 BIA. However, in both dischargeable and non-dischargeable student loan cases, there have been many

instances in front of me in which it is inequitable for the debtor to "skate away" from the obligation in full. The guardian of the public purse should be more proactive in saying so, when appropriate.

[5] I have authority on a s. 172 hearing (whether or not the student loan is dischargeable) to fashion a disposition which fits the circumstances of that case and balances all relevant interests. It would be most helpful to hear from what is often a major (and in some cases only) creditor, when appropriate.

[6] In this instance, Ms. Theriault already has her (apparently automatic) BIA discharge; what is before me is the 178(1.1) application.

[7] I begin with service. In this instance, CRA was served in British Columbia and Employment and Social Development Canada was served in Quebec; I am satisfied this is reasonable and effective given that these are the offices that communicated with the applicant. Although this Court provides an in-house "student loan package" as an "access to justice" tool and contains provincial and federal addresses as known to us (and which differ from the addresses used by Ms. Theriault), I do not think they are the "only" places to serve the creditor, when the debtor has knowledge of a well-founded and valid other address. If the authorities seek to be served at a place different than that from which it has communicated

with the debtor, I suggest it is incumbent upon them to make this known directly to that debtor. See (for summary administration estates) BIA s. 155(d) and *Bankruptcy and Insolvency General Rules*, Rule 6. The notices were sent at least ten days before the hearing: Rule 6(2)(b). In the alternative, it is just in this case to consider this adequate service, for the same reason pursuant to Rule 6(4).

[8] Turning to the merits.

[9] In many of these cases, my primary difficulty has not been in finding "financial hardship" – the loan payments have sometimes been simply untenable, and I have no jurisdiction to alter them. There have been occasions, such as *Re Sullivan*, 2018 NSSC 334 in which the debtor had some, but not the called-for, ability to pay. Since 178(1.1) is "take it or leave it," it escapes my understanding why the authorities do not adapt the situation to what is feasible for the debtor (by which I mean reasonably possible, not "convenient"), in order to get paid albeit over a longer period of time. The Court has no s. 178(1.1) authority to fashion such a resolution.

[10] What I find more frequently wanting is the ability of the applicant to meet the "good faith" test. Often the debtor has made little to no effort to address the obligation. Simply saying, "I can't afford it" is not enough – that goes to financial

hardship but not good faith. There have often been few if any payments, or the only payments have been through garnishment, holdback of tax refunds and benefits, or the like. There is often little to no evidence of any course of dealing between debtor and creditor, or the only evidence is that the application before the Court is to get the student loan authorities off the applicant's back.

[11] This case is different.

[12] Ms. Theriault made several payments – she estimated 10-12, and in full. Also, when working in the past she fully satisfied a provincial student loan (about $5,000). She also said she called the authorities "immediately" when she received notification of re-activation of her student loan account in July 2019. The notice before me calls for a minimum payment of $362.00 on a loan balance of $18,067.16 (of which $13,642.38 is principal).

[13] I found Ms. Theriault to be forthright and sincere.

[14] She is not working in her fields of study; however, she is quite rightly proud of her advancement over time, to her pre-maternity position as a manager.

[15] I find the "good faith" test has been met. I would have preferred a more robust discussion between the applicant and the authorities, but in conjunction with the overall payment history and apparent hiatus by the authorities between

discharge (apparently automatic in 2013) and now, on balance I find the applicant has met this part of the burden upon her.

[16] Her current maternity leave has given rise to a change in her income, which I need not review in tremendous detail. The "financial hardship" test is not a transitory one – the applicant must face and *continue to face* hardship to the extent that she is "unable to pay the debt."

[17] $362 per month must be viewed through the lens, not only of where Ms. Theriault is financially today, but where she is *and where she is going to be* within a reasonable time horizon. I find it is appropriate to consider not her current income but her income when, shortly, she goes back to work.

[18] Her managerial job awaits her; she testified that her "take home" pay will be about $30,000 per year. In addition, she receives $408 under the Canada Child Benefit, for a total (assuming this remains the same upon return to employment) of just around $35,000 per year or a little under $3,000 per month. She and her child comprise a two-person household.

[19] The Superintendent's standards for a two-person household is $2,743. As I have said in other cases, I do not consider this to be the "be all and end all" in s. 178(1.1) cases, but it does provide a useful guideline. Ms. Theriault is at or around

the point at which, in a bankruptcy situation, she would have surplus income under s. 68 BIA, but only just.

[20] I find it a more fruitful exercise, and more in keeping with the s. 178(1.1)(b) "hardship" test, to canvass not just what she has coming in but what is going out and where. Ms. Theriault reviewed that with me, and while I may nit-pick over this item or that ($310 in cable and phone in particular), her budget is not one which lends itself to a great deal of breathing room. As presented to me, her line items add up to about $1,605 per month (rent, utilities, insurance, etc.), and upon return to employment she will have $800 per month in child care and a half-hour commute (in a well-used vehicle, having its own expense). Essentially, that will leave her with under $500 for "everything else," including groceries, fuel, contingencies, and replenishments. This is a remainder that is modest and which does not arise through mismanagement or misplaced priorities.

[21] Although a $362 payment is one which I would find serviceable in many situations, on balance this is not one of them. I find the applicant has met the test in s. 178(1.1)(b), given a reasonable time horizon.

[22] Lastly, to reiterate, once I find the applicant has met the test in 178(1.1), I may but not must effect the discharge; I retain the discretion to refuse the

application, even though I have no other amending authority. In light of the circumstances I have outlined, there is no juristic reason not to exercise my discretion in favour of applicant.

**Conclusion**

[23] The application is granted, and the Court will issue the usual 178(1.1) order.

Balmanoukian, R.