SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Goulding (Re)*, 2020 NSSC 22

Date: 20200117
Docket: No. 43732
Registry: Halifax
Estate Number: 51-1515350

In the Matter of: The bankruptcy of Justin Sterling Goulding

Judge: Raffi A. Balmanoukian, Registrar

Heard: January 3, 2020, in Halifax, Nova Scotia

Counsel: Justin Sterling Goulding, for himself, personally

Balmanoukian, Registrar:

[1] This case raises, squarely, the issue of whether this Court should use the "single date" or "multiple date" method of determining whether a student loan is discharged under s. 178(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA").

[2] Simply put, if a student loan is more than seven years old (meaning seven years after 'end of study') at the date of a bankrupt's filing, it is dischargeable as a s. 178(2) debt. If it isn't, it's not (s. 178(1)), but may be discharged pursuant to a s. 178(1.1) "hardship" application once it is more than five years post-study.

[3] So, to borrow and paraphrase a political expression, "it depends how you define 'seven years old'." Does a student who is in-and-out of school, with or without student loans for each (or any) session, reset the clock each time s/he enrols, or does the clock stop each time s/he ceases study?

[4] Mr. Goulding illustrates this situation nicely. He was a student from 1995 to 1999 (for which he received student loans), and again from 2003 to 2005 (for which he did not). He declared bankruptcy in 2011.

[5] Thus, if one uses a "single date" method, the student loans are not discharged; if one uses a "multiple date" method, the loans applicable to 1995-9 would be included in the general 178(2) discharge provision.

[6] Although the student loan authorities did not appear or make submissions, they took the position with Mr. Goulding that the loans remain extant and owing; thus, this came before me as a s. 178(1.1) "hardship" application.

[7] At the hearing, I advised Mr. Goulding that his loans were discharged, not under s. 178(1.1), but under s. 178(2). I issued an order accordingly, with these reasons to follow.

[8] Different jurisdictions have taken different approaches to this issue. In Nova Scotia, the starting point is that of my learned forebear, Registrar Cregan, in *Re McNutt*, 2008 NSSC 466. He concluded that, since s. 178(1) refers to student "loan" in the singular, the "multiple date" approach is correct – that is, the relevant time period, currently seven years, runs from the end date of study for the particular interval. For example, if a person is a student in 2010-11 and again in 2015-6, the seven year period for any loan advanced for the 2010-11 period begins to run from the end of study date in 2011 (thus subject to discharge for bankruptcy filings in and after the anniversary date in 2018), not 2016.

[9] This approach was followed by Registrar Schwann (as she then was) in *Re Hildebrand*, 2010 SKQB 321, citing and explicitly agreeing with *McNutt*. A prior Saskatchewan decision, *Re Minto* (1999), 14 CBR (4^{th}) 235 (Sask. QB) had explicitly left this question open (at para. 52), while recognizing the policy considerations behind s. 178(1)(g) *BIA*. I have discussed those considerations at length, as well, in other cases and with approval.

[10] Ontario has taken a similar "multiple date" approach, in *Re Dennis* (2007) ONSC 2417. It supplemented the "multiple date" reasoning with a discussion of the underlying rationale that debtor rehabilitation is a primary function of the *BIA*. When coupled with the objective of the student loan regime (that is, to facilitate education with a long-term view to a more productive economic whole), it logically follows that a return to study should not be penalized by "re-setting the clock" on student loans past.

[11] Newfoundland and Labrador also adopted the "multiple date" approach, in *Attorney General of Canada v. Collins*, 2013 NLCA 17.

[12] On the other side of the equation, at least British Columbia and Quebec have adopted the "single date" rule: *Quebec (Attorney General) v. NP*, 2011 QCCA 726; *Syndic de Mamoun*, 2018 QCCS 4702; and *Re Mallory*, 2015 BCSC 5.

[13] *Mallory* is worth considering afresh in Nova Scotia, as it specifically considers and rejects Registrar Cregan's reasoning in *McNutt*. The court did so partially on the basis that the learned Registrar, to the Court's thinking, misconstrued "loan" in the singular by failing to consider that "the singular includes the plural" pursuant to the federal *Interpretation Act* (RSC 1985, c. I-20, s. 33 as amended).

[14] The Court also found that Registrar Schwann (as she then was) erred both in adopting *McNutt* and a "narrow construction" of s. 178(1)(g). Gaul, J. stated at para. 82:

> I fail to see how the length of time between periods of study is of any consequence. The question is not how long a gap has there been or even if the period of studies was successful. The question is, when did the bankrupt stop being a student.

[15] Respectfully, my answer to that question is "it can be more than once." A plain and ordinary meaning may best be illustrated by citing the example above – the student from 2010-11 and again in 2015-6. If you asked her in 2012, "are you a student," the answer would be 'no.' Ask again in 2015 and the answer is "yes." Ask, "how many times were you a student," and the passenger on the Clapham Omnibus would answer, "twice."

[16] To that end, I follow – to an extent, at least – the reasoning in *McNutt*. I will discuss my qualms and caveats later.

[17] I have expressed my views on the general nature of student loans on many occasions; they are not "just any other debt." I said in *Re McCrossin*, 2019 NSSC 71, at para. 52:

> Ultimately, student loans are not the same as other unsecured debt. They are debts to the public, provided at a time of need to enhance an intangible and lifelong asset – an education. The implied bargain is that through that loan facility, the recipient becomes a (more) productive and contributing member of Canadian society. The bargain further assumes that through repayment of the loan and enhanced skills and economic value (and corresponding taxes and consumption), the borrower enriches both him-or-herself and the polity as a whole.

[18] I discussed this, as well, in the context of a single dischargeable loan (in which "end of study" date was not an issue) in *Re Handspiker*, 2018 NSSC 333. It has become my practice, when facing such a dischargeable loan, to make detailed inquiry of the factors I list in that case; some trustees have developed a type of questionnaire for the bankrupt which can be helpful. I am also not reluctant to make a conditional order under s. 172 when the facts warrant; in addition to several unreported cases, I refer for example to *Re Crocker*, 2019 NSSC 121.

[19] I make this diversion to illustrate that I do not look upon student loans lightly; indeed, I have bemoaned both the "all or nothing" limitation placed on me by s. 178(1.1) (*McCrossin*, *supra*) and the failure of student loan authorities to contest either s. 172 or 178(1.1) applications, when appropriate (*Re Theriault*, 2019 NSSC 300, at para. 4).

[20] But that does not mean that either the ordinary meaning of the legislation or system integrity means that the clock is reset each time. Indeed, doing so would frustrate one of the very themes of the *BIA* – debtor rehabilitation; and the prime objective of public student loans and other tax and policy incentives – to foster an educated and productive society.

[21] Improving, refreshing, or perhaps even reinventing one's skills and knowledge is an underpinning to financial success, independence, and societal productivity – core values to the *BIA* itself. It is perverse to think that Parliament either intended or enacted a structure that someone who ended studies in 2011 and went back to school for a semester in 2016 (with or without loan assistance) is "stuck" with the balance of his or her 2011 loan when s/he files for bankruptcy in 2019, subject only to the "all or nothing" binary remedy in 178(1.1). Indeed, using the "single date" rule, s/he would not even be able to apply under 178(1.1) until 2021, probably after receiving a discharge and the resumption of collection efforts. It would be the ultimate embodiment of "a little learning is a dangerous thing."

[22] I have no difficulty with the specific situation in the case at bar – where Mr. Goulding's first period of study was funded by student loans, and would have been "over seven years" but for the second period of study – in a different program, not funded by student loans. In fact, it neatly illustrates the reasons in fact, policy, and

law *not* to follow the British Columbia and Quebec lines of reasoning at least in such situations – the bankrupt is penalized, not rewarded, for embarking on betterment that had exactly zero cost to the student loan program.

[23] I therefore ordered that the student loans in this case were discharged under s. 178(2) as of the time of Mr. Goulding's general discharge.

[24] I am not aware of how much, if any, funds were obtained by the student loan authorities or from what source post-discharge.

[25] I have had more difficulty with two other situations, neither of which are strictly necessary to decide this case. They, however, are worthy of discussion given the divergence of caselaw which, I hope, has now been settled in Nova Scotia for "two periods, two courses of study, one loan" until and unless overruled by binding authority.

[26] The first is the situation in which there are two periods of study and <u>two</u> loans. That is, the student who (for example) studies Arts from 2009 to 2012 and then Commerce from 2014 to 2018. Is loan number one dischargeable when the student files for bankruptcy in 2020? Or to use what is perhaps an even more fraught example, a bachelor's degree in a given area from 2008 to 2012 which is a prerequisite to a master's in the same discipline studied from 2014 to 2016? Is it

fair to discharge the loan which led to the credentials required for the subsequent study when filing in 2020?

[27] The second situation is what I might call the "student, interrupted" category – the student who, while engaged in the same credentialing, studies for a year, takes a year off, goes back to school in the same program, and so on, with or without successive loans.

[28] These seem unjust to discharge. There are, however, at least three answers.

[29] The first is the Court's discretion under s. 172, should the bankrupt not be the subject of an automatic discharge. It is fully within the power of the student loan authorities to contest the discharge and prevent such an automatic result. In most if not all cases, they will have one or more grounds to do so under s. 173, most notably the "50 cents on the dollar" provisions in s. 173(1)(a). That allows for a contestation by a Trustee or Creditor unless such liabilities have "arisen from circumstances for which the bankrupt cannot justly be held responsible." I have already opined that in my view, student loans are generally the epitome of a debt for which the student *should* be responsible (*Handspiker, supra*, at para. 9). The Court's remedies under s. 172 with respect to conditional orders are much more

adaptive and flexible than 178(1.1)'s "take it or leave it," and the Court should not hesitate to use them, when appropriate.

[30] The second answer is that I actively encourage the student loan authorities to contest discharges, again when appropriate. The Court cannot – except for annulments – intervene when the discharge has been automatic and thus has not come before the Court. If the Crown believes that a bankrupt's discharge should be conditional on additional payments into one's estate, especially when the bankrupt has good prospects and a dischargeable student loan is all or most of the indebtedness, they should come to Court and say so.

[31] The third answer is to look at all of the circumstances when a portion of the total student loans advanced have not been discharged and others have, and a 178(1.1) application is before the Court on the non-dischargeable loan.

[32] The Court has an extremely limited quiver under 178(1.1) – again, it cannot modify the loan or its terms, and it can only deal with the loan that falls under that provision, not the antecedents. I believe, though, that the Court can and should look at the whole of the circumstances in deciding whether the "good faith" test has been met. Although the section refers to "good faith in connection with the bankrupt's liabilities under the debt" (emphasis added), it bears scrutiny if an

applicant says, "I acted in good faith on the new stuff while walking away from the old stuff." While there may be such situations brought about by the changes in an individual's means and circumstances, they call for detailed inquiry.

[33] It may well be, also, that a former student who is unable to service (for example) two $15,000 loans, one of which is more than seven years post-study at the time of discharge and one of which is not, might be able to service one of them within the meaning of subs. 178(1.1).

[34] I leave to another day whether there is what – for want of a better term – I would call a "smell test" exception to this analysis. I have expressed my concerns respecting a student who studies a year, then a year off (and thus ceases to be a "student" for the purposes of the *Canada Student Loan Regulations*, SOR 93/392, as amended), then enrols for another year in study in the same or substantially similar program. Does s/he "stop the clock" at each interregnum? Both in law and in practical administration, it may be difficult to impossible to segregate such a situation. I would certainly look at it askance should it be the subject of either a s. 172 or a 178(1.1) application, at least absent a contextualization (such as family difficulty, return to the workforce, etc.) I am not sure this would arise very regularly, but I do not want to be taken as saying that "every time you restart as a student after ceasing to be one, *without exception*, you start a new page." Again,

should the authorities wish to speak to such a circumstance, they should come to Court on the applicable file, and do so.

Conclusion

[35] The Student Loan at issue in this case is declared to have been included with the Bankrupt's discharge, effective April 5, 2012. I trust the authorities will make appropriate adjustments to any collection transactions that took place subsequent to that date.

Balmanoukian, R.