S.C.C. File Number: 40782

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

B E T W E E N :

IZABELA PIEKUT

Appellant
(Appellant)

and

HIS MAJESTY THE KING IN RIGHT OF CANADA AS REPRESENTED BY THE MINISTER OF NATIONAL REVENUE

Respondent
(Respondent)

and

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUÉBEC, HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, AS REPRESENTED BY THE MINISTER OF FINANCE, CANADIAN ALLIANCE OF STUDENT ASSOCIATIONS and CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW

1. Section 178(1)(g) of the *Bankruptcy and Insolvency Act* ("***BIA***") exempts government student loans from discharge for seven years after "the date on which the bankrupt ceased to be a full- or part-time student." Courts diverge on whether this date is specific to the student loan at issue (the "**multiple-date approach**") or whether the date for all of a bankrupt's student loans is the most recent time they ceased to be a student (the "**single-date approach**").

2. The Canadian Association of Insolvency and Restructuring Professionals ("**CAIRP**") urges this Court to adopt the multiple-date approach, which is most consistent with the *BIA*'s text, structure, and purpose, as well as the text and scheme of student loan legislation.

3. The *Canada Student Financial Assistance Act* (the "***CSFAA***") and its *Regulations* (the "***Regulations***")[1] expressly ties loans to specific periods of studies and creates multiple cessation dates when students break from studies for more than six months. This scheme is only consistent with the multiple-date approach.

4. The purpose and scheme of the *BIA* requires a narrow construction of the section 178(1) exceptions. Tying the non-dischargeability period to the studies funded by the student loan encourages debtors to capitalise on their education without frustrating one of the *BIA*'s core purposes: financial rehabilitation. Conversely, the single-date approach has little to recommend it. Textually, it rests on a strained reading of the words "the date" that disregards the earlier reference to "a loan". Purposively, it curtails the financial rehabilitation of debtors, discourages debtors from returning to school and leads to absurd results such as reviving the non-dischargeability period for already dischargeable debt.

PART II – RESPONSE TO QUESTIONS IN ISSUE

5. CAIRP urges this Court to adopt the multiple-date approach to 178(1)(g).

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[1] *Canada Student Financial Assistance Act,* SC 1994, c 28 ("***CSFAA***"); *Canada Student Financial Assistance Regulations*, SOR/95-329 ("***Regulations***"). CAIRP has focussed its submissions on the current *CSFAA* and *Regulations*, which are for the most part consistent with earlier legislation.

PART III – ARGUMENT

6. The text, purpose and scheme of the *BIA* favour the multiple-date approach.

A. TEXT REQUIRES LOAN-SPECIFIC DETERMINATION OF CESSATION DATE

7. Section 178(1)(g) only applies to loans made under federal or provincial student loan legislation ("**Applicable Legislation**"). CAIRP agrees with the Respondent that section 178(1)(g) must be read together with the Applicable Legislation; however, this <u>requires</u> a loan-by-loan analysis of section 178(1)(g), as follows:

(a) ***First***, identify the loan under which the debt arises (the "**Applicable Loan**");

(b) ***Second***, identify the Applicable Legislation under which the Applicable Loan was advanced;

(c) ***Third***, determine the meaning of "a loan", "full- or part-time student" (in either case, a "**student**") and the "the date on which a bankrupt ceased to be a full- or part-time student" (the "**Applicable Cessation Date**") under the Applicable Legislation; and

(d) ***Fourth***, calculate the non-dischargeability period as seven years from the Applicable Cessation Date.

8. Accordingly, the Applicable Cessation Date is provided by the Applicable Legislation, which can only be determined with reference to the Applicable Loan. This is consistent with cases holding that section 178(1)(g) separately applies to each Applicable Loan: "The reference to 'a loan' […] supports an interpretation that the provision applies to a particular loan, rather than cumulative loans"[2] and "there is nothing in [s.178(1)(g)] to suggest or even imply that the date the bankrupt ceased to be a full- or part-time student must somehow relate or connect to the totality of his or her government student loans."[3]

9. Section 178(1)(g)'s use of the phrase "<u>the</u> date" does not support the single-date approach. Replacing the definite article with an indefinite article – "<u>a</u> date" – would suggest that a single loan can bear several cessation dates. This is false under either approach. Even under

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[2] *Attorney General of Canada v Collins*, 2013 NLCA 17 at para 11.

[3] *Re Hildebrand*, 2010 SKQB 321 at para 31.

the multiple-date approach, there is only one date on which the bankrupt ceased to be a student in respect of the Applicable Loan.

10. Section 178(1)(g) results in multiple cessation dates where a borrower has more than one loan: (a) under different Applicable Legislation with different Applicable Cessation Dates or (b) under the same Applicable Legislation when that legislation provides for multiple cessation dates. For example, the *CSFAA* and *Regulations* provide for multiple Applicable Cessation Dates when more than six months elapses between periods of studies.

The *CSFAA* and *Regulations* require the multiple-date approach

11. The *CSFAA* specifies the Applicable Cessation Date for federal loans made after 1995.[4] The CSFAA contemplates multiple loans over a single "program of studies" (e.g., a degree). Each period of studies, students must apply for a loan, which the government may provide. Students who pursue multiple year programs without interruption "continue to be" students under the *Regulations* and no cessation date arises while their studies continue. These students receive several discrete loans sharing one cessation date: the date when the student discontinues their studies and "ceases to be a student".

12. If a student discontinues their studies and ceases to be a student under the *CSFAA*, they may "again become" a student on returning to school. When this happens, there are discrete "periods of studies" with distinct cessation dates. This supports the multiple-date approach.

(i) The CSFAA provides for multiple distinct loans over a program of studies

13. Under the *CSFAA*, "Direct loans" are made to "qualifying students" in respect of a "period of studies."[5] A period of studies is "equivalent to a course […] taken by a full-time student as part of a program of studies."[6] To qualify as a student, a borrower must apply for and receive a "certificate of eligibility"[7] for each period of studies.[8]

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[4] Federal loans before 1995 are governed by the *Canada Student Loans Act*. Provincial loans are governed by the provincial legislation under which the loan was made.

[5] *Regulations,* s. 5.

[6] *Regulations,* s. 2(1). A "program of studies" is a "series of periods of studies."

[7] *CSFAA*, s. 12.

[8] *CSFAA*, s.12.

14. Accordingly, a student must apply for a certificate of eligibility to obtain a loan for each period of studies. The government then decides whether the student will receive a loan for that period of studies. This generally results in a student enrolled in a program of studies receiving discrete loans under the *CSFAA* for each period of studies in the program. Section 5(1)(c) of the *Regulations* contemplates a student having multiple outstanding direct loans.

(ii) The Regulations contemplate continuing, ceasing to be and again becoming a student

15. The *Regulations* supply the federal definitions for both "full-time student" and "part-time student" under section 178(1)(g) and define when a student "continues to be", "ceases to be", or "again becomes" a student.[9] CAIRP agrees with the Respondent that a borrower must again become a student under the Applicable Legislation to receive a new cessation date for any new period of studies.

16. Sections 178(1)(g)(i) and (ii) both draw the date on which a student ceased to be a full- or part-time student from the Applicable Legislation. CAIRP agrees with the Respondent that the French text of section 178(1)(g) mandates this result, as do closely related provisions.

17. Section 178(1)(g)(ii) should be read as consistent with sections 178(1)(g.1)(ii) and 178(1.1), which draw their cessation dates from the Applicable Legislation. Section 178(1)(g.1)(ii) must do so because the meaning of "eligible apprentice" can only be derived from statute – it has no ordinary meaning. Section 178(1.1) does so because it draws the cessation date from the "applicable act or enactment." There is no basis for a different rule for section 178(1)(g)(ii).

18. A borrower ceases to be a student on the earliest of several dates, including the last day of the last month of the period of studies specified in the certificate of eligibility – defined as the "confirmed period".[10] However, where fewer than six months have elapsed since a borrower would have ceased to be a student under the *Regulations*, the returning student "continues to be" a full-time student and is deemed not to have had a cessation date.[11] If more than six months have elapsed and the borrower satisfies certain debt-related and other

[9] *Regulations,* ss. 7, 8, 12.2 and 12.3.

[10] *Regulations*, s. 8 (full-time student), 12.3 (part-time student); *Piekut v Canada (Minister of National Revenue)*, 2023 BCCA 181 at para 24.

[11] *Regulations*, ss. 7(2)(b) (full-time student), 12.2(2)(b) (part-time student).

criteria they "again become" a student.[12] In "again becoming" cases the student will have previously ceased to be a student and will have at least two cessation dates.

19. Accordingly, the reasoning in *Re Mallory* "that the word 'ceased' [cannot] mean 'temporarily ceased' in the context of s. 178" because it "would mean any break in studies, however short, would trigger the start of the seven year period under s. 178(1)(g)(ii)"[13] is inconsistent with the *Regulations* and must be rejected.

(iii) The Regulations contemplate discrete periods when a borrower is or is not a student, not reinstatement to a single student period

20. The *Regulations* expressly distinguish between borrowers who "cease to be" and may "again become" students and those who continue to be students. The ordinary meaning of "again becomes" – "again" meaning "once more" and "become" meaning "to come into existence"[14] – is most consistent with discrete periods during which a borrower is a student. As such, the *Regulations* do not support the Respondent's characterization of sections 7 and 8 as governing "transition[s] between periods of study" and "reinstatement."[15]

The potential for loan consolidation does not mandate a single cessation date

21. The Respondent's statements about consolidation[16] are out of step with the present reality of student lending. Under the *CSFAA* and *Regulations*, consolidation is only required for "risk shared" or "guaranteed" student loans if a full-time student is returning to school and is not current on interest payments (not principal).[17] However, this situation is less likely to arise because interest is no longer payable on federal student loans.[18]

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[12] *Regulations*, ss. 7(2) (full-time student) and 12.2(2) (part-time student).

[13] *Mallory (Re)*, 2015 BCSC 5 at para 68.

[14] "again." *Merriam-Webster.com*. Merriam-Webster. 2024; "become." *Merriam Wesbter.com*. Merriam-Webster. 2024.

[15] Respondents' Factum at paras 50 and 54.

[16] Respondent's Factum at paras 55, 67 and 87.

[17] *Regulations*, ss. 7(2) and 12.2. For returning part-time students, s. 12.1(3) of the *Regulations* directs the government to make further direct loans under any prior loan agreement but does not address consolidating the underlying loans themselves.

[18] *CSFAA*, s. 7(1).

22. The consolidation of multiple loans with distinct Applicable Cessation Dates will only result in a single Applicable Cessation Date if the legal effect of the consolidation is that there is only one Applicable Loan under the Applicable Legislation ("**True Consolidation**"). If True Consolidation occurs, then the consolidated loan becomes the Applicable Loan and provides the only Applicable Cessation Date. This must be determined on a case-by-case basis.

23. Neither the *CSFAA* nor the *Regulations* deem loans to be consolidated. Rather than a legislative deeming provision, the Respondent relies on contractual consolidation. However, contractual consolidation only impacts section 178(1)(g) if it results in a True Consolidation. A case-by-case analysis of the contract and surrounding facts is needed to determine whether the parties have effected a True Consolidation such that, under the Applicable Legislation, there is only one Applicable Loan as opposed to, for example, an administrative consolidation, where loans are administered together but the parties have not legally created a single loan facility.

24. CAIRP submits that the factors relevant to whether a True Consolidation has occurred include: (i) the structure of the transaction, (ii) the terms of the loan agreements and any consolidation agreements, (iii) the circumstances under which any agreements were executed, including whether the borrower had adequate notice of the effect of consolidation, (iv) the Applicable Legislation, (v) whether the loans were made under the same, or different, legislation, (vi) whether the loans were made by the same, or different, lenders and guarantors and (vii) how the parties treat the consolidated loan (e.g., whether the parties account for the consolidated loan as a single loan facility with a single interest rate).

25. For example, the facts in this case relevant to a True Consolidation analysis include that: (a) Ms. Piekut received different loans: (i) from different lenders; (ii) under different legislation; (iii) with different mechanics for interest rate relief; and (b) Ms. Piekut's consolidation agreement for the bank loan expresses a new cessation date.

26. Other situations are possible. A subsequent loan structured as a refinancing and involving an advance of funds to repay earlier student loans might be a True Consolidation.

Conversely, the administrative aggregation of multiple loan facilities involving different Applicable Legislation, parties or interest rates would not be a True Consolidation.

27. This case is a poor vehicle for defining what constitutes a True Consolidation for all cases. The harsh effects of True Consolidation on the availability of discharge raises questions, like the consequences of any failure to disclose those effects to students with little bargaining power, and whether permitting the government to bootstrap section 178(1)(g) obligations through subsequent contracts is consistent with the section's purpose that have not been briefed and are not at issue in this appeal.

B. THE PURPOSE OF THE *BIA* SUPPORTS THE MULTIPLE-DATE APPROACH

28. The purpose of the *BIA* favours the narrower multiple-date approach. The narrow approach to section 178(1) is not a residual presumption; it arises from a purposive interpretation of the *BIA* because "the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate."[19] Because they are mandatory, the section 178(1) exceptions limit judicial discretion and interfere with the court's ability to effect the delicate balance of competing policy interests in the *BIA*. Consequently, the exceptions should only apply where the policy consideration underlying the exception "outweighs any possible benefit in the bankrupt being relieved of [the claim]."[20]

The multiple-date approach promotes the *BIA*'s core policy objectives

29. The multiple-date approach promotes financial rehabilitation and is more consistent with the creditor protection rationale for the section 178(1) exceptions.[21]

30. ***First***, the multiple-date approach promotes financial rehabilitation, consistent with the fresh-start principle. In *Re Goulding*, Registrar Balmanoukian recognised that "[i]mproving, refreshing, or perhaps even reinventing one's skills and knowledge is an

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[19] *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 79.

[20] Respondent's Factum at para 94, citing *Jerrard v Peacock (1985)*, 37 Alta LR (2d) 197 (QB) at para 41.

[21] H. Murray & H. Fisher, You're Hot and You're Cold, You're Yes and You're No: Conflicting Appellate Decisions Regarding Whether Regulators' Fines, Penalties or Restitution Orders Survive Bankruptcy (2022) 17 ARIL ["***Hot and Cold***"].

underpinning to financial success, independence, and societal productivity – core values to the *BIA* itself."[22]

31. ***Second***, the multiple-date approach facilitates the repayment of creditors. The Respondent recognises that "a well-educated population benefits the Canadian public" and "individuals […] are more likely to enjoy improved earnings because of post-secondary education."[23] Accordingly, education better positions borrowers to repay creditors and contribute to the Canadian economy. The single-date approach discourages education by tying a return to school to a revival of the non-dischargeability period.

32. ***Third***, the creditor protection rationale for section 178(1) supports the multiple-date approach. The section 178(1) exceptions preserve liabilities in specific relationships where, because of the nature of the creditor's relationship with the debtor, the creditor is incapable of protecting themselves or, for policy reasons, should not be required to protect themselves from the liability.[24] Government student loans receive special protection because, for policy reasons, they are advanced non-commercially "to help students from low- and middle-income families to afford post-secondary education."[25] Consequently, the government does not require the collateral or guarantees that a private lender would expect.

33. The repayment risk associated with this policy-based, non-commercial lending, which triggers the policy rationale for section 178(1) protection, arises when the loan is advanced. This repayment risk does not materially increase when a borrower returns to school or when a loan is consolidated and so the purpose of section 178(1) is not re-engaged in either situation.

The single-date approach frustrates the *BIA*'s policy objectives

34. The single-date approach frustrates the *BIA*'s policy objectives, and other parts of the discharge regime, in at least four ways.

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[22] *Re Goulding*, 2020 NSSC 22 at para 21.

[23] Respondent's Factum at para 1.

[24] *Hot and Cold* at p. 39.

[25] Respondent's Factum at para 51; See also *Hot and Cold*.

35. ***First*****,** the single date approach frustrates the hardship provision for government student loans under 178(1.1), which permits early discharge of government student loans when a bankrupt shows good faith and continuing financial difficulty. Under the single-date approach, a bankrupt loses hardship eligibility for five years whenever they again become a student under the Applicable Legislation, even if they privately fund later studies. This is perverse.[26]

36. ***Second,*** the single-date approach works hardship and frustrates financial rehabilitation. For example, the borrowers in *Re McNutt* had three children, two of whom were disabled, when they filed for bankruptcy in 2008.[27] The father funded two programs of studies in the 1990s with government student loans, with a two-year gap in between. He did not complete the second program because the school went out of business. He worked for the Canadian Armed Forces, while his wife cared for their children. Their loans were substantial, their family responsibilities demanding, and they had continuing financial difficulties. Under a single-date approach, the father's second incomplete course of studies would have revived his earlier student debt, saddling him with loans he was "unable to pay." Registrar Cregan correctly rejected this approach, reasoning that "I do not see that the language demands that time start to run again for earlier loans when one later takes up studies relying on a fresh government loan or at least a loan under another jurisdiction as in the present case."[28]

37. ***Third***, the single date approach draws irrational distinctions. In *Bataille c Procureur général du Québec,* a borrower's return to studies after declaring bankruptcy, but before discharge, did not revive the seven-year window.[29] Under the single-date approach, that same borrower, returning to studies shortly before declaring bankruptcy, would revive the seven-year window. The precise timing of the bankruptcy, however, bears no relationship to section 178(1)(g)'s purpose and is no reason to treat borrowers differently. The multiple-date approach avoids consequential absurdities like this by aligning the seven-year window with its obvious target: the underlying loan.

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[26] *Re Goulding*, 2020 NSSC 22 at para 21.

[27] *Re McNutt*, 2008 NSSC 166.

[28] *Re McNutt,* 2008 NSSC 166 at para 21.

[29] *Bataille c Procureur général du Québec*, 2023 QCCA 169.

38. ***Fourth***, the single-date approach unreasonably revives dischargeable debt as non-dischargeable debt. The Respondent's position would result in further education "reviving" the non-dischargeability of unpaid student debt arising from studies completed more than seven years prior, for a further seven years. The only effect is to punish the bankrupt for returning to school.[30]

C. SCHEME OF THE *BIA* ADDRESSES OPPORTUNISTIC BANKRUPTCIES

39. The multiple-date approach does not invite opportunistic bankruptcies. As *Re St Dennis* explains*,* the multiple-date approach discourages opportunistic bankruptcies through the existing seven-year non-dischargeability period. The Respondent is "really asking that the bankrupt should wait [further] years before the debt can be discharged."[31]

40. In any event, section 178(1)(g) is not the only arrow in the court's quiver. Section 178 is part of the *BIA*'s comprehensive discharge regime that can (and does) address student loans that fall outside of section 178(1)(g). Section 172(2) limits discharge by granting the court broad discretion to suspend, conditionally grant, or refuse a discharge based on an extensive list of facts in section 173.

41. Courts routinely use sections 172 and 173 to control opportunistic bankruptcies involving private student loans.[32] *Re Coffey* is exemplary.[33] Justice Orsborn ordered a discharge conditional on the borrower repaying $80,000 towards private medical school debts. He found that the debtor had declared bankruptcy "because it was thought that bankruptcy provided a legally-sanctioned way to avoid paying his debts". Similar cases abound.[34]

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[30] *Re Beaton*, 2023 NSSC 21 at para 22.

[31] *Re St Dennis*, 2017 ONSC 2417 at para 22.

[32] Conversely, in student loan cases where the bankrupt was an honest but unfortunate debtor, courts have granted an absolute discharge. See e.g. *Gardner (Re)*, 2010 NSSC 298; *Re: Cyrus*, 2014 MBQB 208.

[33] *Re Coffey*, 2004 NLSCTD 22.

[34] *Re Lepik*, 2017 BCSC 1086; *Re Wright*, 2017 NBQB 107; *Mance (Syndic de)*, 2009 QCCS 5818; *Re Metz*, 2019 SKQB 9; *Re Ament*, 2006 CanLII 30583 (ON SC).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of June 2024.

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PART VII – TABLE OF AUTHORITIES & LEGISLATION

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