CASE COMMENT:

Brunt (Re), 2006 NSSC 237, 246 N.S.R. (2d) 276, 24 C.B.R. (5th) 51 : a case comment and ***Cochran (Re)***, 2006 NSSC 242, 24 C.B.R. (5th) 130 : a case comment

By Tim Hill

These cases offer a comprehensive review of the circumstances in which it might be appropriate to impose a conditional order of discharge upon a bankrupt, where the bankrupt has made an Assignment in Bankruptcy more than 10 years after ceasing to be a student, and where student loans make up a significant portion of the bankrupt's debt.

The cases are of interest because they dispose to the category of l'ancien regime that case law on the subject extant before the 1997 amendments to section 178 of the ***Bankruptcy & Insolvency Act*** (***BIA***). They are also of interest in that they do not appear to conform with the scant case law on the point originating from other jurisdictions.

The facts in ***Brunt*** reveal a bankrupt deserving of sympathy. Ms. Brunt graduated with a Bachelor of Education degree in May of 1995. Following graduation, she worked as a substitute teacher for several years. She married, and became unable to work during her pregnancy because of medical difficulties. The first child, a son, was autistic. The couple had a second child, a daughter. At the time of the application for discharge the children were six and four years old respectively.

During the marriage the bankrupt's husband worked as a mechanic and his earnings were quite modest. Ms. Brunt was occupied caring for her children. The couple separated several months before the application for discharge was heard.

The Registrar found that even if the husband's income had been considered with that of the bankrupt, the family income fell below the Superintendent's Standards. Those standards are used to determine minimum levels of income a bankrupt may retain prior to any consideration being given to payments to the estate from income earned during bankruptcy. The standards are derived from Low Income Cutoffs (LICO) released by Statistics Canada.

Section 178(1)g of the ***BIA*** provides that an order of discharge will not release a bankrupt from student loan debts where the date of the bankruptcy occurred within 10 years after the date on which the bankrupt ceased to be a full or part time student. This provision has been in place in its present form since 1998, and is another step in a number of changes made in the ***BIA*** relating to student loan debt beginning in 1992. In that year, student loans ceased to be preferred debts. In 1997, Section 178(1)g was enacted with the cut off being two years after the bankrupt ceased to be a student. That period was extended to 10 years in 1998. Section 178(1)(g) has been further amended so that the time period will be seven years, although that amendment has yet to be proclaimed.

Ms. Brunt had student loans taken while in University. As the 10 year period since graduation had expired, an order of discharge in her case would release her from the student loan debt. In opposing the application for discharge, the Crown relied upon case law predating section 178(1)g which

supported imposing conditional orders of discharge requiring bankrupts with student loan debt to make significant payments to their estates prior to obtaining an absolute discharge.

The Registrar conducted an extensive review of the applicable case law which essentially characterized student loan debts as being of "a high moral nature". Given that student loans were provided by Canadian tax payers, and given that the student obtains a significant lifetime benefit from the education the loans paid for, the case law pointed to the appropriateness of making significant conditional orders for payment.

Having reviewed this case law, the Registrar concluded that the provisions of section 178(1)g addressed the underlying concerns upon which the courts' pre-section 178(1)g decisions had been founded. In other words, the Registrar found that the enactment of section 178(1)g was intended to, and did, codify the approach a court should take when dealing with applications for discharge in student loan cases. The court did note that there might be an exception in extreme cases. This would be in situations where it was clear that section 178(1)g did not address "the evils in question". Examples of such evils given were situations:

> "Where the Bankrupt treated the responsibility to repay with great high handedness, lived extravagantly, or engaged in high risk business adventures."

To summarize, the case makes it clear that once the 10 year post graduation period has expired, except in exceptional circumstances, student loans will be treated like any other debt on an application for discharge. In addition, only where there was surplus income over and above the Superintendent's Standards would any payments be ordered to be made as a condition of discharge. In Ms. Brunt's case there were clearly no "exceptional circumstances" and no surplus. She received an absolute discharge.

Brunt was followed two weeks later by ***Cochran***. ***Cochran*** also involved a bankrupt who had made an assignment more than 10 years after completing his studies, and an objection to discharge raised by the Crown with respect to outstanding student loans. Unlike Ms. Brunt, Mr. Cochran had surplus income in the amount of $362.00 per month. At the time of the application for discharge, the bankrupt had already paid $5,200.00 to his estate. The Crown sought a conditional order for discharge with payment of $400.00 per month for 36 months. The trustee recommended payment of $375.00 per month.

After referring to ***Brunt***, the court summarized its conclusions in that case and then dealt with a case from the British Columbia Supreme Court, ***Re Cummings***, 2003 BCSC 1530, 46 C.B.R. (4th) 249, 2003 CarswellBC 2471. In that case the court relied on similar case law to that rejected by the Registrar in ***Brunt***. In ***Cummings*** the court imposed a very stiff conditional payment obligation ($200 per month for four years).

While the Registrar in ***Cochran*** declined to follow the British Columbia precedent, he did impose a conditional order for payments over a period of 12 months. The payments ordered were to be $375.00 per month. In imposing this condition, the Registrar noted that he was "acknowledging" the older cases, while at the same time recognizing the effect of section 178(1)g.
Cochran is interesting in that albeit on a rather limited basis, the court has re-imported the pre-

section 178(1)g case law. This is demonstrated by the reference to that case law, and by the fact that the payments ordered were somewhat out of the ordinary. Under the Superintendent's Standards the bankrupt would normally only be required to pay into his estate 50% of the surplus. In this case, the bankrupt was ordered to pay a little more that 100% of the surplus.

It remains to be seen as to what extent the courts in Nova Scotia will in the future retreat from the position taken by the Registrar in ***Brunt*** and in ***Cochrane***. The decision does not conform with Cummings, nor with the only other decision on the point, that of Registrar Herauf in ***Re Ledoux***, 2005 SKQB 75, 8 C.B.R. (5th) 225, 260 Sask. R. 266, 2005 CarswellSask 92 (Q.B.), where the court implicitly recognized the relevance of cases decided under l'ancien regime.