

Take Me to the Water: the baptism of bankruptcy and student debt write-offs

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A few weeks ago, I decided to take a break from reading cases, arguments and alternative arguments to peruse the news (read: basket-cases, facts and “alternative facts”) instead.

Amongst other things, I learned that the federal government is this year planning to write off approximately [\\$178 million](#) in unpaid federal student loans (see <https://goo.gl/RhU9kn>). If you think that’s a lot of lost marbles, this is apparently a big improvement from just a few years earlier (\$312 million in 2012 and \$295 million in 2015). The federal government has stated the reasons for the write-offs include that a debtor may have filed for bankruptcy, the debt itself has passed a six-year legal limit on collection, or the debtor simply has disappeared.

Student debt has of course been a hot political topic as of late, not just in our own province but in others and south of the border as well. From Bernie Sanders to Hillary Clinton to Kathleen Wynne, tuition softening or even elimination altogether has been advocated and tabled in a number of forms. Whether you agree or disagree with this policy tack may depend on your politics and I do not intend to comment on that here. This is, after all, a legal blog; not a political one. And on that note, I return to one of the reasons provided by the feds for the write-offs: “the debtor filed for bankruptcy.”

As both a (relatively) recent student (why didn’t I file for bankruptcy years ago?!) and as a bankruptcy lawyer, this gave me pause and brought me back to some first principles. The law of bankruptcy in Canada provides for a baptism of sorts. Central to the concept of bankruptcy is the eventual emergence of the debtor/bankrupt from the process a new man, “saved”, if you will. In the times of the ancients, personal bankruptcy did not exist – the inability to pay one’s debts as they became due generally resulted in debt-slavery. The first English bankruptcy laws were introduced in the 16th century and second chances were thenceforth given. Arguably, bankruptcy as an escape valve from eternal economic damnation has since led to a less risk-averse and enhanced enterprising business culture, leading to a rising economic tide. In the end result, the “fresh start” principle of bankruptcy has stuck.

But unlike the Lord’s purported mercy, debt forgiveness in modern bankruptcy laws has its limits. Certain classifications of debt will not be released by an order of discharge. Section 178 of the *Bankruptcy and Insolvency Act* provides that the following will survive the bankruptcy and “stick” to the bankrupt: debts not disclosed to the trustee in bankruptcy by the debtor, debts resulting from criminal activity, physical or sexual assault, wrongful death, alimony, spousal or child support, fraud and..... student loans. Which brings this discussion back around to the federal governments’ announcement and a now obvious question: if student debts aren’t discharged on bankruptcy, why are the feds writing them off?

I can think of two reasons. The first is that unlike the other debts that survive bankruptcy, the non-dischargeable status of student debt is conditional. The *Bankruptcy and Insolvency Act* provides that if the debtor is no longer a student and if the date of the bankruptcy is more than seven years (changed from ten years in 2008 by amendments to the *Act*) after the debtor ceased being a student, then the student debt becomes dischargeable. Under those conditions, the write-offs make some sense in principle at least.

However, there may be another reason. As I read the reasons given by the feds for the write-offs – “a debtor may have filed for bankruptcy” – I was left wondering if the mere application for bankruptcy is deterring the federal collectors. In fact, in *Re Halford* (2011), 2011 CarswellOnt 2626, 77 C.B.R. (5th) 275 (Ont. S.C.J.), that appears to be what happened. Representatives of the federal program simply did not respond to the debtor’s application for bankruptcy to relieve him

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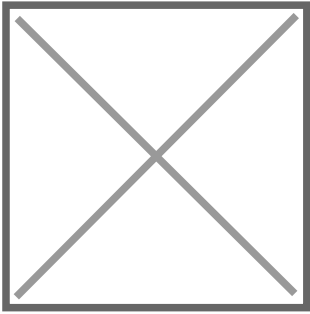
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of his student debts and the registrar inferred that the federal program did not oppose the relief sought and implicitly agreed that the applicant ought to be relieved. And so the debtor was set free.

Whether the federal government shies away from scenario 1 or 2 (or both) and the percentage of the \$178 million in write-offs that results, would be very interesting to learn. However, I have will leave the theological doctrine of “confession” for another post.

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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