

# Treatment of Student Loans in Insolvency Proceedings

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## Status of Student Loans in Light of Piekut v. Canada (National Revenue), 2025 SCC 13

- Prior to 1997, Student loans were treated as ordinary unsecured debts and received no special status.
- The BIA was amended in 1997 and section 178(1)(g) set out that student loans were dischargeable 2 years after the debtor stopped being a full-time or part-time student.

- Section 178 (1.1) was added to provide a mechanism for debtors to make an application to court for discharge of student loans under certain circumstances.
- This hardship provision allows debtors who have acted in good faith and face undue hardship to obtain an early discharge of the student loans.
- The waiting period currently stands at 5 years.

- In 1998, the BIA was again amended to a 10-year waiting period under section 178(1)(g).
- Lastly, section 178(1)(g) was again amended in 2005 to a 7-year waiting period, which is still in place today.

- The provisions of Sections 178(1)(g) and (1.1) only relate to student loans under the Canada Student Financial Assistance Act or any enactment by a province that provides for loans or guarantees to students.
- They do not apply to student financing from traditional commercial lenders.

In re: Piekut, the Supreme Court Justices undertook an in-depth review of the legislation governing student loans. There are several features of these loans that are not available in a traditional lending agreement:

1. Students receive funding based on financial need, not commercial lending criteria such as credit risk or future ability to repay the loan.
2. Interest doesn't accrue and is not required to be paid while student is in school or if they are returning to school for future studies.
3. When student loans are repayable, they are consolidated into one debt for repayment.

- The Supreme Court Justices determined that Parliament's ultimate goal in enacting Section 178(1)(g) and (1.1) was to recoup student loan losses and deter individuals from filing opportunistic bankruptcies to rid themselves of student loans while still benefiting from the education.

- They also referred to the Canada Student Financial Assistance Act and reviewed the definition of the student's last date of study. Since students benefit from the suspension of payments and interest when they return to school, no matter how long in between study periods, they determined that the Single Date approach is the clearer approach.

- They also did an in-depth comparison between the wording of the English and French versions of BIA Section 178(1)(g) and (1.1). They used an interpretive approach when defining “when does the borrower cease to be a full- or part-time student”? The French version is much clearer and shows that this is determined by the federal or provincial student loan legislation.

- In both the English and French versions, additional wording would have to be added to support a multiple-date definition.
- In short, the date the individual ceased to be a full- or part-time student is the last date of any form of post-secondary study, regardless of any previous studies and whether or not the studies were supported by student loan financing.

## Section 178(1.1) Good Faith and Financial Hardship applications (5-years)

- The burden is on the Debtor to show good faith efforts of repayment and ongoing financial hardship.
  - They must show consistent and genuine repayment efforts.
  - The hardship must be well documented and show sustained inability to repay.
  - Vague claims or intermittent use of RAP will likely cause the application to fail. They must show repayment priority and sacrifice.
  - Clear justification must show cause of debtor prioritizing other debts over student loans.

## Section 178(1.1) Good Faith and Financial Hardship applications (5-years) (cont'd)

- If the debtor files for bankruptcy or a consumer proposal 7 years after they ceased to be a full- or part-time student, they are discharged like other unsecured debts, and no special application is required.
- Privately funded student loans receive no special treatment under the BIA. However, creditors will often oppose the discharge, and the Courts will assess future earning potential as a strong factor to granting a discharge conditional upon payment or suspension for the LIT to monitor the debtor's income.

## Insolvency Practitioners should provide advice to student loan debtors during the assessment.

- Debtors should contact National Student Loans to obtain the last date of studies.
- LIT to provide debtor with information on the Student Loan collection practices such as reporting the missed payments during a consumer proposal or bankruptcy if they do not maintain payments during the insolvency process.
- Recommend that debtor apply for RAP prior to student loans going into default if they are not able to make their monthly payments.
- If the student loans are not automatically dischargeable, ensure that the debtor understands the requirement to make their own application to Court for discharge if they meet the hardship requirements.

# Statute-Barred Claims

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# Statutes

- *The Limitations of Actions Act*, CCSM c L150 (the “Old Act”).
- *The Limitations Act*, C.C.S.M. c. L150 (the “New Act”).
- Various other Manitoba Acts contain specific limitation periods.

# The Old Act

- An outlier compared to other Canadian provinces due to its unique approach to limitation periods.
- Resulted in a rather convoluted limitations regime.
- Provided for limitation periods ranging from one to ten years, depending on the nature of the claim at issue.
- Most limitation periods began to run from the time that the cause of action arose, as opposed to when it was discovered.

# The New Act

- Came into force on September 30, 2022.
- Significantly overhauled and simplified Manitoba's limitation regime.
- Brought Manitoba in line with other provinces' limitation legislation.
- Based on the principal of discoverability.
- Manitoba is no longer an outlier.

# The New Act (cont'd)

- It applies to judicial and non-judicial remedies.
- Most civil claims are now subject to a basic limitation period of two years, which begins to run on the day the claim was discovered.
  - This is typically the date on which the party first knew, or ought to have known, of their claim.
- Sets a maximum limitation period of 15 years for most claims, which begins to run on the day the event giving rise to the claim takes place.

# When is a claim discovered?

- 7 A claim is discovered under this Act on the day the claimant first knew or ought to have known all of the following:
- (a) that injury, loss or damage has occurred;
  - (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
  - (c) that the act or omission was that of a person against whom the claim is or may be made;
  - (d) that, given the nature and circumstances of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

# Date of injury, loss or damage – specific cases

8 For the purpose of clause 7(a), the day an injury, loss or damage occurs is as follows:

[...]

- (c) in the case of a claim to realize on collateral under a security agreement, the day the default first occurs;
- (d) in the case of a claim to redeem collateral under a security agreement, the day the creditor takes possession of the collateral;
- (e) in the case of a default in performing a demand obligation, the day the default occurs, once a demand for performance is made;

[...]

# Suspension of Limitation Periods

- A limitation period does not run during any time a stay of proceedings is in effect under the *Bankruptcy and Insolvency Act* (Canada), the *Companies' Creditors Arrangement Act* (Canada) or the *Farm Debt Mediation Act* (Canada) (section 25).

# Extending the Basic Limitation Period

- If, before the expiry of the relevant limitation period that applies to a claim under the act, a defendant acknowledges the right, title, liability or obligation to which the claim relates, the operation of the limitation period begins to run afresh from the time of the acknowledgment (section 20).

# Extending the Basic Limitation Period (cont'd)

- An acknowledgment must meet the following requirements:
  - It must be made to the claimant, the claimant's agent or an official receiver or trustee acting under the *Bankruptcy and Insolvency Act* (Canada);
  - It must be in writing and signed by the defendant making it or the defendant's agent (with certain exceptions);
  - It must be made before the limitation period that applies to the claim expires.

# Extending the Basic Limitation Period (cont'd)

- In the case of a claim for payment of a debt, part payment of the debt by the defendant or the defendant's agent has the same effect as an acknowledgment.

# Extending the Basic Limitation Period (cont'd)

- A limitation period may be extended — but not shortened — in writing, after the Act comes into force (section 24).
- This does not apply to the ultimate limitation period, which cannot be extended by agreement.

## *Bankruptcy and Insolvency Act, RSC 1985, c B-3*

### **Claims provable**

**121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

## *Temple (Re)*, 2012 ONSC 376 (Newbould J.)

- Justice Newbould stated that a time-barred claim could be a claim provable in bankruptcy.

## *Temple (Re)*, 2012 ONSC 376 (Newbould J.)

[28] “In my view, in Ontario it cannot be said that a debt is extinguished if an action on the debt is not brought within two years of its being due. Rather, the debt continues to be owed. Thus, such a debt can be the basis on which an application for a bankruptcy order can be made. Such a debt can also be the basis for a provable claim by a creditor in a bankruptcy.”

## *Temple (Re)*, 2012 ONSC 376 (Newbould J.)

- Led to a change in practice in Ontario of time-barred claims being admitted.

# John Trevor Eyton

- Toronto Star article published December 11, 2019: *“He was a titan of Bay Street and a senator. But J. Trevor Eyton died owing millions in taxes and on the verge of bankruptcy”*
  - [https://www.thestar.com/news/investigations/he-was-a-titan-of-bay-street-and-a-senator-but-j-trevor-eyton-died/article\\_95a4317c-3c6e-5b73-8ba6-3e5c6baadaa4.html](https://www.thestar.com/news/investigations/he-was-a-titan-of-bay-street-and-a-senator-but-j-trevor-eyton-died/article_95a4317c-3c6e-5b73-8ba6-3e5c6baadaa4.html)

# *John Trevor Eytton (Re)*, 2021 ONSC 1719 (Master J. E. Mills)

[11] “A debt which is statute barred is unenforceable at law and therefore may not be a provable claim in bankruptcy. A creditor ought not enjoy a windfall on an otherwise unenforceable debt simply because the debtor was assigned, voluntarily or otherwise, into bankruptcy. To allow the statute barred debt to be proven would permit the creditor to receive dividends on a *pari passu* basis with all other properly proven creditors who, but for the bankruptcy, would have been able to legally enforce their debts. Creditors must not be permitted to use the provisions of the BIA to effectively revive their enforcement rights and collect on statute barred debts. This is not the intention of the BIA which provides for the fair and orderly distribution of the bankrupt’s property among the creditors with proven and enforceable claims.”

# *John Trevor Eytton (Re)*, 2021 ONSC 3646 (Dunphy J.)

Where a claim is barred by s. 4 of the *Limitations Act, 2002*, may it nevertheless be proved in bankruptcy:

- If it has been included by the debtor in the schedule of claims attached to his proposal? or
- Otherwise by reason of the fact that the debt is barred but not extinguished?

# *John Trevor Eytton (Re)*, 2021 ONSC 3646 (Dunphy J.)

[15] “The Statement of Affairs attached to a proposal does not operate as a proof of claim and every creditor, including creditors with claims listed thereon, is still required to prove their claims, such claims being subject to scrutiny by the trustee and potentially other creditors as well. The mere fact that the debtor has listed a claim at a particular amount does not absolve the creditor of the need to submit its claim for review and proof in bankruptcy.”

# *John Trevor Eytton (Re)*, 2021 ONSC 3646 (Dunphy J.)

[18] “The argument advanced by the appellant, if followed, would lead to an absurd result. The underlying policy of the BIA is to provide for the equitable distribution of the assets of the bankrupt among all creditors of the same rank. A statute-barred claim is not of the same rank as an enforceable claim because the creditor cannot enforce payment of it. The appellant’s argument would require me to find that a claim that was statute-barred and quite unenforceable one day becomes enforceable the next by virtue of a bankruptcy intervening. Parliament is of course free to prescribe results, even results that run contrary to the underlying policy of a statute, if it expresses its intention in terms of sufficient clarity to enable a court to determine them. However, a sensible interpretation that is consistent with the purpose of the statute will normally be preferred to one that turns it on its head.”

# *John Trevor Eytton (Re)*, 2021 ONSC 3646 (Dunphy J.)

[20] “While a statute-barred claim continues to exist in the sense that it has not actually been extinguished, it is not a claim upon which any proceeding to enforce payment may be brought. The bankrupt cannot be said to be “subject” to a claim that cannot be enforced.”

[24] “... the right to enforce is permanently extinguished by s. 4 of the Limitations Act, 2002 even if the underlying obligation is not.”

# *John Trevor Eytton (Re)*, 2021 ONSC 3646 (Dunphy J.)

[25] “Accordingly, I find that the appellant’s claim – being one that it was prohibited from enforcing at the time of bankruptcy by reason of s. 4 of the *Limitations Act, 2002* – is not provable in bankruptcy within the meaning of s. 121(1) of the *BIA* because it is not a claim to which the bankrupt was subject.”

# *John Trevor Eytton (Re)*, 2021 ONSC 3646 (Dunphy J.)

- Re-affirmed the law in Ontario that a time-barred claim cannot be a claim provable in bankruptcy.

J. Ross Macfarlane and Adam Fisher, “**Limitations Statutes and Bankruptcy: Rejecting the Once-Provable Claim**” in ARIL Society, ed, Annual Review of Insolvency Law, (Toronto: Thomson Reuters, 2021)

- Contains legal analysis and practical advice for both lawyers and trustees regarding the change (re-affirmation) that statute-barred claims are not claims provable in bankruptcy following the *Eyton* decision.

# OSB Response re: Statute-Barred Debts

- Directive 22R4 (June 2024).
  - Implementation delayed to September 16, 2024.
- CRA and Other Government Departments Exempted.

# Proof of Claim Form – Section 3

- I, *(name of creditor or representative of the creditor)*, of *(city and province)*, do hereby certify:
- 3. That **the debtor was, at the date of bankruptcy** *(or the date of the receivership or, in the case of a proposal, the date of the notice of intention or of the proposal, if no notice of intention was filed)*, namely the \_\_\_\_ day of \_\_\_\_\_, **and still is, indebted to the creditor** in the sum of \$\_\_\_\_\_, as specified in the statement of account *(or affidavit)* attached and marked Schedule "A", after deducting any counterclaims to which the debtor is entitled. Any debt payable in a currency other than Canadian currency was converted to Canadian currency as of the date of bankruptcy *(or the date of the receivership or, in the case of a proposal, the date of the notice of intention or of the proposal, if no notice of intention was filed)*.
- *(The attached statement of account or affidavit must specify the supporting documents or other evidence in support of the claim)*

# Proof of Claim Form – New Sections 4 and 5

- I, *(name of creditor or representative of the creditor)*, of *(city and province)*, do hereby certify:
- 4. That, to the best of my knowledge, **this debt has never been** *(or this debt has been or part of this debt has been)* **statute-barred** as determined under the relevant legislation.
- 5. That **payment for this debt by the debtor to the creditor has been due** *(or has been in default)* **since** the \_\_\_\_\_ day of \_\_\_\_\_, and that **the last payment**, if any, on this debt by the debtor to the creditor was made on the \_\_\_\_\_ day of \_\_\_\_\_, *and/or* that the **last acknowledgement**, if any, of liability for this debt by the debtor to the creditor was made on the \_\_\_\_\_ day of \_\_\_\_\_, as follows:
- *(Give full particulars of the claim, including its history, any acknowledgement or legal action)*

# Added three dates and Attestation

- Attestation
- Date of Default
- Last Payment Made
- Last Acknowledgement of Debt
- Guidance to Completing Form 31, Proof of Claim (OSB Website)

# Attestation

- That, to the best of my knowledge, this debt has never been (or this debt has been or part of this debt has been) statute-barred as determined under the relevant legislation.
  - *Have you seen any creditor indicate that their claim is statute-barred?*

# Three dates

- Date of Default – What Constitutes Default?
  - All creditors (and possibly trustees, lawyers and OSB) have different definitions of default but generally thought of as when payments are missed beyond the due date.
  - May be more complicated in a commercial context. Credit agreements may have a defined definition of what constitutes default.
  - Creditors have mostly been using the date of filing as the date of default or the last missed payment date.

# Three Dates (cont)

- Last Payment Made
  - Most creditors know this date.
  - If this section is blank, then start asking questions.
  - Possibly stated on Schedule A.

# Three Dates (cont)

- Last Acknowledgement of Debt
  - Mostly left blank, or
  - Creditors insert the date of bankruptcy, or
  - Could be the same as last payment date, or
  - Some other date.

## Three Dates (cont)

- Do we take this information at face value?;
- Bear in mind how claims are prepared and who is preparing them;
- Automated.

# Guidance to Completing Form 31, Proof of Claim

- Paragraph 4
- Confirmation of debt status:
- Select whether all, part or none of the debt is statute-barred. A debt is statute-barred when legislation extinguishes the debt or bars a creditor from taking legal action to recover on it due to the passage of time, known as the limitation period.
- The specific conditions and the time for a debt to become statute-barred vary depending on the circumstances and relevant legislation. For most unsecured liabilities, the general limitation period is between two and six years.
- A statute-barred debt is not a provable claim under the Act. If you have a claim, it is advisable to seek legal advice to confirm the relevant legislation and limitation period that apply to your claim.

# Guidance to Completing Form 31, Proof of Claim

- Paragraph 5
- Claim Details:
  - Provide the date (day, month, and year) when payment was owed and the date (day, month, and year) of the last payment made by the debtor for the debt, if any.
  - Provide the date of the debtor's most recent acknowledgment of the debt, if any.
  - Include all relevant details about the debt or obligation, e.g., the nature and history of the claim, how and when the debt or obligation was contracted, etc.

# Can you Reaffirm a Statute-Barred Debt?

- There was some thought that listing the debt on the Statement of Affairs is a reaffirmation.
  - It is not.

# Practical considerations

- What to do if you discover a statute-barred claim?
  - Ask for more particulars?
  - Disallow it?
  - Allow it relative to amount of dividend?
  - Cost/Benefit/Materiality considerations
  - Bear in mind Rule 113 regarding service of claim disallowances
    - Personally served
    - Registered mail
    - Courier
  - Costs or service are not recoverable in summary administrations or consumer proposals.

# Is the New Proof of Claim an Improvement?

- Has it achieved the desired results?

# Questions?