The Debtor's Discharge From Bankruptcy

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I. The History

Quiconque s'est le moindrement arrêté à examiner l'évolution de la législation touchant la faillite, au cours des siècles, est frappé par l'ouverture graduelle d'esprit du législateur en regard des possibilités pour un débiteur de parvenir à sa libération ou, selon un terme consacré par l'usage, d'envisager sa réhabilitation.

One must bear in mind that the word "bankrupt" originally brought with it a significance which scarcely carried a note of sympathy for the human being to whom it referred. From the standpoint of etymology it has been advanced by some that the word "bankrupt" originated from the Italian words "banca rotta", meaning a broken bank or bench. It would have originated from the custom in Italy of breaking the bench or counter of a money-changer upon his failure. According to others, however, the word was derived from "banque route" meaning a trace of track thereby signifying by the combination of the two words banque and route, "one who hath removed his banque, leaving but a trace behind".[1]

In 510 B.C. the Roman magistrates, the decemvirs, drew up the law of the Twelve Tables. This severe and archaic legislation constituted the insolvent debtor and his family the slaves of his creditor and ordered his death if he had more than one creditor, his body being divided between them. Later on, with the Roman "cessio bonorum", the debtor, by surrendering his goods to his creditors was exempted from imprisonment and corporal punishment.

Reflecting upon the attitude of society towards debtors, creditors, work and debt, and the changes which have intervened in the course of history, Mr. John D. Honsberger, Q.C., stressed, a few years ago, that this rigour of the early Roman bankruptcy legislation was influenced by the high value placed by society on property and the extreme low value put on the person. Fortunately, a softer attitude made its way, although it took centuries to come to such a realization.

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[1] *Cyclopedia of Law and Procedure,* vol. 5, pp. 237-38, (N.Y., 1902).

Mr. Honsberger wrote that:

> The Lex Julia, enacted in the time of Julius Caesar, provided that the person of the debtor would no longer be at the disposal of his creditors. They were merely authorized to seize the debtor's goods and sell them by auction to satisfy their claims. Sometime later, an insolvent debtor who had not committed any fraud and who had surrendered all of his property to his creditors, was entitled to an exemption of all personal penalties. This was known as the "cessio bonorum" which is the real basis for most of the law of bankruptcy in civil law. It was also the beginning of a new and more humane attitude towards the honest and unfortunate debtor.[2]

While, today, the discharge is a matter of right for a debtor, which entails his reinstatement in the community, we are not so far away from those times when, even by the common law of England, each creditor was allowed to take separate proceeding to recover his debt and the eventual compulsory discharge was ignored. The first English Bankruptcy Act was enacted in 1542. It still bears influence upon our attitudes. It was assumed then that bankruptcy was a quasi-criminal act. A debtor was an offender. Only those who were tradesmen could avail themselves of the privilege of the Act. It was a "Creditors' Act". In 1705, under Queen Anne, the first "debtor's Act" came into being. A debtor, who was a merchant, was given a discharge of all his debts at the time of his bankruptcy, provided he first surrendered all of his property and conformed to all of the other provisions of the statute. In Canada[3] during colonial times, we maintained the distinction, which arose in England, between the word "bankrupt" and the word "insolvent". One must take note of the fact that the word "bankrupt" was originally applied in England to fraudulent persons, meaning "those persons as do make bankrupt" or more specifically, those "who craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors, their debts and duties".[4]

Without going much further into the history of bankruptcy and insolvency and the legislation relating thereto one is bound to realize that the debtors, whether traders or not, were looked at by society, as duly expressed in the law a few centuries back, as "... consuming at their own wills and pleasure the substance obtained

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[2] *The Aims and Objectives of Bankruptcy Legislation*, an address delivered to a Toronto social club.

[3] Duncan and Honsberger, *Bankruptcy in Canada*, 3rd edition, pp. 2 *et seq.*, (Toronto, 1961).

[4] *Ibid.*, p. 1.

by credit from other men for their own pleasure and delicate living, against all reasons, equity and good conscience." [5] Referring to the last-described genus of debtors and looking at the situation, at the beginning of the twentieth century, Mr. D. E. Thompson, K.C., talking before the Canadian Manufacturers' Association on "Bankruptcy Legislation in Canada" [6] said:

> Irate creditors are sometimes inclined to think that notwithstanding the improvements of civilization, the genus here described is not yet quite extinct.[7]

Bankrupts were in effect treated as criminals and one had to wait until 1705, during the reign of Queen Anne, to feel that some relief was given to the debtor,[8] when the stigma was somewhat lifted. It became possible for a bankrupt to be released from his debts, upon surrendering his property and conforming to the directions of the law.

In the province of Quebec, under the Ordinance of 1673, while the law then in existence allowed a debtor, as an insolvent, to have his property divided among his creditors by surrendering it to them, the right to a discharge from further liabilities was not recognized. The Ordinance of 1839 was, indeed, a big improvement upon the Ordinance of 1673. As indicated by De la Durantaye,[9] in referring to the Ordinance of 1839:

> The substance of the English laws of 1571, 1706 and 1825, was combined in that Ordinance applicable to Lower Canada.

The voluntary assignment, instituted by the Law of 1825 in England, was incorporated in the Ordinance of 1839. Mr. D. E. Thompson, expressing himself on this 1839 "Ordinance concerning bankrupts and the administration and distribution of their estates and effects", modelled on the English Bankruptcy laws then in force, considered that:

> Quebec (then Lower Canada) takes first place on this subject among the Provinces, [referring to the discharge granted to the debtor] not only by reason of the greater liberality of its common law, but because it was the first to cover the whole ground by statutory provision.[10]

He went on to say:

> The Law thus promulgated ensured not only rateable distribution, but the debtor's right, in the absence of fraud, to a discharge after full

[5] (1542), 34 and 35 Henry VIII, c. 4. See, Thompson, *Bankruptcy Legislation in Canada, infra* n. 6 at p. 173.

[6] (1901-02) 1 Canadian Law Review, p. 173.

[7] *Ibid.*

[8] (1705), 4-5 Anne c. 4. There were provisions concerning the discharge of the debtor from prison and also from liability for past debts.

[9] *Traité de la Faillite*, p. 23, (Montreal, 1934).

[10] *Supra*, n. 6 at p. 174.

surrender of his estate, as well as immunity from arrest for debt, and release therefrom if under arrest.[11]

It is interesting to note further on in that address that the year following Confederation (1868), the House of Commons appointed a Select Committee to inquire into and report upon the insolvency laws in force in the several provinces.

> As to the Province of Quebec the report acknowledges the principle of the common law, but reflects on the efficiency of administration in the following language: — "The right of the creditors of an insolvent to a just distribution of his assets among them all, has always been recoguized by the law of Lower Canada, although the means under the common law of enforcing that right were cumbrous and expensive. The effects of the debtor could only be realized under execution, and by this process only the minimum price of the goods sold was obtained."[12]

Subsequent to Confederation the first Act of the Parliament of Canada on Bankruptcy and Insolvency was enacted in 1869. It was in fact an Act respecting insolvency applicable only to traders.[13] It provided for the discharge of a debtor, and for his release from imprisonment, as long as he could make proof of an assignment of all his property and the absence of fraud. A new Act,[14] also called "The Insolvent Act", was passed in 1875 applicable to all the provinces. The principle of the discharge was still kept. This Act was repealed in 1880. It took nearly 40 years before a bankruptcy law applicable to the whole of Canada became a reality, by the passing of the Bankruptcy Act of 1919.[15] The original Act of 1919 which came into force on July 1st, 1920, was consolidated with its subsequent amendments and revised.[16] The revised statute of 1927 and its amendments were in turn eventually repealed. The present Bankruptcy Act which appears in the revised statutes of 1952. c.14 was enacted in 1949 and came into force on July 1st, 1950.[17]

Before terminating the historical discussion it might be well to review, in the words of Mr. D. E. Thompson, the situation which faced Canada in the course of those 40 years when no uniform and legislation universally applicable governed the ad-

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[11] *Ibid.*

[12] *Ibid.*, at p. 175.

[13] 32-33 Vic. c. 16. It was known as the Insolvent Act.

[14] 38 Vic. c. 16.

[15] 9-10 Geo. V c. 36.

[16] R.S.C. 1927 c. 11.

[17] 13 Geo. VI c. 7. The Bankruptcy Act has since been revised once more and now appears in R.S.C. 1970, c. B-3. The references made herein to the Bankruptcy Act are to the pre-1970 revision.

ministration of insolvency and bankruptcy from coast to coast. In his opinion, since 1880, the Government of Canada though invested with the power had abdicated its authority,

> ...leaving the rights of the parties concerned to be wrought out under the diverse and necessarily defective laws of each province. The result is confusion; injurious to our credit abroad, oppressive to unfortunates at home, and out of harmony with our awakening national life.[18]

Questioning himself on the sort of law which was needed nationwide, an accomplishment which took place in 1919 and in 1949 as stated above, he did say this:

> But what sort of a law should we have? Should it provide for discharge of debtors, as well as for administration of assets? Has the rigor of our law in this respect since 1880 been in the aggregate a national gain, or a national loss? Some among us still believe that no debtor should be discharged from any debt without his creditors' consent. Their arguments are singularly like those by which imprisonment for debt used to be defended.
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> The preamble to one of our own statutes on that subject passed fifty years ago, is in the following language: "Whereas imprisonment for debt, where fraud is not imputable to the debtor, is not only demoralizing in its tendency, but is as detrimental to the true interests of creditors, as it is inconsistent with that forbearance, and humane regard for the misfortunes of others, which should always characterize the legislation of every Christian country; and whereas it is desirable, to soften the rigor of the laws affecting the relations between debtor and creditor, as far as due regard for the interests of commerce will permit," etc.[19]

Suppose the opening words of that preamble were altered so as to make it apply to the refusal of discharge to a debtor whom the law summarily strips of all his property, is the sentiment more lenient than the humane feelings of this generation should endorse?

II. The Situation Today

With this retrospective view in mind and remembering the legislation eventually passed by the Canadian Government I shall now deal with our present day situation, remembering that, in the course of past centuries up to the present, bankruptcy legislation has gone through a transformation from being a law of the creditor to presently being a law concerned with the public interest. This transformation was not direct and involved first of all, a shift in emphasis from the creditor to the debtor.

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[18] *Supra*, n. 6 at p. 177.
[19] *Ibid.*

The principles of an equal distribution of the property of a bankrupt among his creditors without preference cannot be dissociated from the other objective or goal of bankruptcy legislation which is that of obtaining for a debtor a discharge of his debts. In fact, the aujudication of bankruptcy operates as an automatic application for a discharge of the debtor.

Some changes under the 1949 Bankruptcy Act

Bill "N" an Act respecting Bankruptcy was filed in the Senate, for first reading on February 14, 1949. It was accompanied by some explanatory notes. Since in the course of these remarks I intend to make reference to those explanatory notes, to the debates and evidence submitted before the two Houses and their Committees, such references should be looked at strictly as shedding some light on the circumstances which surrounded the passing of the Bankruptcy Act of 1949. The Supreme Court of this Country has affirmed the rule of law that the debates in Parliament are not admissible in aid of interpretation of a statute. The original rule being that:

> The sense and the meaning of an act of Parliament must be collected from what it says when passed into a law and not from the history of the changes it underwent in the House where it took its rise.[20]

In confirmation of this rule, Mr. Justice Cartwright has said:

> ... the statement of a Minister in introducing a Bill would be inadmissible in aid of the interpretation of the statute as finally passed into a law.[21]

The principle laid down by the Supreme Court of Canada regarding the debates and parliamentary history applies equally well to the explanatory notes. Notes do not form part of the law. On that account, it would be illegal to render a judgment on the basis of explanatory notes.

Reference shall be made to them in order to try to understand the circumstances which brought about those changes to the law of 1919, the evolution of our legislation in relation to the discharge of a bankrupt, the facilities granted to a debtor to obtain his discharge on the condition that he first observe the provisions of the law and conduct himself in such a way that the rehabilitation which he is requesting should be given to him absolutely, under conditions, or suspended.

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[20] *Miller* v. *Taylor,* (1769), 4 Burr. 2303 at p. 2332, *per* Willes J.

[21] *Attorney-General of Canada* v. *The Readers' Digest Association (Canada) Limited et al* [1961] S.C.R. 775 at p. 792.

Section 127(1) of the Bankruptcy Act stipulates that "the making of a receiving order against, or an assignment by, any person except a corporation operates as an application for discharge unless the bankrupt waived such application. The explanatory note reads as follows:

> Subsection 1 is new. It establishes a new principle in regard to the discharge of a bankrupt. The operation of the former Act indicated that only a few bankrupts apply for a discharge, largely for two reasons, first, that many bankrupts are not aware of their legal status and believe that their debts are determined by the bankruptcy, and, secondly, because of the financial inability of many others to meet the expense of an application. From the beginning of the bankruptcy legislation there has been a gradual evolution in the attitude of the public towards bankrupts until at the present time creditors are held more or less equally responsible with bankrupts for their debts. If The Bankruptcy Act is to serve its intended purpose to give bankrupts an opportunity to rehabilitate themselves as useful citizens, more responsibility must be accepted to create that opportunity for the bankrupt by providing an automatic procedure for his discharge. This procedure has been incorporated in the Bankruptcy Act of the United States — Sect. 14 of the Amendment to the Bankruptcy Act of the United States as approved on June 22, 1938.

The view is thus expressed that one of the purposes of the Bankruptcy Act, apart from all the other subjects contained in the legislation, consists in the opportunity for a bankrupt to rehabilitate himself. It results therefrom that we must bear the responsibility to supply the bankrupt with the means to obtain his discharge by a proper procedure which, under this section, becomes an automatic one. Such a mechanism in support of this object of the Act lies in the progressive attitude of the public *vis-à-vis* the bankrupt in that creditors are also regarded as sharing the responsibility for the debts of a bankrupt. Moreover, the application of our bankruptcy legislation, prior to the introduction of the new legislation of 1949, had taught us that there existed a misconception as to the role of certain bankrupts in relation to the discharge application. A very large number of bankrupts were under the impression that the advent of the bankruptcy put an end to their debts. Others did not apply for their discharge because they were without means to finance the procedure.

Along with Section 127(6), it was indicated in the Bill that when a trustee is not available to perform his duties on an application for the bankrupt's discharge, it is within the power of the Court to authorize any other person to perform such duties, with the appropriate directions, if necessary, to enable the application of the bankrupt to be brought before the Court. It was said in the explanatory notes referred to above, that:

:.. availability of a trustee should not affect the legal right of a bankrupt to have his application brought before the Court and heard. The Courts have attempted to deal with this problem merely on the basis of removing an injustice which might be inflicted on a bankrupt, but there has always been some doubts as to whether or not the Courts have such authority.

This Section of the Act was an additional step to warrant that the automatic procedure for the discharge of a bankrupt be carried out.

A new article, Section 128A, was inserted within the provisions governing the discharge of a bankrupt. The trustee is bound to file with the Superintendent in Bankruptcy, within two months after his appointment or for such longer period as allowed by the Superintendent, in respect of each estate, a report which is qualified as follows by the explanatory note:

The report setting out the name of the bankrupt and the names of the persons controlling the day-to-day operations of the bankrupt, the trustee's opinion whether the deficiency between the assets and liabilities of the bankrupt has or has not been satisfactorily accounted for, and the probable causes of the bankruptcy.

The note further states:

A separate report prepared by the trustee will also be required to be filed with the official receiver to permit the dissemination of information relating to previous bankruptcies so that prospective creditors may better judge the credit rating of their customers.

In the opinion of Messrs. Houlden & Morawetz:

There has been considerable discontent in the business community with the situation where a person, who has the effective control of a bankrupt corporation but does not appear as an officer or director, immediately starts up another corporation which may in due course become bankrupt. There has been no way, prior to this amendment, of the trustee making a public record of who actually controlled the day-to-day operations of the bankrupt, and whether the deficiency between assets and liabilities are or has not been satisfactorily accounted for. The report required by Section 128A will now furnish this information. The information in the report will be available to creditors and they will be in a better position to grant credit in the future.

In addition, the report is designed to provide the Superintendent with informatioin which will assist him in determining whether or not there should be an investigation into the affairs of the bankrupt.[22]

Such being the case this new section should assist creditors in their future conduct towards a person so concerned and give the Superintendent the proper openings to go deeper into the affairs of the bankrupt.

[22] *Bankruptcy Law of Canada — Cumulative Supplement*, p. 103, (Toronto, 1969).

Under Section 128 the trustee is required to prepare a report as to the affairs of the bankrupt, the causes of the bankruptcy, the performance of his duties by the bankrupt, his conduct, his convictions of offences under the Act and all other facts, matters or circumstances which would justify the Court to refuse an unconditional order of dischare. The opportunity was afforded to the Superintendent, under subsection 3, to make such further or other report to the Court to ensure that all of the relevant facts are before the Court at the hearing. In order that the initial report of the trustee be so supplemented, the trustee must forward a copy of his report to the Superintendent not less than ten days before the day of the hearing for the application for a discharge (128(2)).

Under Section 129(2), the Legislator has lessened the provisions of the former Bankruptcy Act and deleted words which in the former Act were effecttively an absolute prohibition to a discharge being obtained by a bankrupt. It is now within the discretion of the Court to refuse suspend or make conditional a discharge, should it not be granted absolutely. The factors to be considered by the Court in coming to such a decision are now outlined under subsection 1 of Section 130. The period of suspension ordered pursuant to s. 129(2) is a matter to be determined within the Court's discretion.

Section 133 deals with the duties of the bankrupt in cases of conditional discharge. The bankrupt is obliged to give the trustee such information as required with respect to his earnings and after-acquired property and income. To add further to the obligations imposed upon a bankrupt under a conditional discharge he must file with the Court and with the trustee at least once a year a statement under oath with particulars of any property or income he may have acquired subsequent to the order for his discharge. This new section further allows the trustee or any creditor to force the bankrupt to attend for examination under oath with reference to the facts contained in his statement as to his earnings, income, after-acquired property or dealings. Upon failure by the bankrupt to fulfill those duties, the Court, on the application of the trustee or any creditor, may revoke the order of discharge.

To avoid inducing a bankrupt, who is subject to a conditional order of discharge on payment of a further dividend or sum of money, to pay creditors directly or bargain with them and, thus, make payments on an unequal basis, Section 133(3) rules that all payments on account shall be made to the trustee for distribution to the creditors.

According to the terms of this new article, if a debtor benefits from a conditional discharge, he is called upon to act in good faith, cooperate with the trustee and the creditors and see to it that all the creditors are treated equally.

An order of discharge operates as a release to the bankrupt from all claims provable in bankruptcy except the debts mentioned in Section 135 and Section 136. Without citing at length those cases where debts of the bankrupt are not released by his discharge, suffice it to say that the most commonly known are those debts or liabilities for alimony, the debts arising out of fraud and the debts or liabilities for goods supplied as necessaries of life. A further debt which is not released by an order of discharge is that of the partner or co-trustee with the bankrupt at the date of the bankruptcy. Is neither released the debt of a person who was surety or in the nature of a surety for the debt for the bankrupt or was jointly bound or had made a joint contract with the bankrupt.

Under the terms of Section 137(2) the Court may annul the discharge if it was obtained by fraud. When the revocation or annulment of an order of discharge intervenes, it does not prejudice the validity of a sale, disposition of property, payment made or thing duly done before the revocation or the annulment.

Those are in essence the principles regarding the discharge of a bankrupt as initiated by the amendments to the Bankruptcy Act in 1949 and 1966.

If we now come to the proccedings which took place before the Committees of the Senate and the House of Commons, from March 1949 until December 1949 (the law was sanctioned on December 10, 1949), certain views deserve to be recalled.

Various opinions of learned and responsible persons and organizations were enunciated in relation to the mechanism for the automatic discharge of the bankrupt, as covered by Section 127. Some favoured the preservation of the system whereby it was up to the bankrupt himself to ask for his discharge and for the trustee to ask for a hearing for presentation of the demand. Others insisted that it was sufficient that the trustee should let it be known to the bankrupt that he could avail himself of his right to a discharge by indicating to him the way to do it. For some, if an automatic measure was offered a bankrupt to obtain his discharge, the cost of such application should be borne by him and not by the creditors. That a receiving order or an assignment should be considered as an automatic demand for a discharge appeared to others as being contrary to public order in view of the history and the purposes

of the bankruptcy law. Without denying the tendency to favour the debtor, it appeared, on the examination of certain representations before the Committees, that, for certain people, it would be better to impose upon a debtor the obligation to obtain his discharge after fulfilling the conditions required by the Act and to leave him to satisfy the burden of demonstrating to the Court that he had followed the law, in lieu of imposing such responsibility on the estate. The Bar of the Province of Quebec suggested that Section 129 be amended to state that a discharge should not be suspended for more than five years.

The Superintendent of Bankruptcy, Mr. R. Forsyth, followed up with a detailed consideration of the suggestions. In connection with section 127 he admitted that whether or not a discharge is necessary in all cases depends on different factors which vary with the individual debtor. As to who should bear the cost of the application, he was satisfied that many debtors did not apply for their discharge because of the costs. In many instances, deserving debtors are prevented from making an application to the Court owing to prohibitive and entirely unwarranted bills submitted by some trustees. The fee claimed is sometime out of all proportion to the services which the trustee is required to render. The procedure of Section 127 is not unduly complicated and should not impose a grave burden on the estate. Apart from any remuneration voted or allowed to the trustee, the only other real expense involved is the cost of mailing the notices to the creditors and the costs on the application. In his mind, the application for a discharge should not be delayed too long. The bankrupt should be given the opportunity to clear his debts at the earliest possible moment consistent with justice and get off to a fresh start. Therefore, unless the bankrupt has waived his right, it is advisable that the trustee ask for a hearing of the discharge not earlier and not later than twelve months following the bankruptcy. While undoubtedly the administration of many estates cannot be completed within twelve months, nevertheless enough is known about the bankrupt's insolvency, his transactions and his conduct, to enable the trustee to prepare his report and to warrant that it will at least indicate those matters about which doubts exist in the event that the information obtained up to that point has revealed questionable aspects which require further explanations or investigations. The Court can delve into these at the hearing. Moreover, Section 137(1) provided that a discharge may be annulled if the bankrupt fails to perform the duties imposed on him by the Act.

III. A Look at the Jurisprudence

The general philosophy behind the notion of discharge is that the court, when considering the application, must look beyond the bankrupt's and creditors' interests. Regard must he had, as well, to the interests of the public.[23] The importance of the role played by the notion of discharge of the bankrupt was recognized in the case of *In re Green*[24] where it was held that the success or failure of a bankruptcy system varied directly with the good or poor administration of the discharge provisions of the Bankruptcy Act.

The Bankruptcy Court is no more a clearing house for the liquidation of debts[25] than it is a collection agent. It must strike a balance between having the effect of being too lax with irresponsible debtors, and being too harsh with those honest and sincere debtors unfortunate in their personal and/or business dealings.[26]

To aid the Court in its hearing of the bankrupt's application for discharge Rule 101 of the Bankruptcy Rules affords the Court the power to bring the bankrupt before the Court for examination.

If in trying to satisfy the interests above described the Court feels it is inadvisable to grant the discharge, it is clearly within its power to suspend it or grant it conditionally. It is rare that the discharge would be refused absolutely.

> The purpose and object of the bankruptcy Act is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 [now Section 129] and 143 [now Section 130] of the Act plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed *only* in cases where the conduct of the debtor has been particularly reprehensible or in what have been described as extreme cases.[27] (Emphasis added).

The above exerpt from a judgment of the Supreme Court of Canada was delivered by Mr. Justice Estey. On the basis of the alternatives open to the Court, to either grant, refuse, suspend, or make conditional a discharge (Section 129(1) of the Bankruptcy Act), it would appear that the highest Court of the land, by stating

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[23] *In re Sceptre Hardware Company* 3 C.B.R. 734.

[24] 5 C.B.R. 580.

[25] *In re Palach* 35 C.B.R. 58.

[26] See, *In re Beerman and Sands* 5 C.B.R. 781 and *In re Newsome* 8 C.B.R. 279.

[27] *Industrial Acceptance Corp. Ltd. and T. Eaton Co. Ltd. of Montreal* v. *Lamarre* [1952] 2 S.C.R. 109 at p. 120, 32 C.B.R. 191.

that "the discharge is not a matter of right", has stressed the point that notwithstanding the fact that the debtor has the right to apply for his discharge, the discharge applied for is not obtained automatically and should not be viewed as if facing no obstacles to its being granted. It was the Court's opinion, as seen above, that the debtor should be obliged to suffer a period of probation depending on the circumstances. The discharge is therefore, depending on the circumstances, usually suspended or conditional. In this context, the harsh consequences resulting from the absolute refusal of a discharge or the refusal of a "discharge in perpetuum"[28] are related to the reprehensible conduct of the debtor deriving from any of the thirteen facts outlined in Section 130 of the Act. In brief, by the fact that a bankruptcy takes place, it is open for a debtor to exercise his right to eventually obtain his discharge. However, the realization of this eventuality is subject to a variety of circumstances.

One very important procedural element in the making of an application for the discharge of the debtor is the preparation, by the trustee, of a report as to the bankrupt's affairs. This report, according to s. 128(5) of the Bankruptcy Act, is *prima facie* evidence of the statements it contains, for the purposes of the application for discharge.[29]

A greater insight into the effects of such a report can be gained from an examination of the decision in the case of *In re Kemper.*[30] There, the debtor's application for discharge was opposed on the grounds that the debtor had been fraudulent. The trustee's report suggested there were sufficient grounds on which the Court could refuse a discharge,[31] but also suggested that the conduct of the debtor was not open to censure. On this point the Court, *per* Smily J., held:

> The Court is not bound by the trustee's report, but if no facts under s. 130 are reported by the trustee in his report the onus is on the creditors' to establish that such facts exist...[32]

The preceding exerpt was the enunciation of a general rule, for in that particular case the trustee's report did make reference certain facts contained in s. 130(1) of the Bankruptcy Act.

[28] *Supra,* n. 3 at p. 758.

[29] Although such report is *prima facie* evidence, it remains for the Court to come to its own conclusions on the bankrupt's state of affairs: *In re Hoerner* 5 C.B.R. 613.

[30] 2 C.B.R. (n.s.) 130.

[31] *i.e.* The assets of the debtor were not equal to 50¢ on the dollar for the unsecured liabilities.

[32] *Supra,* n. 30 at p. 132.

That the Court views the report of the trustee as being more than just routine was seen in the case of *Re Chylinski.*[33] The effect of that decision was that rather than fill in the blanks of pre-printed form, the trustee should really sit down and conscientiously prepare a report on the bankrupt's affairs, as said report,

> ...forms the basis of the order which is made by the Court in connection with the discharge of the debtor.[34]

The question arises as to what can and should be done by the debtor in the eventuality that the trustee's report contains unfavourable facts. In the case of *In re Roy*[35] it was held to be up to the debtor to rebut the presumption of negligence created by the fact of his assets not totalling more than 50¢ on the dollar for his unsecured liabilities. Bernier J., speaking for the Court, held that generally:

> Il incombera donc au failli de rejeter ce qui, dans ce rapport peut lui être défavorable. Il devra aussi rencontrer toute preuve faite par les opposants établissant un des faits énumérés à l'article 130,...[35a]

Another procedural requirement, to be met by one or more of the bankrupt's creditors, is that they (or he) must give notice to the trustee and the bankrupt of any opposition to the latter's discharge on grounds other than those mentioned in the trustee's report. Such notice must state the grounds of the discharge and must be served at or before the time which has been fixed to hear the application for discharge.[36]

To illustrate the relative character of the right to a discharge afforded a debtor in bankruptcy, it would be most helpful to consider the jurisprudence on the matter.

A general rule with regard to a bankrupt's application for discharge is that it,

> ...must be determined upon its own facts and by the due exercise of judicial discretion in relation thereto.[36a]

This principle evolved from the case of *Rice* v. *Copeland*[36b] where there was an objection, by one creditor to the discharge on the grounds of the debt owing him having been incurred by fraud. Another creditor opposed the discharge as he had a large claim

[33] 12 C.B.R. (n.s.) 258.
[34] *Ibid.*
[35] 5 C.B.R. (n.s.) 64.
[35a] *Ibid.*, at p. 66.
[36] See s. 128(7) of the Bankruptcy Act.
[36a] 7 C.B.R. (n.s.) 288 at p. 292.
[36b] 7 C.B.R. (n.s.) 288.

arising out of a car accident with the debtor. The Court held that in considering an application for discharge it would not examine the question of whether the bankrupt was guilty of fraud. Such an inquiry would have to be made at a separate hearing. In the words of Dickson J., speaking for the Court:

> The Bankruptcy Act must not be considered to be a clearinghouse solely for the liquidation of debts: ... Nor must it be considered a summary and expeditious means of avoiding payment of damages arising out of automobile collisions.[36c]

It can be seen, therefore, that the judicial discretion to be exercised in relation to the facts surrounding the bankruptcy, is quite wide.

Notwithstanding the absence of facts under s. 130 of the Bankruptcy Act it is still within the Court's discretion, upon considering the debtor's behavior both before and after his bankruptcy, to make conditional or suspend an order of discharge.[37] As mentioned earlier it is always within the Court's discretion to refuse the discharge, but according to the case of *In re Lalonde* [38] such a refusal would only come in extreme cases due to its penal effect.

In the above-mentioned case of *Industrial Acceptance Corporation et al.* v. *Lamarre,* the discharge of the debtor was considered justifiable subject to the imposition of terms, namely the consent given by the debtor to a judgment against him by the trustee for part of the balance of the debts proved in the sum of $5,000.00, after immediate payment of a claim for necessaries of life in the sum of $92.60 to the T. Eaton Co. Ltd. Having failed to pay to the trustee the seizable or non-exempt portion of his salary at the request of the trustee, who was within his rights to claim it, the debtor had committed an offence and could not therefore obtain his absolute discharge, while he was in a position to make such payment. The trial judge was validly exercising his judicial discretion to refuse to suspend or direct the discharge subject to a condition. The obligation of a debtor to pay a portion of his salary derives from Section 39 of the Act related to the property of the bankrupt divisible amongst his creditors.

In another case the Court of Queen's Bench of the Province of Quebec [39] suspended the discharge of a debtor until the fulfillment of the payment by him of 50% of the unsecured claims. The

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[36c] *Ibid.,* at p. 292.

[37] *In re Pehlke* 20 C.B.R. 415.

[38] 32 C.B.R. 191. See also the exerpt from Mr. Justice Estey's judgment in the *Industtrial Acceptance* case, *supra.*

[39] In the case of *Banque de Montréal* v. *Arnold* [1969] B.R. 524.

judgment was so rendered on the basis of the *Industrial Acceptance case, i.e.* the debtor should have previously deposited with the trustee the seizable portion of his salary during the bankruptcy.

In *Dame Grenier* v. *Bolduc*,[40] the Court of Appeal of the Province of Quebec again underlined the relative right for a discharge claimed by a debtor, by refusing to grant an absolute discharge on the following facts which appeared evident:

a) the assets were not equal to 50% on unsecured liabilities, and the debtor appeared responsible for this state of affairs (s. 130(1)(a));

b) the bankrupt had continued trade while knowing to be insolvent (s. 130(1)(c));

c) the bankrupt had been bankrupt on a previous occasion (s. 130(1)(j)).

The Quebec Court of Appeal again confirmed the precarious character of the debtor's right to a discharge in *Portugais et al.* v. *Perras et al.*[41] The discharge of a debtor was made conditional on the payment of a certain sum of money to the two contesting creditors. The debtor, before he made his assignment, had been condemned to pay to the contesting creditors, Portugais and his lawyer, the sum of $715.75 and the costs, following damages resulting from an accident which occurred while he was driving a truck. The only creditors listed when he made his assignment were the plaintiff on the judgment and his lawyer for the costs. It appears that the trustee had failed to take proper measures in order to ensure that the bankrupt pay the seizable portion of his salary. The absolute discharge of the debtor was refused and the discharge was made conditional on the payment of the sum of $1,478.32. Referring to the decision of the Supreme Court of Canada in *Industrial Acceptance* case, *supra*, the Court of Appeal of this Province strongly stressed the point that an assignment by a debtor constituted, in this instance, a mockery of justice, and it recalled in the exact terms of the Supreme Court of Canada that:

> If debtors can go into bankruptcy as a convenient means of evading payment of just obligations and obtain discharges without difficulty, bankruptcy becomes an abuse.[42]

One situation in which the court does not view bankruptcy as a means of evading the payment of debts and will grant a con-

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[40] [1958] B.R. 89.
[41] [1959] B.R. 54.
[42] *Ibid.*, at p. 58 *per* Rinfret, J.

ditional discharge is when the debtor is genuinely overpowered by his liabilities. For example, in the case of *Re White*,[43] where amongst the debtor's liabilities was a judgment for damages resulting from a car accident, the court held that:

> ... if a debtor is so burdened by his debts that he cannot properly support his family or otherwise perform the ordinary duties of citizenship he is entitled to go into bankruptcy because of such debts whatever the debts are whether arising from a judgment with respect to a motor vehicle accident or however they may arise.[44]

The discharge was granted conditionally on the very easy terms of $500 being paid off at the rate of $5 *per* week or such larger amounts as the debtor would be able to pay.

This is illustrative of the bankruptcy Court's concern with the elements of public policy in addition to the interests of the creditors and the debtor.[45]

An indication of to what extent the debtor was obliged to support his family can be found in the case of *In re Lambert*.[46] In that case a conditional discharge was granted and it was held that the conditions of the discharge,

> ... should not be oppressive or interfere with the debtor maintaining his family and himself in accordance with their requirements and necessities having regard to their station in life, ...[46a]

The court went on to make allowances for the fact that the debtor had an executive position in the field of sales and had to keep up certain appearances and maintain certain expenses with respect to his office.

Two recent decisions of 1971 have reinforced the views expressed above as to the factors influencing the court's discretion.

In the case of *In re Hart* [47] when it come to the granting of a discharge the court held:

> In order for the Court to make an order for payments out of the earnings of the debtor, the Court must be satisfied that the debtor's income is *more than sufficient* to maintain the debtor and his family in *a decent standard of living:* ...[48] (Emphasis added).

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[43] 7 C.B.R. (n.s.) 111.

[44] *Ibid.*

[45] In the earlier case of *In re Green* 5 C.B.R. 580, the court had recognized the undesirability of so weighing down a person with his debts as to render him incapable of performing the ordinary duties of citizenship.

[46] 3 C.B.R. (n.s.) 216.

[46a] *Ibid.*, at p. 217.

[47] 14 C.B.R. (n.s.) 92.

[48] *Ibid.*, at p. 93.

In the case of *In re Pilawsky*[49] an absolute order of discharge was granted seeing that to make the discharge conditional on the payment of certain sums would be to saddle the debtor,

> ...with such an amount that he cannot reasonably support his family in accordance with the station in life that they occupy...[50]

Resulting from the foregoing discussion it can be seen that the courts have tried to balance a variety of interests with the objective of leaving the debtor and his family as self-supporting members of society at the same time as granting the creditors some partial satisfaction of the debts incurred by the bankrupt.

Another situation in which the discharge granted will be conditional is where a debtor receives a salary in excess of what is required to properly maintain his family,[51] part of which could have been seized by the trustee but was not. In several such cases[52] a discharge was granted upon the debtor's consenting to a judgment.

The conditions which can be imposed on the bankrupt's discharge are entirely within the court's discretion and an example of the lattitude of that discretion can be seen in the case of *In re Hutson*.[53] It was made a condition of the discharge, in that case, that a legacy which the debtor had received in England be assigned to the trustee so that he could collect it and distribute it to the creditors.

Certain conditions can never be a part of the discharge. It has been held that to make it a condition of the discharge that the creditor alleging fraud be paid would be to give such creditor a preference.[54] The creditor who claims that the debtor was fraudulent has his claim against the debtor under s. 135(1)(e) of the Bankruptcy Act.

One of the key factors to be considered in the bankrupt's application for discharge is his financial status. In the case of *In re Sorrenti et al*[55] no time limit was placed on the conditional discharge which was not to become a final discharge until the bank-

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[49] 14 C.B.R. (n.s.) 32.

[50] *Ibid.*, at p. 34.

[51] *Mason* v. *The Canadian Bank of Commerce* 13 C.B.R. 243.

[52] See s. 129(2)(c) of the Bankruptcy Act; *In re Cox* 24 C.B.R. 33; *In re Tait* 20 C.B.R. 392; *In re Baillargeon* 15 C.B.R. 77 and *In re Gauthier* 17 C.B.R. 99.

[53] 31 C.B.R. 219.

[54] *In re Kemper* 2 C.B.R. (n.s.) 130.

[55] 2 C.B.R. (n.s.) 226.

rupts, professional men each earning $10,000 *per* year, paid $5,000 each to the trustee.

In the case of *In re Thiessen* [56] the court suspended the discharge for three years because there was a failure to pay 50¢ on the dollar without a valid excuse and the debtor still traded after he knew he was insolvent. Another factor influencing the court's decision was that the debtor did not account satisfactorily for his loss of assets.

The case of *In re Langlois* [57] is a perfect example of the role played by the facts in each case. In that case the bankrupt's assets were not sufficient to equal 50¢ on the dollar, but the court was quite willing to grant a discharge subject only to a short suspension period. The reason for that was the bankrupt had committed no offence and had only gone into bankruptcy because he had personally guaranteed two companies that went bankrupt. The court's lenient attitude towards the debtor notwithstanding his financial position was due to the particular circumstances of the situation.

Naturally the more money the debtor has or has the potential of obtaining, the harsher will be the terms of his discharge. For example in *Re Bowerman* [58] a physician who had a large income was granted a discharge provided he paid to the trustee, for the creditors' benefit, a sum of $500 *per* month for a period of four years. In the court's opinion such a sum, based on his financial status, would not prove crippling to him.

From the jurisprudence have evolued guidelines which can be considered by the court when entertaining a debtor's application for discharge. For instance in attempting to determine the length of the period of suspension of a discharge the following factors play a role: *a)* the fact that the bankruptcy was caused by inexperience,[59] *b)* the fact that the debtor had been taken advantage of by one of his partners,[60] and *c)* the fact that the debtor had been in bankruptcy for a long period of time.[61] In considering whether or not to suspend the discharge altogether the court will consider the fact that credit was extended too freely to a trader by his creditors.[62]

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[56] 4 C.B.R. 354.
[57] 11 C.B.R. 493.
[58] 9 C.B.R. (n.s.) 261.
[59] *In re Berman* 5 C.B.R. 366.
[60] *Ibid.*
[61] *In re Stafford* 37 C.B.R. 206.
[62] *In re Beerman and Sands, supra* n. 26.

Assuming that the debtor fulfills the conditions of his discharge and makes all the required payments to the trustee, the problem arises to the distribution of such sums.

In the case of *In re Bona*[63] Smily, J., speaking for the Supreme Court of Ontario, held that the distribution would have to be made in accordance with s. 95 of the Bankruptcy Act. The trustee would have a priority for his fees notwithstanding the fact that a third party guaranteed payment of the trustee's fees and disbursements.

Rule 4 of the Bankruptcy Rules, when applied to the Quebec situation, permits the use of a a.483 of the Code of Civil Procedure to annul an order of discharge which has been irregularly obtained.[63a]

An examination of the jurisprudence is, as seen above, quite helpful in trying to understand the factors involved in the granting of a discharge be it absolute conditional or suspended. It is important though, to not go too far and try to establish hard a fast rules applicable to all cases for it has been said that the considering of already decided cases in coming to a decision on an application for discharge is a dangerous practice.[64]

Facts and circumstances surrounding the hearing of an application for a bankrupt's discharge imply the consideration of guidelines which revolve upon the duties imposed upon a bankrupt by Section 117 of the Act, to wit, the discovery and delivery of his property, delivery of his books and records, his attendance for examination before the official receiver, the submission by him to the trustee of a statement of his affairs, his assistance in the making of an inventory of his assets, his presence at the first meeting of creditors and other meetings of his creditors or inspectors, when required. His duties, under Section 117, are numerous and should not be ignored when an analysis is made of his conduct, cooperation and good will. The complete chapter covering the discharge of bankrupts, under Sections 127 to 139, governs the application, the procedure, the powers of the Court, the objections of the creditors, the consideration of the facts, the effects of the orders, etc. Those particular provisions of the Act are applicable to the demand for the discharge.

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[63] 3 C.B.R. (n.s.) 270.

[63a] This principle comes from the case of *Longchamps* v. *Caron* 1 C.B.R. (n.s.) 251, which was decided in relation to a.1177 of the old Code of Civil Procedure which is a.483 of the present Code.

[64] *In re Palach* 35 C.B.R. 58.

IV. Conclusion

There are, indeed, facts and circumstances which debtors, creditors and the public in general cannot set aside, and which have to be appreciated by the Court. Some of them were duly considered by our esteemed colleague of the Supreme Court of Ontario, the late Honourable Mr. Justice F. T. Mc Dermott, at a Conference of Judges on Bankruptcy Problems, held in Montreal, on January 18, 1968. The following points are taken into account, explored and clarified. Needless to say that they are not limitative.

- The age of the bankrupt, his wife and dependents and the number of dependents;
- The effect of a lengthy suspension upon his qualification for a position;
- The state of his health both before and after bankruptcy;
- The salary or revenue of the bankrupt at the time of bankruptcy and his earnings at the time of the hearing of the discharge application with a look to the future;
- The occupation of the bankrupt or the business carried on by him;
- The period of time the bankrupt carried on business;
- The rent paid by the bankrupt;
- Whether the insolvency has resulted from obligations of a personal nature of the debtor or from guarantying commitments of others *e.g.* as a major or minor shareholder, director or officer of a corporation, an endorser, etc.;
- The incidence of a prior bankruptcy;
- The value of the proposed assets and the recovery actually made therefrom;
- The amount of liabilities shown by the debtor and that of the proven claims;
- Preferred claims proven and their implication. If the bankrupt has not set aside nor, by way of consequence, remitted to various levels of government the amounts deductible from wages for income tax or sales taxes, workmen's compensation or other like deductions, this could reflect upon his conduct while in business;
- Facts referring to sections 117 and 130;
- The opinion of the trustee and the inspectors;
- The resolution of the inspectors accompanying the trustee's report;

— The prospect of dividends for the preferred and ordinary creditors;
— A verification that creditors who filed their proof of claim have been notified of the application for discharge;
— The fact of the bankrupt's assets not equalling 50¢ on the dollar of the amount of his unsecured liabilities;
— The payment of the trustee's fees;
— The date of the bankruptcy;
— The amounts periodically paid to the trustee;
— An appreciation of the debts which will not be extinguished by the discharge order (Section 135).

Taking all those facts and circumstances, and others revealed by each individual case, consideration being at the same time given to the provisions of the Bankruptcy Act, sections 117 and 130 in particular, the case rests. The judge, in the exercise of his discretion, must, of necessity, render his decision upon the facts of that case. To paraphrase the Supreme Court of Canada in the *Industrial Acceptance Corporation* case, his decision should stand as long as he has not omitted the consideration of or misconstrued some fact, or violated some principle of law. Such a decision cannot be the result of a simplification of a set of rules.