Canadian Association of Insolvency and Restructuring Professionals
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2006 Personal Insolvency Roundup:

GREATEST HITS OF 2005

Robert A. Klotz, Klotz Associates

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INTRODUCTION

Here is my subjective list of the top personal insolvency cases of 2005. Some of these are important, others are merely curious and piqued my interest, and a few are just plain wrong. There are undoubtedly, and inevitably, many interesting and important cases that I have omitted or overlooked. So this list is really just a "taster", designed to red-flag some developments in the jurisprudence that may have fallen under the radar screen. While I believe the summaries to be accurate, readers are encouraged to decide for themselves by reading the cases. Occasionally I have added my comments[1] in brackets at the end of the decision. References to "RAK" are to my own views.

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[1] or intemperate fulminations, as the case may be.

A. DISCHARGE

1. Trustee's acceptance of a creditor's claim is binding at the bankrupt's discharge hearing

Pothof, Re (2005), 14 C.B.R. (5th) 196 (Alta. Registrar, August 11 2005): At the discharge hearing, the bankrupt cannot dispute the amount of the opposing creditor's claim where the trustee has accepted the claim.[2] [RAK: There is a possibility of real injustice here.]

2. Watch out for non-provable claims that survive bankruptcy

Théroux (Syndic de), [2005] J.Q. no 3743, J.E. 2005-1063 (C.S.Q., Denis J., 14 avril 2005): Vendor sold his home, declared bankruptcy two years later. Two years after his discharge, the purchaser discovered building defects, and sued the vendor three years later (seven years after the sale). Held: not a provable claim. The claim was contingent on an event that had not yet occurred by the date of discharge, and there was no indication that it would do so. The trustee ought not to have served a notice of stay. *Lotfi c. Québec (Procureur général)* [2005] J.Q. no 15485 (Qué. C.A. 7 octobre 2005): Government reimbursement claim under a pre-bankruptcy sponsorship agreement for post-bankruptcy welfare payments to sponsored immigrants, was not provable because the claim never arose before the bankrupt's discharge.[3]

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[2] Related decisions: The trustee's quantification of a creditor's claim is res judicata against the bankrupt in the creditor's subsequent s. 178 action: *Skytal Ltd. v. Schiber* (1997), 46 C.B.R. (3d) 275 (Ont. Gen. Div.), aff'd (1998), 9 C.B.R. (4th) 129 (Ont. C.A.); *Kennedy v. Bohnet* (2002), 34 C.B.R. (4th) 56 (Alta. Registrar); *384783 Alberta Ltd. v. Koppe* (2002), 38 C.B.R. (4th) 302 (Alta. Master), ¶12-13; *Lamont Hi-Way Service Ltd. v. Bunning* (2003), 44 C.B.R. (4th) 91 (Alta. Registrar). The trustee must value the claim before the bankrupt's discharge, else award costs against the trustee: *Anstead, Re* (2003), 41 C.B.R. (4th) 167 (Sask. C.A.)

[3] For further reference, see *Peters v. Remington,* [2001] 9 W.W.R. 558, 28 C.B.R. (4th) 82, 94 Alta. L.R. (3d) 302, 291 A.R. 189 (Q.B.), affirmed [2004] 3 W.W.R. 614, 49 C.B.R. (4th) 273, 339 A.R. 320 (C.A., January 13 2004), leave to appeal refused [2004] SCCA 86 (S.C.C., August 19 2004); R. Klotz, *Non-Provable Claims that Survive Bankruptcy*, 20 Nat'l Debtor-Creditor Rev. 39 (2005)

3. **Student loan cases: the mercy hearing**

(a) The BIA student loan provisions do not violate the Charter of Rights: *Chénier v. Canada (Attorney General)* (2005), 12 C.B.R. (5th) 173 (Ont. S.C.J.).

(b) Studies will interrupt the 10 year period for student loans only if they are funded by government loans: *Ledoux, Re* (2005), 8 C.B.R. (5th) 225 (Sask. Registrar)

(c) A student ceases to be a full-time student on the last day of the month of Canada Student Loan Act eligibility, not on graduation day: *Pyke, Re* (2005), 8 C.B.R. (5th) 308 (N.S. Registrar, February 8 2005) (lenient interpretation of hardship in the circumstances, loan discharged).[4]

(d) Try this argument regarding good faith: analogize from *San Francisco Gifts, Re* (2005), 10 C.B.R. (5th) 275 (Alta. Q.B.): a corporation was acting in good faith in C.C.A.A. proceedings despite its recent criminal conviction for fraud on a massive scale through phoney safety certificates on its electrical products and a $150,000 fine: good faith means good faith in the C.C.A.A. process, not before the date of filing

(e) Reject the mercy application where the student did not adduce sufficient evidence to determine the good faith issue: *Sararas, Re* (2005), 13 C.B.R. (5th) 117 (Man. Registrar).

(f) The student failed before completing his course, had been unemployable since then (per medical report) due to mental and physical disabilities. Held: He acted in good faith despite never having paid a penny, because he was unable to do so, derived no economic benefit from the loan: mercy granted: *Fines, Re* [2005] O.J. No. 4463 (Dep. Registrar Nettie, October 21 2005). Similar case where the student declared bankruptcy at the 9 year, 11 month mark, never finished the course, impoverished since then, the student loans comprised only 20% of total debts, mercy granted: *Westwood, Re* (2005), 16 C.B.R. (5th) 306 (B.C. Registrar).

(g) No good faith where the bankrupt thought she had filed immediately after the two year period expired, 91% of total debt, did not seek interest relief; no inability to pay where she earned $400/month more than the Superintendent's standards, spent

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[4] The academic term ends at the month's end under the Canada Student Loan Regulations s. 4.1, The trustee was not negligent for not knowing this: *Zambrowicz v. T Carleton and Co.* (2005), 14 C.B.R. (5th) 311 (Ont. Sm. Cl. Ct.)

$200/month on tobacco, had previously held a good job: *Power, Re*, [2006] O.J. No. 8 (Dep. Registrar Nettie, January 5 2006).

(h) The bankrupt was in good faith despite working in his field of study and had bought a sailboat, but no continued future financial difficulty because he could probably borrow to pay off the student loan and his financial circumstances were possibly likely to improve: no mercy: *Cook, Re*, [2006] O.J. No. 493 (S.C.J., Platana J., January 18 2006). Also: the court has no jurisdiction under s. 178(1.1) to order a partial discharge.

4. Student loans in the background

Rae, Re (2005), 10 C.B.R. (5th) 63 (Alta. Registrar, February 16 2005): Where the bankrupt has substantial surviving student loans, grant an absolute, or modest conditional, discharge. Contrast with *Weihs, Re* (2005), 12 C.B.R. (5th) 118 (Man. Registrar, May 2 1005): $30,000 conditional order over 5 years where total debts were $150,000, there were significant non-government student loans, notwithstanding that there were also surviving student loans.

5. Can the Trustee withdraw its opposition and grant an automatic discharge?

(a) *Tomko, Re*, [2005] M.J. No. 507 (Man. Registrar): The trustee can withdraw its Notice of Opposition before the nine month mark, and grant the automatic discharge, where the opposition was based on outstanding obligations of the bankrupt (i.e. counselling, surplus income) that are satisfied before the nine months are up.[5]

(b) *Tremblay (Syndic de)* [2005] J.Q. no 19696 (C.S.Q., Bédard J., 8 septembre 2005): Where the trustee alone opposes the discharge, but withdraws the opposition after the nine month mark, a creditor cannot oppose because it is too late. Only a creditor's timely opposition (within nine months) can benefit other creditors, who can then also oppose.

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[5] This reasoning has since been rejected in Ontario: *Luftenegger, Re*, [2006] O.J. No. 1815 (Registrar Nettie, May 8 2006)

6. **The court does not buy the bankrupt's "Mexican" strategy**

Fleury, Re (2005), 16 C.B.R. (5th) 38 (B.C. Registrar): CRA opposes the 66 year old bankrupt's discharge where he took $1.8 million from the sale of his company's sole asset and sent the money to Mexico without paying the $900,000 tax debt thereby generated. He married his Mexican wife four years before, but only obtained permanent status there in the year of the sale. He gave his wife power of attorney and now says that she deviously transferred all the money to her accounts. They later separated and she divorced him. He says that the divorce order left all his Mexican assets with her; but the order did not mention assets other than noting that they had contracted under a joint ownership of property regime. A form of separation agreement left all the assets with her. But he was lying about his lack of any bank account in his name. His ongoing "cordial" relationship with his ex-wife did not reconcile with her apparently absolute refusal to assist him in his ongoing bankruptcy problems. Discharge refused.

7. **Setting aside the automatic discharge**

(a) Don't rescind the automatic discharge where the creditor was late in opposing, unless the bankrupt's conduct caused or contributed to the creditor being late: *Rae, Re* (2005), 10 C.B.R. (5th) 63 (Alta. Registrar).

(b) Eight years after the automatic discharge, the court varies the discharge to impose a retroactive 6 month suspension, i.e. ending 7½ years ago, where the trustee's s. 170 report was not accompanied by an inspector's resolution, the principal creditor with a $1.5 million libel judgment inadvertently did not oppose: *Bardyn, Re* (2005), 14 C.B.R. (5th) 163 (Ont. S.C.J.)

(c) The court should relieve against late service of a Notice of Opposition only where the error of is one of form not substance: *Tomko, Re*, [2005] M.J. No. 507 (Man. Registrar, December 30 2005). The creditor served the trustee on last day, and served the O.R. and the bankrupt one week later, with no prior indication that it would oppose. This was an error of substance, do not set aside the automatic discharge.

8. **Frivolous or vexatious defence (s. 173(f))**

Bhullar, Re (2005), 10 C.B.R. (5th) 159 (Man. Registrar), ¶9-11: The opposing creditor had obtained summary judgment, with solicitor-client costs, against the bankrupt who filed no evidence. Held: this alone does not prove a frivolous or vexatious defence. A defendant may not seriously defend a claim for reasons other than absence of merit, e.g. lack of resources.

9. **A subrogated provincial welfare claim for support survives discharge**

Russell v. Russell (2005), 12 C.B.R. (5th) 297, 270 Sask. R. 118 (Q.B. June 23 2005): Alberta court confirms a Saskatchewan support order which allocated $19,000 support arrears between those owing to the wife ($13,000) and subrogated arrears ($6,000) owing to the province for repayment of social assistance. The Husband then declared bankruptcy and argued that the $6,000 subrogated portion of the arrears were not owing "to the wife" and hence were extinguished by s. 178. Held: S. 178 addresses the nature or character of the debt, not to whom it is owed. This is consistent with the social policy behind the section, namely that a bankrupt should not be relieved of his support obligations by bankruptcy. While support orders are traditionally incapable of being assigned because they are a variable personal right, subrogation legislation has created an exception in favour of governments, allowing the province to stand in the wife's shoes to collect subrogated support. The BIA should not allow the bankrupt to shuck his obligations and pass them to the taxpayer in view of society's vested interest in ensuring that he support his family.

10. **A Family Court order to pay the mortgage, survives the husband's discharge**

Fournier v. Mason (2005), 286 N.B.R. (2d) 136 (Q.B., July 29 2005): A consent matrimonial order required the husband to pay the $500 monthly mortgage on the matrimonial home, and to pay out the mortgage entirely in six months. Five years later, when he fell into arrears on the mortgage payment, the court held him in contempt and ordered that he bring the arrears up to date and resume the monthly mortgage payments to the bank. He declared bankruptcy one month later. The wife moved for contempt.

> ¶80 "An order may be ambiguous or subject to circumstances, (i.e. bankruptcy that may call into question his obligation depending on whether it is a marital property settlement or a spousal support obligation) but one cannot avoid the ramifications of contempt by just sitting back and pointing to a potential ambiguity. It would be incumbent on Mr. Mason to forthwith upon the arising of such circumstances to bring a motion to the court for directions or clarifications. There would be a positive duty on him." ...
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> ¶106 "Particular orders are not necessarily drafted with the intricacies of bankruptcy legislation contemplated. Situations often present themselves where it is evident the parties' consideration has not been the categorization of amounts but rather the determination of an ultimately fair result between the parties."

The Court reviewed the factors: The wife would have been entitled to spousal support had the husband not been required to pay the lump sum, based on compensatory factors but also on a needs and ability to pay basis. She inherited the property free and clear, he lived there only 4 years; he had no potential claim against the home; the court noted that the assumption of the mortgage obligation cannot be traced to a specific value of any property interest he had. Tax treatment: not determinative in this case since the lump sum obligation (non-periodic) was not entitled to tax shifting. Indemnity obligations: The key should be the function performed by the payment of the debt, not the initial purpose for the debt. The husband agreed that he wanted the wife to be able to remain in the house and have enough money to do that. Held: the obligation was in the nature of support. However, the order should be varied downward slightly to reflect the reduction of the monthly mortgage payment to $455.

11. **Damages for breaching a non-competition agreement survive discharge**

Alberta Care-A-Child Ltd. v. Payne (2005), 13 C.B.R. (5th) 1 (Alta. Q.B.), ¶100-113:

> "He deliberately diverted resources and business opportunities of the Plaintiff to his own benefit. His breach of fiduciary duty discloses a level of dishonesty, wrongdoing or misconduct that would meet the culpability standards of s. 178 ... A liability that is easily measured in monies representing the damage caused by the breach of duty does fall within the scope of the phrase 'any debt or liability'. The loss of profits for the period in issue is a quantifiable liability that meets both the language and the purpose of the legislation").[6]

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[6] Related case: *Taylor, Re* (2002), 38 C.B.R. (4th) 107 (Alta. Registrar): Damages for breach of a non-competition clause and fiduciary duty survives bankruptcy; "misappropriation" includes misappropriation of customers, not just of money.

12. **"Go do it yourself": Enforcement of conditional discharge orders by a creditor**

Johns, Re (2005), 12 C.B.R. (5th) 26 (B.C.S.C., June 16 2005): A creditor can obtain a s. 38 order to enforce a conditional discharge order.

B. PRIORITY ISSUES

13. **Exoneration: the joint mortgage debt was payable only from the bankrupt's half**

Ken Glover & Associates Inc. v. Irwin (2005), 15 C.B.R. (5th) 115 (B.C. Master, September 30 2005): The spouses owned a joint investment property. The $300,000 mortgage on the property was taken out for the husband's sole benefit; half was paid to the wife, who advanced it to his corporation in which she had no interest. No direct evidence as to intention. The fact that they were separated when the loan was made, made the inference more compelling that he would bear the burden of repayment. By her unchallenged evidence, she received no benefit from the loan. So she is entitled to exoneration for the mortgage. But no exoneration regarding a judgment registered against the property in respect of a [joint] credit card debt incurred solely by him and for his benefit. Equitable exoneration does not apply to a judgment debt, only a mortgage. [RAK: This distinction is unsupportable in theory.]

14. **The wife's cohabitation agreement trumps the trustee**

Kajtar (Trustee of) v. Bannerman (2005), 10 C.B.R. (5th) 212, 15 R.F.L. (6th) 305 (Ont. S.C.J., April 29 2005): The bankrupt's common-law wife contributed $36,000 to the purchase of their jointly owned family home, evidenced by a written agreement that she would be paid that amount from the proceeds of sale before any division of the value of the property. Separation 4 years later, home sold, $51,000 proceeds held in trust pending the outcome of matrimonial proceedings. The husband declared bankruptcy 16 months

later. Held: the agreement created an express trust, satisfying the three certainties.[7] Wife gets her $36,000 first, the balance to be divided equally.

15. **Security against "any and all assets" is effective against land and future assets**

Powers, Re (2005), 14 C.B.R. (5th) 199 (Alta. Registrar): A handwritten agreement granting security against "any and all assets" of the borrower, grants valid security against all his real and personal property, including future acquired assets.

16. **Damages award for lost earning capacity vests in the trustee [?]**

Hogg, Re (2005), 12 C.B.R. (5th) 20 (Man. Registrar, May 2 2005): s. 68. Five months after he declared bankruptcy, the bankrupt was in a bicycle accident. He told the Trustee that he might have a claim for accident benefits, namely a lump sum indemnity for his inability to continue his high school education as a result of the accident. At his discharge hearing he swore that he had not acquired or become entitled to acquire any assets. The trustee later learned that a few days before the hearing, he had received a $7,700 lump sum indemnity for loss of education. In a motion heard 10 months after the discharge, the court annulled the discharge[8] for fraud under s. 180(2) and ordered that $7,700 be paid to the estate. Damages for economic loss are designed to compensate a bankrupt for the impact on his earning capacity, which is a capital asset accruing to the estate, applying *Re Bell*.[9]

17. **Defrauding Peter to pay Paul**

Grant v. Ste. Marie Estate (2005), 8 C.B.R. (5th) 81, 39 Alta. L.R. 4 71, 375 A.R. 33 (Q.B., January 18 2005): The undischarged bankrupt had been criminally charged with fraud. In

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[7] A valid trust must satisfy the three certainties: *intention* to create a trust, the *subject matter* of the trust, and the *objects* or beneficiaries of the trust.

[8] See also *Faust, Re* (2005), 12 C.B.R. (5th) 202 (Alta. Registrar): Annul the bankrupt's discharge where he became entitled to a bequest before the discharge, did not tell trustee.

[9] [1996] B.C.J. No. 247 (S.C., Warren J.). *Cf. Archibald, Re* (2003), 39 C.B.R. (4th) 18 (N.B. Registrar): loss of earning capacity does not vest in the trustee); *Anderson, Re* (2004), 2 C.B.R. (5th) 27, 358 A.R. 183 (Alta. Registrar): lost earning capacity is not a capital asset, does not accrue to the trustee.

order to make restitution, he defrauded a new mark of $195,000 (an "advance fee" scam, supposedly required in advance to obtain fictitious $10,000,000 financing) and gave the money to his lawyer. After deducting $21,000 for his unpaid fees, the lawyer paid the money into court as partial restitution. When the bankruptcy came to light, the money was paid out to the trustee. When the fresh fraud came to light, on application to determine entitlement, the court held that the new mark had priority, through express trust, over the money, except for any fees and expenses paid out before receiving notice of the breach of trust. So the lawyer's fees, and the trustee's fees, paid before notice of the fraud, were protected. A creditor who in good faith and without notice of the trust, receives trust money in satisfaction of a debt, is a bona fide purchaser for value without notice and may keep the funds.

C. ADMINISTRATION ISSUES

18. The trustee can realize on the bankrupt's post-discharge equity in the matrimonial home

Dovgala, Re (2005), 14 C.B.R. (5th) 182 (Ont. Dep. Registrar, August 10 2005): The bankrupt was the joint owner of the matrimonial home. There was no equity on the date of bankruptcy. Two years after the debtor's automatic discharge, the trustee registered its interest and began negotiating to sell its half interest back to the bankrupt. The trustee clearly informed the bankrupt that he intended to realize on the half interest. The trustee was discharged five years later. In 2005, three years after the trustee's discharge, the bankrupt applied for a vesting order over the trustee's half interest. Held: The court cannot infer from the trustee's discharge that the trustee has admitted the property was unrealizable. The trustee was not estopped (legally barred) from realizing on its half interest: neither the trustee was not responsible for the bankrupt's misapprehension. While the trustee should not sought his discharge until realization issue had been resolved, the trustee had made it clear before then that it found the property was capable

of realization.[10] Also: A sale back to the bankrupt (or her nominee) is incidental to the administration to the estate, can be effected by a discharged trustee.

19. **The trustee must accept a proof of claim despite having a counterclaim**

Dunham, Re (2005), 9 C.B.R. (5th) 205 (N.S. Registrar): A creditor's liquidated claim in a proposal must be accepted unless a defence or counterclaim is proved. The debtor's pending counterclaim and defence alleging negligence and breach of contract, does not help. Do not apply summary judgment principles to the proof of claim procedure, ie. it does not matter if the creditor could not have obtained summary judgment in court.

20. **Appoint a new trustee who will be fairer to the bankrupt**

Jopp, Re, [2005] A.J. No. 1763 (Alta. Registrar, December 13, 2005): Where the trustee's conduct was unfair to the bankrupts (he obtained a court order extinguishing their exemption claim over a mobile home, without notice to them, after telling them the exemption was OK), and the trustee had been discharged, appoint a different trustee to complete the file.

21. **The trustee can be rotten if the BIA so allows**

Goldray Inc., Re (2005), 15 C.B.R. (5th) 98, 259 D.L.R. (4th) 213 (Alta. C.A.): Estoppel is unavailable against the trustee if its effect would be to nullify a statutory provision that imposes a positive obligation on a party (in this case, the trustee is allowed to lie in the weeds and take advantage of a creditor's misunderstanding as to when the 30 day appeal period begins to run to appeal a disallowance). [RAK: The rule of trustee fairness in *Ex parte James*[11] was not argued, apparently, in this case.]

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[10] This conclusion follows *Edgar, Re* (1982), 42 C.B.R. (N.S.) 125 (B.C.S.C.), but is arguably inapplicable to provinces with homestead or residence exemptions where the home is a 'limited exemption' asset: *MacKay, Re* (2002), 35 C.B.R. (4th) 275 (Alta. Registrar) (Limited-exemption assets: relevant date is date of bankrupt's discharge; trustee must raise issue of surplus equity no later than bankrupt's discharge hearing; increase of value in property which vests in trustee is not after-acquired property), followed by *Mernickle, Re* (2002), 44 C.B.R. (4th) 108 (Alta. Registrar); *Agnew, Re* (2005), 8 C.B.R. (5th) 170 (Sask. Registrar) (Determine fair market value at date of bankrupt's discharge re exemption)

[11] (1874), 9 Ch. App. 609, [1874-80] All E.R. 388 (C.A.)

22. **Granting leave to proceed against the bankrupt (s. 69.4)**

(a) *Royal Bank of Canada v. Jakola* (2005), 13 C.B.R. (5th) 257 (Ont. S.C.J., July 13 2005): The issue on a s. 69.4 leave application (here, a fraud claim) is material prejudice to the creditor, and the court must determine that the requested order is equitable on other grounds. The debtor's financial ability to defend is not a factor. But in a companion decision decided by the same judge on the same date (*Jakola, Re* (2005), 13 C.B.R. (5th) 198 (Ont. S.C.J., July 13 2005)), the court allowed the bankrupt to deduct his legal fees for the fraud litigation from his s. 68 income. [RAK: stands for the proposition that if leave is granted, the bankrupt may use his surplus income to defend].[12]

(b) *Jenkins, Re* (2005), 13 C.B.R. (5th) 208 (N.S. Registrar): Low threshold, do not assess the merits: bankruptcy stay lifted where the bankrupt filed Affidavits denying any fraud, and the creditor filed no Affidavit at all.

(c) *Critchley (Syndic de)*, [2005] J.Q. no 15972 (Qué. Registrar): Fraud creditor gets s. 69.4 leave, four months into the bankruptcy, to enforce a criminal fraud restitution order (78% of debts). The bankrupt sought a delay to establish sufficient revenue to meet his obligations ie a hiatus to catch his breath, because garnishment prevented him from establishing his real estate business. The court lifted the stay despite the absence of any material prejudice to the creditor: the bankrupt had not shown good faith, no previous effort to pay the debt, went bankrupt at the creditor's first enforcement step, the stay is primarily for the benefit of the trustee and creditors, and only incidentally for the bankrupt's rehabilitation. It was equitable in the public interest to lift the stay. [RAK: What about the other creditors?] *Cf. Gagnon c. Rabouin*, [2005] J.Q. no 9228 (C.S.Q.,4 juillet 2005): Refuse leave to enforce a fraud judgment against the bankrupt where the creditor (97% of debts) would not suffer 'serious prejudice' by waiting for the discharge before proceeding. *Poirier (Syndic de)*, [2005] J.Q. no 8741 (C.S.Q., Trudel J., 30 juin 2005): Don't permit s. 178 creditor to enforce until the trustee is discharged, to avoid giving a preference over other unsecured creditors.

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[12] See R. Klotz, *Case Comment: Hudjik, Re*, 10 C.B.R. (5th) 42 (2005), arguing that the bankrupt's financial circumstances should not be excluded as a consideration. *Turner, Re*, [2006] O.J. No. 430 (Registrar Nettie, February 6 2006): On a s. 69.4 motion, the bankrupt's financial ability to defend the action is completely irrelevant. The bankrupt's financial circumstances are not a consideration.

23. **Bankrupt discharged unwillingly at fraud creditor's request**

Hudjik, Re (2005), 10 C.B.R. (5th) 42 (Alta. Registrar, April 5 2005), aff'd [2005] A.J. No. 684 (Q.B., May 25 2005): Grant an absolute discharge against the bankrupt's wishes at the request of his fraud creditor who wants to pursue collection alone, without sharing; don't let the bankrupt stay in bankruptcy, no rehabilitation period or hiatus for a fraudster.[13]

24. **Unhappy trustee settles matrimonial claim for a song, court approves**

Cochard, Re (2005), 15 C.B.R. (5th) 38 (Alta. Q.B., September 8 2005): The wife declared bankruptcy after she commenced matrimonial proceedings (which she valued at $750,000), without informing her family lawyer. She was the half-owner of the matrimonial home. Her fiancé bought the home from the trustee and resold it one month later for a 50% profit. Her creditors consisted of $59,000 of credit cards, $4,000 of friend's loans, $181,000 claimed by her fiancé under a contract to assist her in her divorce, and $35,000 owing to her lawyer. The lawyer refused to file a proof of claim or issue a bill, and asserted that his claim would survive bankruptcy. The court ruled in a previous decision[14] that the wife's property claims accrued to her trustee. The trustee reported to the court that the bankruptcy was a fraudulent scheme by the wife and her fiancé to flow through her assets, in fraud of her creditors.

> "The Trustee does not see how it would ever be in a position to fully evaluate and enforce the claims initiated by Ms. Cochard. Further, the Trustee notes that to the extent either of the claims produce any recovery in the estate, [the fiancé] will be claiming that money for himself and his company until his claims are fully paid. And if the claims produce a surplus in the estate, that surplus would be in due course payable to Ms. Cochard. In the Trustee's view it is unlikely there will ever be any significant benefit to Ms. Cochard's legitimate creditors by having the Trustee expend estate resources evaluating and enforcing those claims. It makes no business sense to have the Trustee in the middle of disputes between the real plaintiffs and the real defendants."

The trustee thereupon settled the matrimonial claim with the husband for $85,000, with inspector approval, and sought court approval. The wife and fiancé opposed the

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[13] See R. Klotz, *Case Comment: Hudjik, Re*, 10 C.B.R. (5th) 42 (2005)

[14] *Cochard, Re* (2004), 7 C.B.R. (5th) 73 (Alta. Q.B., June 14 2004)

settlement, and sought a s. 38 order. ¶48 "[T]his is not a situation in which the Trustee proposes to do nothing. On the contrary, the Trustee proposes to settle the claim, which is to do something. [The wife and fiancé] have not met the formal pre-requisite to the operation of s. 38 which is that the Trustee refuses to do anything. Therefore, they are not entitled to a s. 38 order." The court approved the settlement:

> ¶51 "Parliament has given to the Trustee the unrestricted right to settle a bankrupt's claims: s. 30(h) and (i). Therefore, as a matter of public policy, the legislator has clearly indicated the degree of trust that is reposed in a trustee."

Additional factors supporting the settlement: The estate had no assets to pursue the litigation, there were conflicting appraisals of the disputed assets, the wife's credibility was in dispute (which made it difficult to predict the results of the litigation), there were tangled litigation issues regarding the flip of the home, and the litigation was likely to be time-consuming and expensive. Finally, the trustee granted the wife and her fiancé a right of first refusal to buy the claim for $85,000.

> ¶59 "If the claims were as well founded and easy to litigate as suggested by [them], it appears likely that [they] could find someone to put up $85,000 for a $750,000 return."

[RAK: result: creditors get very little, wife's claim is settled for a minimal amount, wife's lawyer takes a loss, husband preserves his assets, wife gets nothing. Wife should have entered into an agreement with trustee to pursue the claim at her cost.]

25. **No 'trial de novo' (new trial) on appeal from trustee's disallowance [?]**

Johnson v. Erdman (Trustee of), [2005] S.J. No. 742 (Sask. Registrar, December 8 2005): An appeal from the disallowance of a claim under s. 135(4) is a true appeal, not a trial de novo. Without the court's permission on proper grounds, do not permit the introduction of fresh evidence that was not put before the trustee.[15] *Canadevim ltée (syndic de)*, [2005] J.Q. no 20394 (C.S.Q., 30 août 2005): Appeal from disallowance is a true appeal. Trustee disallows the creditor's proof of claim as statute-barred without asking for invoices or any further information. The appeal must proceed on basis of the record before the trustee. So the creditor was not permitted to establish the existence of a subsequent

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[15] Applying *Galaxy Sports Inc., Re* (2004, 1 C.B.R. (5th) 7 (B.C.C.A., May 20 2004), a case involving the appeal of a disallowance in a hotly contested bankruptcy proposal.

acknowledgment of debt. It is the creditor's responsibility to submit proof of all the elements of which the trustee could consider in his decision - ie. the creditor must mention the acknowledgment of debt in its proof of claim. [*Quaere*]. Contrast to *Saine (Syndic de)*, [2005] J.Q. no 16420 (C.S.Q., 11 novembre 2005): S. 135 appeal is a trial de novo.[16]

26. **Trustee's fees: Up or Down**

(a) The court may reduce the trustee's fees for failure to properly realize upon the assets or undue delay, even if the fees have been approved by the inspectors: *Wright, Re*, [2005] B.C.J. No. 2507 (Registrar, November 18 2005), or by the creditors: *Price, Re*, [2006] B.C.J. No. 732 (Master, March 17 2006). However, the court can increase the trustee's fees, where warranted, even if the creditors have voted to fix them: *Okusako, Re* (2005), 16 C.B.R. (5th) 239 (B.C. Master, November 16 2005)

(b) Trustee can include in fees, time spent to explain fees to guarantor and to collect fees from guarantor: *Golden Mile Bowl Inc, Re* (2005), 14 C.B.R. (5th) 187 (Ont. S.C.J.,)

(c) Trustee sits on file for twelve years: don't reduce his fee where would this would merely give creditors a .003% dividend; instead, award the Superintendent $1,000 costs of taxation: *Micro Adm. inc (Syndic de)*, [2005] J.Q. no 15970 (Qué. Registrar, 6 mai 2005). Reduce trustee's fees by half where, after miscalculating the s. 68 amount, the trustee failed to take any steps to fix the problem despite the Superintendent's insistence: *Nowlan (Syndic de)*, [2005] J.Q. no 15974 (Qué. Registrar, 6 septembre 2005). Reduce trustee's fees by $500 where the trustee strong-armed the bankrupt into signing a post-bankruptcy rebate authorization: *James, Re* (2005), 16 C.B.R. (5th) 195 (B.C. Registrar, December 2 2005).

(d) Where the OSB does not respond for four years to the trustee's request for a comment letter, the OSB was deemed to have concurred in the trustee's conduct (here, calculation of surplus income): *Braithwaite, Re* (2005), 16 C.B.R. (5th) 17 (N.B. Registrar, October 7 2005)

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[16] Following *Eskasoni Fisheries Ltd., Re* (2000), 16 C.B.R. (4th) 173 (N.S. Registrar) and *MacDonald, Re*, [2000] O.J. No. 2744 (S.C.J.), distinguishing *Galaxy Sports Inc., Re*, *supra*. See R. Klotz, *Appeals from Disallowance: the Danger of Filing an Undetailed Proof of Claim*, 21 Nat'l Creditor-Debtor Rev. 9 (2006)

(e) *De Marni v. Westgeest and Associates* (2005), 15 C.B.R. (5th) 78 (B.C.S.C.,May 6 2005): Where the trustee quitclaims property without equity to a secured creditor, the fee must go into the estate, cannot be billed separately, the trustee cannot profit. Property without value is still property of the bankrupt under s. 67.

D. SURPLUS INCOME ISSUES

27. **Should the bankrupt pay more than 50% of surplus income?**

Powell, Re (2005), 13 C.B.R. (5th) 106 (B.C.. Registrar): Considerations on fixing the appropriate percentage of surplus income (50%-75%) payable by the bankrupt:

(a) The bankrupt's personal and family economic situation;

(b) The bankrupt's conduct and cooperation (or lack of it) during the bankruptcy;

(c) Any previous bankruptcies;

(d) The reasons for the bankruptcy;

(e) Any amount realized by the trustee from assets;

(f) Any amount remitted by the bankrupt during bankruptcy and whether this was voluntary

Here, the percentage was fixed at 71%.[17]

28. **Pre-bankruptcy "receivables" are income**

Gill, Re (2005), 9 C.B.R. (5th) 5 (B.C. Registrar, February 23, 2005): A severance benefit payable to all employees, based on years of employment, as a result of a mill closure, declared before bankruptcy but paid after the date of bankruptcy, is income, not a "receivable", even though the bankrupt did not cease employment. The Court observed that the trustee proposed to average out this amount over 9 months for surplus income purposes.

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[17] This approach was applied in *White, Re*, [2006] O.J. No. 1404 (S.C.J., April 7 2006), where the court fixed the percentage at 70%.

29. **Child support is income under s. 68 [?]**

O'Brien, Re (2005), 11 C.B.R. (5th) 275 (Alta. Registrar, April 5 2005, trustee and bankrupts unrepresented): Double bankruptcy, the spouses were happily married. In the month after declaring bankruptcy, the wife received a cheque for $4,800 for accumulated child support arrears (presumably from a prior spouse) from the Ontario FRO. She sought to have this lump sum excluded from the surplus income calculations. Held: Spousal and child support is intended to be used to offset monthly household expenses. So in the bankruptcy context, periodic child support is to be considered part of the total income of the recipient parent for the purpose of calculating surplus income. Even if periodic support is paid in a lump sum, it is still income intended to be used to offset household expenses. Lump sum support is not to be considered as after-acquired property accruing to the trustee. Court notes that the lump sum should be added to the wife's income and averaged over 9 months to determine surplus income. [RAK: Minimal consideration of the fiduciary theory (ie child support is held in trust for the children), no reference to *Mirlin*,[18] *Taylor v. Taylor*,[19] or *Marzetti*.[20] The better approach, with respect, is to treat child support as the separate income of another person in the family unit, to be factored into the surplus income standards and then adjusted back out under the "family situation adjustment" in para. 8 of the Surplus Income Directive.]

30. **Deduction for support obligations**

McConnell (Re), [2005] O.J. No. 5547 (Ont. Dep. Registrar Nettie, December 23 2005): Despite marital separation, where there is no evidence of an order or written agreement, do not allow a non-discretionary support deduction in the s. 68 calculation.[21]

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[18] *Mirlin, Re*, [1996] S.J. No. 633 (Sask. Registrar, July 31 1996): "These [child support] payments, by their very nature, are for necessaries of life and any court should be reluctant to categorize them as a capital asset which would provide a source of income or free up income for payments toward a conditional order."

[19] *Taylor v. Taylor* (2002), 60 O.R. (3d) 138, 26 R.F.L. (5th) 208, 21 C.P.C. (5th) 205 (Ont. C.A.)

[20] *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765, 5 R.F.L. (4th) 1, 26 C.B.R. (3d) 161 (S.C.C.)

[21] Related case: *Little, Re*, [2004] B.C.J. No. 1685 (B.C. Registrar, August 12 2004): To establish the bankrupt's deduction for support payments at the discharge hearing, he must produce some formality, be it a court order, separation agreement, or sworn evidence of his spouse that this obligation exists and that he is not in arrears; and proof of the income of his current spouse; to simply

31. **The problem of the wealthy spouse**

(a) *LeDrew, Re* (2005), 13 C.B.R. (5th) 63 (Ont. S.C.J., June 27 2005): The husband was a high-profile lawyer whose tax arrears of $492,000 (the sole proven claim) had accrued over an 8 year span. Two years before his bankruptcy, he married his second wife and they bought a $1.8 million house jointly, subject to a marriage contract. The contract provided that the wife would fund half the price, he would finance the other half by being solely responsible for the $900,000 mortgage. Family expenses were to be shared jointly in proportion to their respective financial abilities, and each waived spousal support. The house was now worth $2.3 million, his sole asset. CRA filed a Certificate against the home for $172,000. His mortgage payment was $5,500; he was earning $7,000 gross monthly, though his normal monthly income was $13,000. CRA opposed his discharge. Held: A mortgage expense of 45% of net income is excessive, cannot be justified at a time of deep indebtedness to CRA. They could have found suitable, less expensive accommodation without any loss of dignity. Purchase of this home was unnecessary, constituted extravagant living per s. 178(1)(e), contributed to his bankruptcy. Failure to pay taxes over many years means not an honest but unfortunate debtor. The wife had considerable income, and was supporting the husband, but she would not disclose her income. Since she had no obligation to support him and there was no guarantee that she would continue to do so, her income is not a factor and she is under no obligation to disclose her income. Order: pay 50% of CRA's unsecured claim ie $95,000, through surplus income payments, by means of a consent to judgment. Also: CRA Tax Certificate constitutes a secured claim. [RAK: Since each spouse was entitled by the marriage contract to disclosure of the other's income, the trustee should have been so entitled. Also, the wife was supporting him despite the contract; why shouldn't the court look past the contract at the conduct?].

(b) *White, Re* (2005), 13 C.B.R. (5th) 317 (Ont. S.C.J., July 18 2005, RAK for the trustee, under appeal): 58 year old husband's second bankruptcy. Home owned solely by wife. His sole debt was a $925,000 income tax debt. He earned $15,000 monthly, and

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state her income/contribution is not sufficient.

claimed a s. 68 non-discretionary expense of $12,500 for monthly support payments under his separation agreement. He claimed to have been living separate under the same roof for the last 19 years at three consecutive addresses. Husband was a tax shirker, had not paid any taxes in the previous 5 years despite earning $340,000 average annual income. He wrote a book on beating taxes. The separation was known only to a few close friends. He did not deduct support payments from income tax. He never gave the wife monthly cheques; paid bills each month, gave her $400/week cash. His mortgage payments were reducing the mortgage by $42,000 each year, while not paying any income tax. The court inferred, given his expertise, that his plan was to defeat the tax claims and keep capital in the wife's home. The various amendments to the separation agreement over the years were drafted by the wife, a non-practising lawyer, and were not witnessed (contrary to FLA requirement). He did not cooperate with trustee. He remained in control of everything. They objectively appear to be married, on bankruptcy forms (showing 'married') and income tax returns. Held: Support payments require some formality. They must be actually paid, and used by the payee for her sole benefit and not that of the payee. If the payor controls everything in the spouses' lives, they cannot be separated. Where housing costs are extravagant, the court must consider the other spouse's assets and income. Fix surplus income without regard to any legal obligation to pay support, though account for their child's special needs. In a subsequent hearing, the s. 68 obligation was fixed at 70% of his surplus income.[22]

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[22] *White, Re*, [2006] O.J. No. 1404 (S.C.J., April 7 2006): The test of "fair and reasonable amount for family maintenance according to condition in life" no longer applies. No account can be taken of a family's condition in life unless they generate non-discretionary expenses. The old "station in life" arguments (such as in *Bayliss, Re* (1982), 40 C.B.R. (N.S.) 16 (Ont. H.C.) no longer apply. A bankrupt is not entitled to maintain a lifestyle he or she may have enjoyed at the expense of creditors previously without regard to his or her obligations. The s. 68 calculation is not adjusted to include how the family lived by the bankrupt not paying his income tax. Obligation set at 70% of surplus income, retroactive to date of bankruptcy due to bankrupt's total lack of cooperation.

E. PRE-BANKRUPTCY TRANSACTIONS

32. Proving insolvency

Include the value of the debtor's exempt asset (an $89,000 exempt RRSP) in assessing solvency in a fraudulent preference proceeding: *Krawchenko (Trustee of) v. Canada (MNR)* (2005), 11 C.B.R. (5th) 238 (Man. Q.B.). Held: she was solvent at the time of the impugned payment to CRA, since her debts were $51,000, and her assets, including the exempt RRSP, were $97,000. The payment to CRA within 3 months of bankruptcy was not a preference where her dominant intention was to get CRA off her back. The nature of the creditor is a consideration.

33. Forgiveness of a debt is not a settlement

Sudbury Regional Credit Union Ltd. v. Fragomeni (2005), 13 C.B.R. (5th) 262 (Ont. S.C.J.,): Eight months before her bankruptcy, the bankrupt forgave a $92,000 unsecured loan to her daughter and son-in-law so that they could buy a bakery. Held: this does not constitute a settlement under s. 91, although it is a gift. According to *Royal Bank of Canada v. Whalley*,[23] "settlement" requires an intention that the property be retained or preserved in a traceable form to the benefit of the transferee. There was no intention that the original loan be traceable or be maintained in any form; the original loan was presumably co-mingled with the other sources of equity in their business and could be used as they saw fit; it did not create new equity in the business as it had never been secured.

34. The Court upholds a flip of the matrimonial home on the basis of an oral separation agreement

Exelby & Partners LLP v. Gibson (2005), 7 C.B.R. (5th) 196 (Alta. Q.B.): The spouses jointly owned their home and had been married 8 years with at least one child. One month after their separation, they agreed that the husband would transfer his half interest in the home to the wife in lieu of spousal support and equalization against his pension.

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[23] (2002), 59 O.R. (3d) 529, 34 C.B.R. (4th) 277, 213 D.L.R. (4th) 106 (Ont. C.A.)

She took over making mortgage payments based on the agreement. The transfer was effected eight months later for $1 stated consideration. Three weeks later the husband declared bankruptcy. Both spouses had lawyers during this period, and draft agreements had been exchanged but not finalized. There was no executed separation agreement either at the time of the transfer, the date of the bankruptcy, nor as late as 1½ years after the separation, while the spouses haggled over custody. The transfer was upheld. The wife's undertaking not to sue for support or equalization, was valuable consideration which was not grossly inadequate. The agreement need not be in writing. The evidence demonstrated a lack of intent to defraud and the wife's lack of knowledge of his insolvency, and overcame the presumption raised by the relationship between the spouses. [RAK: The case is disturbing in that there was no enforceable consideration given for the transfer. The Alberta Matrimonial Property Act requires separation agreements to be written. The agreement must be accompanied by a detailed written acknowledgement regarding voluntariness, full disclosure and knowledge of the rights being compromised in the agreement. The acknowledgment must be signed before a lawyer, outside the presence of the other spouse. Surely an unenforceable oral understanding is not enough, particularly one that never comes to fruition either before the transfer, before the bankruptcy, or within a reasonable time thereafter. This is not an issue of fraud or knowledge, but simply the adequacy of the consideration. By focusing solely on good faith, the court ignored the statutory requirement of good consideration. Evidently the judge did not wish to apply the statutory test that may have invalidated this transaction, because the spouses and their lawyers had acted honourably, from a matrimonial law perspective. Suffering, confusion and additional legal fees would be inflicted upon this family if the transaction were unravelled.]

35. **Sham trust**

Biggar, Re (2005), 16 C.B.R. (5th) 1 (B.C.S.C., November 29 2005), aff'g (2004), 50 C.B.R. (4th) 44 (B.C. Master, March 3 2004): A formal trust declaration stated that the bankrupt held half his shares in a company in trust for his wife. It was signed 16 years before his bankruptcy during a company reorganization, but never acted upon until the husband's bankruptcy. The company accountant had never been informed that she owned

shares, the bankrupt had represented to third parties that the shares were his, and he had executed agreements as sole owner of the shares. Held: the agreement was ineffective as a trust. The bankrupt had always dealt with the shares as his alone, apparently with the wife's knowledge, and never indicated any encumbrance on the shares until the bankruptcy. The trust declaration was never intended to be acted upon as a transfer of the shares nor to take effect according to its terms.

36. **This guy had some gall**

Stoneman v. Gladman (2005), 16 C.B.R. (5th) 78 (Ont. S.C.J., July 22 2005): The bankrupt cannot sue, after his discharge, to enforce a secret pre-bankruptcy agreement to transfer his assets to the Defendant, then get half the assets back after his discharge: illegal contract, action dismissed.

F. MARITAL ISSUES

37. **The bankrupt is not bound by his own separation agreement signed while bankrupt [?]**

Hamilton v. Hamilton, [2005] B.C.J. No. 2667 (S.C., December 6 2005): A bankrupt has no capacity to waive or release his rights for matrimonial property division under the B.C. Family Relations Act. So the separation agreement he signed in the wife's favour, while bankrupt, was ineffective to prevent him, after his discharge, from suing her for property division. [RAK: nothing wrong with a bankrupt spouse waiving his right to claim for property division, because until he does so, he holds no vested property right in wife's assets; the only asset he holds is a personal right to make the claim. There is no policy reason why a bankrupt spouse should not be permitted to release his or her right to claim property division, since that right has not yet become property of the estate per *Bosveld*. Since the bankrupt husband, but not his trustee, had the sole right to commence the claim, why should the husband not retain the right to release it?]

38. **Phoney marital separation, to gain advantage in bankruptcy proceedings**

Tremblay (Syndic de), [2005] J.Q. no 17207 (C.S.Q., 16 novembre 2005): Double bankruptcy where the spouses both fraudulently asserted they were separated when really they were always cohabiting. *W.F. v. M.S.F.*, [2005] B.C.J. No. 453 (S.C., March 4 2005): During a period of marital separation, the wife had obtained a $2,000 monthly support order. The spouses subsequently reconciled. The husband then filed a commercial proposal, falsely claiming a $2,000 support deduction, pursuant to the order, on the basis of 'separate under same roof'. The proposal was accepted and approved. The truth only came out in matrimonial court when, two years later, they separated permanently.

39. **Sham separation agreement to defeat creditors**

Hawco v. Myers (2005), 252 N. & P.E.I.R. 121 (Nfld. & Lab. C.A., December 7 2005): The spouses separated after 16 years of marriage, two children in their 20's. Their separation agreement was prepared by the husband, a then non-practicing lawyer, with advice from independent counsel. He had paid no support in the 3 years since the separation. The agreement provided for payment to her of $2,000 monthly child support and $1,000 monthly spousal support, both retroactive to the separation date; and $100,000 compensatory support with interest from the date of separation: total instant arrears of $220,000. The husband's intention was to create substantial child and spousal support arrears so as to give the wife priority against his other creditors over a substantial fee from litigation that was nearing completion. At the time he had been unemployed for 3 years, and he believed that she would give him half the money. Held on appeal: On the facts, the wife was not part of the husband's scheme. As to whether it is improper for a separation agreement to put the wife and children ahead of other creditors:

> "Whether a separation agreement can be attacked by creditors of one of the parties to the agreement depends on a number of factors. Trying to get the best for oneself (on one's children) per se cannot be equated with intent to defraud other creditors."

However, when the agreement created a $217,000 support debt, this exceeded the most optimistic view of the money he would be receiving or earning; it bore no relation to reality, and had no realistic relationship to his ability to pay, nor did the retroactive arrears

or the lump sum. The agreement was a sham drafted to create an artificial priority. It was contrary to public policy to uphold such artificial priorities.

40. **Family Court grants bankruptcy order**

Mgrdichian v. Mgrdichian (Ont. S.C.J. #04-FD-299671-FIS, Backhouse J., March 10 2005, the author acted as the wife's insolvency counsel): The husband declared bankruptcy with $28,000 credit card debt, substantial support arrears and a $2,000,000 equalization claim by the wife. The wife was destitute. The wife moved in matrimonial court under s. 69.4 for leave to continue her conspiracy and fraudulent conveyance action against the husband and his brother. The husband and his brother objected to jurisdiction, and sought to have the motion heard in bankruptcy court. Held: all Superior Court judges have jurisdiction to deal with bankruptcy matters. It would be costly to require separate motions in different courts. There is no restriction on a Superior Court Judge making orders to lift the stay. Here, the trustee was unlikely to pursue the fraudulent conveyance proceedings because there were no funds in the estate; the trustee had confirmed this by letter. It was just and equitable that all these claims proceed in the family law action. The substantial issues were the wife's claims for custody, support and equalization. The facts suggested that his purpose in declaring bankruptcy was to defeat her claims. So leave to proceed was granted.[24]

41. **Family Court puts the screws to the husband if he declares bankruptcy**

Bishop v. Bishop, [2005] N.S.J. No. 324 (S.C., August 8, 2005): Trial over support and property division. The spouses owed $34,000 of joint matrimonial debts incurred during cohabitation. The husband was holding the creditors off pending resolution of the matrimonial dispute. He had threatened to declare bankruptcy.

> "¶36 It is appropriate to hold Mr. Bishop responsible for the payment of the matrimonial debts. He has ability to earn income in the future ... Should Mr. Bishop fail to pay all of the debts, and should Ms. Bishop be required to pay any of the debts, she would be entitled to apply for an increase in any spousal support order ...

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[24] Consider also *McCrossan v. McCrossan* (Ont. S.C.J. (Family Court), Milton No. 4276/05, Murray J., February 10, 2006, the author advised the wife's matrimonial counsel), where the family court granted an order exercising jurisdiction under Part XIII (International Insolvencies) of the BIA.

> ¶70 .. [I]f Mr. Bishop makes an assignment in bankruptcy or a proposal under the *Bankruptcy and Insolvency Act*, which has the effect of requiring Ms. Bishop to pay any of the matrimonial debts, she will be entitled to apply for a variation in spousal support to cover any amount she is required to pay. This provides Ms. Bishop with a complete indemnity with respect to the matrimonial debts."

G. BANKRUPTCY PROPOSALS

42. **Bankruptcy proposal does not trump professional discipline penalties**

Hover, Re (2005), 10 C.B.R. (5th) 19, 251 D.L.R. (4th) 263 (Alta.C.A.): The provincial dental association fined a dentist $43,000, payable at $2,500 monthly, on terms that his dental licence would be suspended in the event of non-payment. He filed a proposal and claimed that the fine could not be enforced as it would prevent completion of the proposal. Held: His licence can be suspended for non-payment despite the proposal. There is no operational conflict between provincial regulatory functions and the BIA. The fine was ancillary to the disciplinary function, hence the consequences of non-payment are not stayed by the BIA.[25]

43. **Can a consumer proposal authorize the administrator to extend time to pay?**

(a) Yes: *Williams, Re* (2005), 10 C.B.R. (5th) 300 (B.C. Registrar, January 27 2005): OK for a consumer proposal to give the administrator power to extend time for payments for up to 5 years. Any term is OK provided it does not violate or offend the BIA.

(b) No: *Sztojka, Re*, [2005] O.J. No. 5551 (Ont. Dep. Registrar Nettie, December 23 2005): The power to extend time to pay is the same as a power to waive default, which cannot be delegated to the inspectors or the administrator. Therefore a consumer proposal cannot provide that the inspectors or administrator can cure or waive default,

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[25] See also *Strathcona County v. Fantasy Construction Estate (Trustee of)* (2005), 16 C.B.R. (5th) 88 (Alta. Q.B.,) ¶45-46: A public agency may enforce provincial statutory obligations after bankruptcy, ie. enforce compliance with a public duty, and by doing so it does not become a "creditor"; but once it exercises a statutory authority to do what ought to have been done by the bankrupt (here, remedial environmental cleanup) and seeks to recover the cost, it becomes a creditor subject to the BIA.

either before or after a deemed annulment. The court cannot amend the proposal at the court approval stage to delete the offending provision.

44. Section 178 debts are wiped out through acquiescence to a consumer proposal

Pleau (Proposition de), [2005] J.Q. no 17857 (C.S.Q., 30 novembre 2005): Deemed approval of a consumer proposal, by simply not voting, constitutes "assent" to the proposal by a creditor, and therefore extinguishes any remaining s. 178 claim (here, fraud). [RAK: This decision means that s. 178 creditors are at risk unless they vote against a consumer proposal. The proposed wording in Bill C-55 does not rectify this problem.]

45. Change the language in bankruptcy proposals

Anthopoulos, Re (2005), 11 C.B.R. (5th) 189 (Ont. S.C.J., April 21 2005): Use of the language "Sections 91 through 101 of the BIA shall not apply" in a proposal, does not prevent creditors from bringing claims against pre-filing date transferees under the *Fraudulent Conveyances Act*, the *Assignments and Preferences Act*, or other applicable legislation, or at common law based on fraud.

46. Claim for equalization re-vests automatically after the bankrupt's discharge [?]

Johnson v. Johnson (2005), 7 C.B.R. (5th) 226, 191 Man. R. (2d) 41, [2005] 7 W.W.R. 584 (Master, January 7 2005): Both spouses declared bankruptcy after separation. They consented to an order that the wife was entitled to an equal sharing of all exempt family assets, with no deduction for the value of husband's assets at date of marriage. On the subsequent marital accounting, the Court distinguished *Suppes*,[26] to apply the legal fiction and divesting language of the BIA to exempt property. So all property vests in the trustee, and is governed by s. 67. It is the trustee, as goalkeeper, who determines what is exempt.

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[26] *Suppes (Re)*, [1997] M.J. No. 152 (Man. Sr. Registrar): Husband filed a proof of claim in wife's bankruptcy for personal items in possession of wife, and equalization under MPA. "These claims relate to property which is listed in the trustee's Report as exempt. The stay of proceedings does not apply to exempt assets. These aspects of the claim are not provable in bankruptcy."

> "The trustee during this time obviously made the decision that the creditors of the wife's estate had no monetary interest in her then unrealized marital property claim."

Her right to claim an accounting re-vested in her automatically upon her and the trustee's discharge, and also through a specific written assignment from their mutual trustee. Her claim can proceed since they are both discharged, their mutual trustee is discharged, the assets in issue have all been returned to the parties per *Ramgotra*, no creditor is advancing a claim against either spouse regarding the exempt assets. While the wife's claim was provable in his bankruptcy, she does not lose her MPA and homestead rights. Her homestead rights run with the land and the BIA does not remove them. The cause of action, while provable in bankruptcy, has been returned to the wife. The ability and consequences of a trustee in making such a decision re marital property claims must be respected by this court. [RAK: Why perpetuate this sequence of legal fictions? Why should her creditors have any right to pursue the husband's exempt assets? Why should she have to get her trustee's assignment to pursue this claim? What interest is served to require this? Why should the decision of their joint trustee, who is in a pure conflict of interest, be respected? It makes much more sense to say that matrimonial property claims against exempt assets neither vest in the trustee nor are stayed or extinguished by bankruptcy.] Contrast this result with *Demers c. Lapierre*, [2005] J.Q. no 15121 (C.S.Q., 11 octobre 2005): The bankrupt owned a property that the Defendant, before bankruptcy, had trespassed upon and removed trees. The trustee notified the mortgagee that he disclaimed any interest in the property. After the bankrupt's discharge she sued for trespass and cleanup costs. The trustee was subsequently discharged. Held: since damages were not nominal, the cause of action accrued to the trustee. The disclaimer returned the property to the bankrupt. But the cause of action remained with the trustee. The trustee's discharge did not have the effect of returning it to the bankrupt, as inspector approval or court order is required under BIA s. 40. The Plaintiff never obtained an assignment from the trustee, and had not requested an adjournment for that purpose. Action dismissed.[27]

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[27] Related case: *Lichtenfeld v. Conifer Contracting Ltd.*, [2005] O.J. No. 3446 (S.C.J.,August 12 2005): Breach of contract action by Plaintiff re construction of his home, cause of action arose before his bankruptcy, not disclosed to his trustee. Trustee released its interest in the home, perhaps would not have if had known. Trustee wrote letter saying it had no interest in the proceedings, though

H. MISCELLANEOUS CASES

47. Security for costs

(a) Security for costs can be ordered against the bankrupt for his bankruptcy discharge hearing where there are unpaid cost orders against him and he was trying to manipulate the system: *Moss, Re* (2005), 9 C.B.R. (5th) 80 (Man. Q.B.), leave to appeal refused (2005), 15 C.B.R. (5th) 123 (C.A.). The security was later fixed at $15,000: (2005), 15 C.B.R. (5th) 128 (Man. Registrar)

(b) Security for costs was ordered against a Plaintiff who had filed a bankruptcy proposal. The proposal, which was accepted, provided for the proceeds of the lawsuit to be paid to the Plaintiff's trustee for distribution to creditors: *Enescu v. Wawanesa Mutual Ins. Co.*, [2005] O.J. No. 4836 (Div. Ct.), refusing leave to appeal from (2005), 17 C.B.R. (5th) 283 (Ont. S.C.J.).

48. Possible world record for nine-time bankrupt

Nikki Mandi Carlin, age 55, was convicted in Australia on June 10 2005, on seven Bankruptcy Act charges, including false declarations in her Statement of Affairs and obtaining credit by fraud. She was given a four month suspended jail sentence. She had declared bankruptcy nine (9) times under various names since 1986. She continually accrued debts then declared bankruptcy under different names, often while already bankrupt under another name. She did not tell her various trustees about her previous names or bankruptcies.[28]

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complained about the non-disclosure. Held: Trustee had not disclaimed its interest by notice of quit claim or specific disclaimer. To permit the Plaintiff to proceed would defeat the purposes of the BIA because the money should go to the creditors. Held: No cause of action.

[28] Insolvency and Trustee Service Australia (ITSA), press release June 15 2005

49. **Examine the French version of the BIA if the English version is ambiguous**

Pyke, Re (2005), 8 C.B.R. (5th) 308 (N.S. Registrar): Where the English version of the BIA is ambiguous, the court should first look to the French version to determine whether its meaning is plain and unequivocal. If so, there is no need to resort to further rules of statutory interpretation.[29]

50. **Bankruptcy does not automatically disqualify an executor**

Bartel v. Bartel, [2005] M.J. No. 367 (Man. Q.B., October 17 2005) Bankruptcy does not automatically disqualify an executor. It depends on the circumstances of the bankruptcy and the conduct of the bankrupt. The onus lies on the person seeking disqualification.

51. **Annulment**

(a) *Hannay (Bankrupt), Re* (2005), 16 C.B.R. (5th) 52, 21 R.F.L. (6th) 46, 266 Sask. R. 223 (Registrar June 8 2005): The husband had divested himself of his 42% interest in the family farm shortly after separation, under extremely suspicious circumstances. The price was $485,000 payable over 14 years without interest or security. The husband flouted a matrimonial court order to pay the first instalment of the sale price, $34,000 into trust and then pay half of that instalment to the wife as interim disbursements. The matrimonial court strongly criticized the husband and ordered him to pay the $17,000 he did receive from his father, into court, and indicated that there would be serious judicial scrutiny into the financial transactions. He declared bankruptcy ten days later. His $111,000 debts included a suspicious $55,000 debt to his parents not shown in his matrimonial financial statement. His assets were $382,000. His financial evidence was contradictory. The Trustee advised the court that he could not pay his debts as they came due. Annulment granted. The "sale" was a transparent and naive attempt to shelter his assets and invoke suspicious debts. He had incurred $19,500 in credit card debt in the 6 weeks before bankruptcy. He presented no evidence to the court. He was not insolvent and the bankruptcy was an abuse of process designed to protect the farm transaction from judicial

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[29] Applying *R. v. Mac*, [2002] 1 S.C.R. 856 (S.C.C.)

scrutiny. The registrar doubted that he had jurisdiction to make a vesting order under s. 181. Instead, he made an interim non-dissipation order under the rules of court, on the understanding that the matter would reappear in family court at which time a further and better order for preservation might be made. [RAK: Given the possible jurisdictional limitation, it is prudent to bring an annulment motion before a judge rather than a registrar.]

(b) *Sten, Re*, [2005] O.J. No. 10 (Registrar Nettie, January 5 2006, the author represented the bankrupt's wife): Annulment refused. Second marriage, 13 years. Interim support order, unpaid. Bankrupt had concealed assets from trustee, incurred debts in a design to prejudice the wife and carry out his threat that she would be left on the street. His bankruptcy immediately followed provincial support enforcement measures through suspension of his drivers licence and seizure of his Canadian passport. Court concludes that the bankruptcy was likely motivated by revenge and a desire to pay back the wife for her assertion of her matrimonial rights. An annulment should be granted only in the clearest of cases, as it will have a clear negative impact on all of the creditors, except the wife who will personally benefit from it. The husband was not before the court, as he had moved back to Czech Republic and had not informed the trustee of his address, and the motion may not have come to his attention. He left $10,000 worth of ammunition in his safe, but court doubts that it has that value. Any ambiguity should be resolved in favour of the bankrupt in view of the extraordinary relief requested. The civil standard of proof must be satisfied to a high standard. The Wife's evidence was somewhat dated (3 years old) of his dealing in substantial deposits and withdrawals from his bank account (he disclosed no business in the 5 years before bankruptcy); court rejects evidence that, according to bankrupt's mother, he has purchased property in the Czech Republic. The onus of proof must be satisfied to a high standard.

> ¶22 "If the assignment is annulled, the house becomes available to Sten in family court, where she might reasonably expect to obtain a charging order against it to secure her ongoing support. She might even be awarded all or part of the Bankrupt's share of it as lump sum support, or otherwise. These outcomes are not possible in a bankruptcy, where that $40,000 will be available to all of the unsecured creditors. Clearly, it is in Sten's personal interest to annul the bankruptcy, and, while this is

certainly not improper, the Court is charged with balancing the rights of the Bankrupt, all of the creditors, and the integrity of the insolvency system ...

¶23 In addition, while this Court is, and must be, mindful of legitimate policy concerns in the area of family law, it is also charged with executing policy in the area of insolvency law. The issue comes down to which of the sound policy needs of ensuring that a spouse, such as in Sten's very sympathetic situation, has this family asset available to her, more or less exclusively, to satisfy her legitimate economic needs as a spouse, or the distributive scheme of the BIA, which gives much less credence to the status of Sten as spouse and attempts to distribute the assets without regard to type of claimant (i.e. a bank is seen as no more or less sympathetic than a spouse, and both are treated equally if their debts are equal in rank), shall have precedence. This is always a difficult balance for any Court. However, given that Parliament has seen fit to include the majority of claims such as Sten's in the pool of ordinary unsecured creditors, and that to accede to Sten's request would be to cause a distortion in the distribution of the Bankrupt's assets amongst all of his creditors, I am guided by Mr. Klotz's own words, that such a result should be reserved for the most egregious of cases, when, as I have found, the Bankrupt is insolvent, and technically entitled to make an assignment, so long as there is no fraud or abuse of process.

¶24 Given the lack of hard facts, which might still be obtained through the use of the quasi-criminal provisions of the BIA, together with the clear personal motivation of Sten for an annulment, I am hard pressed to conclude from her affidavit that there has been an abuse of the Court's process or a fraud committed, for which the proper remedy would be an annulment. On a balancing of equities, this is not one of the "most egregious of cases" where the distortion and preference caused by an annulment is warranted. I have found the Bankrupt to be insolvent. Despite the Bankrupt's likely motivation in making his assignment, I do not find that motivation alone to be an abuse of process. Neither do I find any evidence of fraud by the Bankrupt on the Trustee or the body of creditors. The Bankrupt, having sought it, is entitled to the protection of the BIA. He is also subject to its burdens."

On appeal, [2006] O.J. No. 1249 (S.C.J., Cumming J., March 30 2006), the bankruptcy was annulled on the basis of fresh evidence, namely conclusive proof (discovered after the earlier hearing) that the bankrupt was the sole owner of real estate, estimated at $300,000, in the Czech Republic. This established that he was solvent; service of the material was established upon him.

"¶15 The title to the Sten home in Toronto is now in the name of the Trustee. The title is to so remain in the Trustee's name pending any order of the Family Court transferring title to Ms. Sten or until this Court otherwise orders."

52. **Contempt**

(a) Penalty: *Bressi (Trustee of) v. 1418146 Ontario Inc.* (2005), 13 C.B.R. (5th) 35 (Ont. S.C.J.): The bankrupt was uncooperative throughout the bankruptcy and breached

numerous court orders. He had withdrawn $50,000 from trust on the very day he declared bankruptcy. He was held in contempt. Penalty considerations: Will he do the same thing again, after discharge? What must be done to prevent others from ignoring the requirements that a bankrupt must meet in the bankruptcy proceeding? Is a fine sufficient to match the shameless and egregious conduct that has taken place throughout the proceeding or is a committal to prison the only act that will bring home the seriousness of breaches of the bankruptcy system and a person's failure to comply with court orders? Penalty in this case: Pay $50,000 in one year, else six month jail term.

(b) *Brit Corp. v. Triumbari Containers Ltd.* (2005), 13 C.B.R. (5th) 165 (Ont. S.C.J., July 8 2005): The creditor obtained a judgment and attempted to conduct a judgment debtor examination. The debtor had numerous non-attendances, refusals, non-production of documents and unanswered undertakings. He declared bankruptcy before the return date of a contempt motion. Held: bankruptcy stays the contempt motion, which is an integral part of the civil action. [RAK: Court does not consider numerous reported decisions to the contrary.[30]] *Cf. Turkawski v. 738675 Alberta Ltd.* (2005), 16 C.B.R. (5th) 123 (Alta. Q.B., May 6 2005): The debtor declared bankruptcy after the court committed him to jail for contempt re non-disclosure in judgment debtor examination proceedings arising from a fraud judgment. Held: while the bankruptcy affects his right to dispose of any of his property, it does not affect the application to him of any laws of general application, including contempt. The bankruptcy is irrelevant to the committal proceedings.

(c) *MacDougall v. Larade* (2005), 11 C.B.R. (5th) 112, 15 R.F.L. (6th) 352 (N.S.C.A., April 29 2005): In their divorce settlement, the husband agreed to pay a $28,000 joint credit line. Six months later he declared bankruptcy, having paid only interest. The bank then sued the wife. Two years later, the court found his conduct to be "contemptible" and therefore found him in contempt, declared that the bankruptcy was fraudulent, ordered him to pay her $30,000 with $2,500 costs, and directed that the wife was a secured creditor for the $30,000. On appeal: The judge had essentially concluded that the bankruptcy itself was a fraud, effected for a fraudulent purpose. This was a collateral attack on the validity

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[30] See R. Klotz, *Bankruptcy, Insolvency and Family Law, 2d ed.* (2001, Carswell), §13.3

of the bankruptcy itself, which was improper under the guise of a contempt proceeding, especially in the absence of notice to the trustee; and the facts did not support the conclusion. Order set aside, without prejudice to other remedies.

53. **The Court is not fond of an "insolvency clause" on partner's bankruptcy**

Backman v. Wendzac Ltd. Partnership (2005), 11 C.B.R. (5th) 193 (Ont. S.C.J., April 19 2005): Section 38 creditor (bankrupt's wife) pursued the husband's limited partnership interest that he had concealed from his trustee. The partnership agreement had an insolvency clause that forfeited a partner's interest upon default of the agreement, and required a forced sale of the partner's interest to the remaining partners, at a sharply reduced value, upon a partner's bankruptcy. Held: No forfeiture of partnership interest on default where the partnership failed to follow the notice provisions set out in the agreement. The insolvency clause was probably inoperative because it was not put into operation at the time of the alleged default.

54. **Wrongful dismissal suit is prejudiced by bankruptcy**

Mann v. Northern B.C. Enterprises Ltd. (2005), 11 C.B.R. (5th) 114 (B.C.C.A.): An undischarged bankrupt director may not continue his wrongful dismissal suit on behalf of his solely-owned management corporation, or self-represent it, even though his trustee was indifferent.

55. **Over-aggressive collection agency**

Mulders v. TCH International Inc., [2005] O.J. No. 727 (Sm. Cl. Ct., February 15 2005). Debtor recovers $5,000 damages from overly aggressive collection agency whose collections officer telephoned before sending an introductory letter, did not introduce himself in the phone call, threatened to place a lien on the house 'tomorrow', discussed

confidential information with the debtor's husband, kept on calling after the debtor told him to communicate only in writing.[31]

56. **Golf club membership saved by annulment**

Battenberg v. Union Club, [2005] NSWSC 242 (Australia, New South Wales S.C., Eq. Div., Campbell J., March 30 2005): The bankrupt's membership in a prestigious golf club was revoked automatically upon his bankruptcy. When the bankruptcy was later annulled, the court ruled, in what appeared to be a hotly contested case, that the annulment had retrospective effect on the forfeiture of his membership: he was back in!

Robert A. Klotz

KLOTZ ASSOCIATES
Barristers & Solicitors
Suite 405
121 Richmond St. West
Toronto, Canada
M5H 2K7

(416) 360-4500
Fax: (416) 360-4501
Web: www.klotzassociates.com

[31] Related case: *LaFleur v. Canadian Bonded Credits Ltd.* (2003), 68 O.R. (3d) 754 (Sm. Cl. Ct.): Overly zealous collections effort through frequent automated phone calls to debtor's brother who did not live with debtor. Debtor was awarded $4,500 damages against the collection agency.