CAIRP 2008 PERSONAL INSOLVENCY UPDATE

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RESP’s

*Re Vienneau* [2007] N.B.J. No. 365 (N.B.Q.B., Registrar Bray)

RESPs vested in the trustee. The funds were not trust funds because the parents retained the right to withdraw the funds at any time. However, the funds were returned to the parents because the trustee had already disclaimed any interest in the RESP’s.

Child Tax Benefits

*MacKinnon v. Deloitte & Touche Inc.* [2007] S.J. No. 46 (Sask. Q.B., Registrar Herauf)

Child tax benefits deposited directly into an RESP prior to bankruptcy are not exempt and are property of the bankrupt divisible among her creditors. The court permitted deductions for the amount used by the child of the bankrupt for education after the bankruptcy. The court directed the bankrupt and trustee to agree on the after tax value to be paid by the bankrupt to estate, excluding the government grant portion of the fund. If the parties could not agree the court permitted the trustee to collapse the RESP and retain the after tax value of the fund.

Family Assets

*Montalban v. Montalban* [2007] BCSC 1266 (Martinson J).

After the bankruptcy of her husband, the non-bankrupt spouse applied for reapportionment of family assets in her favour. The court found that no portion of the family assets had vested in the trustee because there had been no separation agreement, divorce or other triggering event so the court could reapportion the family assets in favour of the non-bankrupt spouse.

Proposals

*Re Wandler* [2007] ABQB 153 (Alta Q.B., Topolinski J.).

CRA opposed court approval of a Division I proposal because it did not comply with section s.59 (3) of the *BIA* by providing reasonable security for the performance of the proposal. The debtor’s assets were less than 50 cents on the dollar of his unsecured debt and he did not appear at the hearing or lead evidence to show that he should not be justly held responsible. The court dismissed the application to approve the proposal, finding that the minimal initial payment required by the proposal was not meaningful security.

Consumer Proposals

*Re Koskins* (2007) 32 C.B.R. (5th) 225 (Ont. S.C.J., Registrar Nettie)

The OSB opposed the application of the administrator to validate its issuance of a Certificate of Full Performance when the debtor had made all payments except $100.00 before the required completion date of his consumer proposal. The certificate was set aside because the proposal was deemed to be annulled pursuant to section 66.31 of the *BIA.* The administrator was directed to give notice of the order to the debtor and creditors and to retain counsel to bring an application to seek leave to make a further proposal.

Student Loans

*Re Sims* [2008] ABQB 121 (Alberta Q.B., Registrar Laycock)

A student loan was not discharged in bankruptcy when the bankrupt had graduated on April 13, 1997 and made an assignment on April 26, 2007. The *Canada Student Loan Regulations* provide that a person ceases to be full-time student on the last day of the last month of the period of studies so the bankruptcy had occurred within ten years from the date the bankrupt ceased to be a student and the debt was not discharged under s. 178(1)(g) of the *BIA*.

ICBC Debts

*Re Thompson* [2007] BCSC 742 (Meiklem J.)

At an examination for discovery in a civil action and in a settlement agreement, the bankrupt admitted that he had conspired to defraud ICBC. The portion of the debt owed by the bankrupt to ICBC for money the bankrupt had obtained by fraudulent misrepresentation survived the bankruptcy.

Tax Debts

*A.G. Canada v. Keith G. Collins Ltd.* 2007 MBQB 141 (Simonsen J.)

CRA was found to have a security interest in the proceeds of the bankrupt’s RRSP as a result of its registration of its deemed security interest in the personal property registry prior to the bankruptcy without the bankrupt’s consent.

*Re Cox* [2007] BCSC 1665 (Cole J.)

A proposal contained a term that CRA could take no action to enforce its security interest arising from its charge filed against the debtor’s property under the *Income Tax Act* and that CRA would discharge its charge upon issuance of the Certificate of Full Performance of the proposal. CRA filed as an unsecured creditor and voted against the proposal, but the proposal was accepted by the majority of the creditors.

The debtor completed the proposal and received a Certificate of Full Performance, but CRA took the position that it was not bound by the terms of the proposal and filed an Amended Proof of Claim as a secured creditor.

There was no evidence that the value of the property had increased or had not been accurately valued at the time of the proposal and CRA had taken no steps to appeal the proposal, so the court found that CRA was bound by the proposal, including the clause preventing it from taking action to enforce its security interest.

Discharge of Bankrupt

*Re Alexander* [2007] BCSC 564 (Tysoe J.)

CRA opposed the discharge of a bankrupt with a tax debt of $422,000 plus interest and penalties on the basis that his actions in investing monies in a tax shelter which was then reassessed was rash and hazardous speculation as was his investment in a speculative oil and gas project at a time when the assessment of his tax debt was under appeal. The bankrupt had no income and had developed health problems that would likely prevent him from working in the future. The bankrupt’s wife had significant assets and income.

The court held that the investment in the oil and gas investment was speculative and therefore the bankrupt ought to be justly held responsible for the value of his assets not being worth 50 cents on the dollar. However, the court found that it was inappropriate to order a monetary conditional discharge when the only realistic source of payment was the bankrupt’s spouse. The application was adjourned for six months so that better evidence of the bankrupt’s diagnosis and prognosis could be made available to the court.

*Re Zinkiew* [2004] BCSC 1831 (Registrar Bouck)

The bankrupt was justly responsible for the fact that his assets did not equal 50 cents on the dollar when he had refused to pay income tax based on advice from the Institute of Global Prosperity that the payment of income tax violated his rights under the Charter of Rights and Freedoms. Although the bankrupt was a stay-at-home dad, the court based its order on his historical earnings and his perceived ability to pay and discharged him on condition that he pay his estate $36,000.00.

*Re Boucher* [2007] BCSC 644 (Rogers J) and BCSC 1668 (Registrar Bouck)

On appeal, the court held that the registrar had erred in presuming that the bankrupt had the ability to access equity in property registered in his wife’s name to pay a conditional order of discharge of $100,000. The conditional order was reduced to $50,000 when remitted to the registrar who noted that the bankruptcy was tax driven, the bankrupt had the ability to make payments to the estate, had been previously bankrupt and was not rehabilitated.

*Re Sidhu* [2008] BCSC 90 (Master Young)

The bankrupt was convicted of dangerous driving causing death. The court found that the amount owing by the bankrupt to ICBC as a result of the accident was not a debt that survived his discharge pursuant to s.178 (1). However the bankrupt’s discharge was made conditional upon payment of $21,600.00 over six years.

*Re Gamaleldine* [2007] O.J. No. 2112 (Registrar Nettie)

The bankrupt’s discharge was opposed by the trustee and by AMEX. The bankrupt claimed that he had gambled away his assets, most of his business assets had been seized by his landlord and that he had burned all of his financial records. The court refused the discharge of the bankrupt for a second time, finding that the bankrupt had been less than forthright with the court and should have produced some evidence to support his claims. The court found that the bankrupt had the burden to recreate records to support his story.

*Re Cable* [2007] BCSC 1004 (Masuhara J.)

The bankrupt had a made payment to his spouse in the amount of $36,600 three days after the date of his Notice of Intention to Make a Proposal. The court found that this was clearly a preference and ordered the bankrupt discharged upon payment of the same amount, finding that the bankrupt was highly qualified and capable of earning income although he had no job at the time of the hearing.

*Re Schmidt* [2007] BCSC 1572 (Registrar Bouck)

The bankrupt had debts arising from a motor vehicle accident for which he was held criminally responsible and jailed for 3 months. The bankrupt’s discharge was adjourned so that his ability to work and earn income in the future could be canvassed.

*Re Mount* [2008] BCSC 517 (Registrar Bouck)

A 37 year old non-practising bankrupt lawyer in ill health was discharged on condition that she pay $9,412, as suggested by the trustee. The bankrupt had incurred significant credit card debt on luxury items in the year prior to her bankruptcy when her only income was that of an articled student. The bankrupt’s spending was reckless and she had continued to trade while insolvent, so facts under section 173(1)(a) and (c) had been proven.

Sale of Property by Trustee

*Re Appleyard* [2007] O.J. No. 1329 (Ontario Superior Court of Justice, Ground J.)

The petitioning majority creditor opposed the motion of the trustee for the sale of the bankrupt’s interest in property to her co-tenant. The court found that the proposed sale was commercially reasonable and that the property had been adequately exposed to the market, including being listed on MLS. Although the petitioning creditor’s last minute offer was higher, the offer put forward for approval by the trustee resolved other issues including a dispute over a right of first refusal made by the co-tenant.

Substitution of Trustee

*Re Lloyd* [2007] M.J. No. 3552 (Manitoba Q.B., Registrar Sharp)

The bankrupt’s discharge hearing was adjourned and his trustee advised him that it was his responsibility to proceed with the application. The trustee took no steps to collect surplus income payments and obtained its discharge. The bankrupt requested assistance with his discharge and the trustee advised that it would require an advance payment of $1,200. The bankrupt went to another trustee who assisted him and the bankrupt was discharged on condition that he pay $10,200 for outstanding surplus income. The court granted the application of the second trustee to be substituted as the trustee of the bankrupt.

Liability of Trustee

*Re Braich* [2007] BCSC 1604 (Brenner C.J.)

The bankrupt filed an action in Washington against his trustee and counsel for the trustee. The court found that the bankrupt could not advance any claims including claims outside of Canada against the trustee or the trustee’s solicitor without first obtaining leave of the court pursuant to the provisions of s.215 of the BIA.

Trustee’s Fees

*Re Biller* [2007] BCSC 1081 (Master Donaldson)

Prior to its substitution, the trustee’s time charges amounted to over $180,000 but it reduced its fees to $85,000 prior to the hearing. The total recovery in the estate had been $160,000.00. The court reduced the substituted trustee’s fees to $70,000 due to its delay and failure to realize on assets. The substituted trustee had to bear the responsibility for over $12,000 in legal fees incurred without the authorization of the inspectors.

*Re Prentice* 2008 BCSC 526 (Master Hyslop)

The OSB disputed the amount sought for remuneration by the trustee due to the delay in the trustee requesting that the estate be converted from a summary to an ordinary administration after the trustee had retained a lawyer to obtain an inheritance the bankrupt refused to deliver to the estate. The Court allowed $9,000 for fees instead of the $15,720 sought by the trustee.

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