**CAIRP 2010 PERSONAL INSOLVENCY UPDATE**

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**Collection Outside of Bankruptcy**

*Morgan & Partners Inc. v. Summit Credit Corp.* 2010 ONSC 731 (Ontario Superior Court of Justice, Eberhard J.)

Debtor made a consumer proposal and Summit filed as an unsecured creditor. During the period of the proposal the debtor sold his house but Summit refused to lift execution registered against the property so the sale could not complete. Although the proposal had not been fully completed the court lifted the execution so as to not give Summit an advantage over the other unsecured creditors.

*Re Dhaliwal* 2010 ONSC 793 **(**Ontario Superior Court of Justice, Morawetz J.,)

Creditors ignored bankruptcy and accepted a payment on account of a debt owing to them that would survive the bankruptcy. The court found that generally creditors are to share equally in the assets of the estate in the absence of an order made under s.38 of the BIA and a creditor who has received funds from the bankrupt is obliged to pay those funds to the trustee for the benefit of the estate. However, in this case the funds either came from a third party source, in which case they were not part of the estate, or were after acquired property of the bankrupt which had not yet vested in the trustee. The bankrupt had a right of possession and a right of disposal of the property until the trustee intervened. The creditors had acted in good faith and was therefore protected by s.99 (1) of the BIA and did not have to pay the funds to the trustee.

**Family Law Issues**

*Re Cunningham* 2009 ABQB 758 (Alberta Court of Queens Bench, Shelley J.)

Bankrupt made assignment after the court had made an order in family law proceedings giving his wife unequal distribution of matrimonial property. The judgment in the matrimonial proceedings did not effect in an in species distribution and did not create a property interest, trust or charge over the bankrupt’s property. Since the judgment was monetary only the property vested in the trustee. However, the court did lift the stay of proceedings in the bankruptcy to permit the wife to pursue her judgment against the bankrupt’s BIA exempt assets, since the bankruptcy was a deliberate attempt to defeat the matrimonial judgment. The wife was directed to pay funds that she had garnished to collect the money owing to her in the matrimonial proceedings to the trustee.

*Elkaim v. Markina* 2010 ONSC 874 (Ontario Superior Court of Justice, Perell, J.)

Bankrupt made an assignment while he was a common law spouse of Markina who became the owner of two properties. The bankrupt was discharged in 2005 and the trustee discharged in 2006. The court held that the bankrupt’s constructive trust claim arising out of his separation from Markina in 2007 and commenced in 2009 did not vest in the trustee because any claim for unjust enrichment arose after the breakdown of the relationship and after the bankruptcy.

**Fraud**

*Valastiak v. Valastiak* 2010 BCCA 71

Court made an order in family law proceedings that the wife was entitled to judgment in the amount of $30,000.00 as compensation for money that her now bankrupt husband had transferred from the proceeds of the matrimonial home into a company that was held solely in the bankrupt’s name. The Court of Appeal found that the judgment survived the bankruptcy pursuant to s.178 1(d) because the bankrupt’s use of the money including treating the corporate account as his own piggy bank amounted to misappropriation, he acted in a fiduciary capacity because he held 50% of the shares of the company on resulting trust for his wife and because there was a special relationship of trust and dependency between the bankrupt and the wife.

*Healthcare Benefit Trust v. Lang* 2009 BCSC 1634 (B.C.S.C. Cole J)

Lang received long-term disability benefits under a long-term disability plan and undertook to advise the insurer of any other disability income she received, including WCB benefits. The disability insurer learned that Lang had received WCB benefits and made multiple requests for information and reminded Lang of her obligation to repay the insurer. The disability insurer obtained default judgment against Lang who then made an assignment into bankruptcy. The court found that the debt survived Lang’s discharge and found the debt was the result of a misappropriation while Lang was in a fiduciary duty because she had entered into an undertaking to advise the disability insurer of any money she received from WCB.

**CRA**

*Barr v. Barr* 2009 BCSC 1433 (B.C.S.C. R.D. Wilson J.)

Bankrupt was on title as the 50% owner of property. Shortly prior to the bankruptcy, CRA had registered certificates of judgment against the bankrupt’s interest on the title to the property. CRA filed as a secured creditor in the bankruptcy. The petition of the bankrupt’s wife that the bankrupt held his 50% interest in the property in trust for her was dismissed as none of the documentation and previous statements made by the bankrupt supported this proposition. Furthermore, CRA’s claims against the bankrupt were secured claims and survived his discharge from bankruptcy.

**Student Loans**

*Re Lau, 2010 BCSC 274 (*(B.C.S.C. Master Young)

Bankrupt applied to discharge his student loan debts of $31,000.00 and $24,000.00. He had obtained both a Bachelor of Science and a Bachelor of Arts in music. The court was not satisfied that the bankrupt had acted reasonably by taking a job for $22,800.00 after he claimed to have been wrongfully dismissed from a job of $72,000.00 without pursuing a claim against his former employer. As well the bankrupt had made sporadic student loan payments until the time of his bankruptcy while at the same time obtaining a great deal of credit without paying it off. The application to extinguish the loan was denied with leave for the bankrupt to apply again n two years.

*Re Cote* 2010 B.C.S.C (B.C.S.C. Master Bouck)

Bankrupt had applied to be discharged from bankruptcy and at the same time applied to extinguish his student loan debts which were the major debts in his bankruptcy. The bankrupt had not completed his education or derived any economic benefit from it. He did make some modest payments towards the student loan debts and had made use of the interest relief provisions. He did not have employment income sufficient to make payments towards the loan. The court noted that the suggestion made by the Crown as to a repayment program over five years did not take into account the fact that interest would continue to accumulate until the loan was repaid in full because under s.178 1.1 the entire student loan debt survives the bankruptcy. The plan would also assume that the bankrupt would remain employed as a taxi driver and his monthly expenditures would not increase in even a modest way. The court discharged the student loan debt and granted the bankrupt an absolute discharge.

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