**CAIRP 2011 PERSONAL INSOLVENCY UPDATE**

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**Discharge of Deceased Bankrupt**

*Re Simoes* 2011 BCSC 63 (B.C.S.C. Registrar Sainty)

Four cases were heard together for the discharge of deceased bankrupts who had not complied with all of their duties. Each case was decided on its own facts. Three of the deceased bankrupts had complied with all of their duties except their second counselling. They were granted absolute discharges. The discharge of the fourth deceased bankrupt was suspended for one week because he had failed to submit budgets, attend the second counselling and had not made payments as agreed at the time of his assignment.

**Discharge of Bankrupt**

*Re Rochon* 2010 BCSC 818 (B.C.S.C. Master McCallum)

At the time of his assignment, the Bankrupt was advised by the Trustee that he could include in his non-discretionary expenses, money that he was paying directly to his 19 year old daughter. However, at the time of discharge, the Trustee’s section 170 report stated that the Bankrupt owed additional excess income because the payments to the daughter were not allowed as non-discretionary expenses. If the Bankrupt had known of the Trustee’s current position previously, the Bankrupt could have asked for mediation as to surplus income or taken steps to vary the child support order. The Court found that the Bankrupt had done everything he could and should have done to comply with the Trustee and surplus income standards. He was discharged on condition that he make the payments agreed at the time of his assignment.

*Osatchoff v Pinder Bueckert & Associates Inc.* 2010 SKQB 171 (Sask. Q.B. Registrar Schwann)

33 years prior to bankruptcy, a Creditor had suffered serious injuries as a result of being struck by a car driven by the Bankrupt when he was drunk. The Bankrupt was convicted of dangerous driving and the Creditor obtained a civil judgment of $75,000. Only $35,000 was paid by an insurer and the bankrupt had paid only $100, so, with interest, amount owing was $133,000. The Bankrupt suffered from mental heath disorders, was on government disability pension and had little prospect of future employment. The Trustee initially recommended an absolute discharge but at the hearing suggested a suspension. The Bankrupt was discharged conditional on him paying $50 per month for 3 years and assigning to the Trustee 20% of any inheritance he may receive following his absolute discharge up to a maximum of $40,000.

*Re Goldstein 2011* ONSC 561 (Ont. S.C.J. Morawetz J.)

The Law Society of Upper Canada revoked a lawyer’s license and ordered him to pay costs of $60,000 because he had obtained mortgages through fraud and false pretences. The Law Society’s application that its costs award survive bankruptcy was dismissed because the costs award did not arise out of fraud on the Law Society. The Bankrupt could be held responsible for his own disbarment, inability to practice law and resulting bankruptcy. Since he had no ability to pay, his discharge was suspended for one year.

**Claims surviving Bankruptcy**

*Armstrong v Lang* 2011 BCCA 20 (B.C.C.A.)

The Court of Appeal found that a debt arising when the Bankrupt failed to pay a retroactive WCB award to the disability insurer who had provided her benefits during an overlapping period of time was a debt arising through misappropriation while the Bankrupt was acting in a fiduciary capacity. The Court found that the Bankrupt held the funds in trust for the disability insurer when she received them and was acting in a fiduciary capacity because she had an obligation to pay the funds and the ability to put them out of reach of the insurer.

**Trustee’s Fees**

*Re Harms* 2011 BCSC 379 (B.C.S.C. Registrar Cameron)

A lawyer was appointed an inspector and requested an examination of the Bankrupt. The Trustee recalled that the creditor was to pay for the examination to be conduced by the lawyer but there were no minutes recording this. After two examinations of the Bankrupt the lawyer sent the Trustee a bill for over $22,000. The Trustee agreed that the estate would pay for the examinations and settled the amount of the legal fees at $7,920.00. The Trustee’s fees were reduced from $13,334 to $9,000 due to the delay in administration of the estate as a result of Trustee’s failure to clarify the terms of the lawyer’s retainer.

**Bankrupt’s liability on Foreclosure Judgment**

*Bridgewater Bank v Simms* 2011 BCSC 303 (B.C.S.C. Master Keighley)

The Bankrupts continued to pay their mortgage payments after their assignments but defaulted prior to their discharges. The Bank sought personal judgment against the Bankrupts for any deficiency on any sale in foreclosure proceedings. The Court reviewed cases where bankrupts had continued to make payments on secured assets, and indicated that there may be a different result depending on whether the default occurred before or after the bankrupt’s discharge but adjourned the application because no deficiency had yet occurred.

**Appeal from Disallowance of Proof of Claim Property**

*Sran v Sands & Associates* 2010 BCSC 937 (B.C.S.C. Lynn Smith J.)

The Trustee disallowed a Proof of Claim Property of the Bankrupt’s brother, who claimed that he held a 50% beneficial interest in real property registered in the sole name of the Bankrupt based on an unregistered trust agreement. The Court refused to consider further evidence produced by the Appellant after the Trustee’s Notice of Dispute, because the evidence had been available previously and the Trustee had carefully explained that the Appellant should provide all possible evidence with his Proof of Claim and detailed the issues that needed to be addressed. The Court dismissed the appeal, finding that that the trust agreement was not valid because it did not define the share of the property held in trust. The Court also held that there was no resulting trust because there was consideration for the transfer of the property from the Appellant to the Bankrupt..

**Claims provable in Bankruptcy**

*Rottball v Rottball*  2010 BCSC 1038 (B.C.S.C. Master Bouck)

Assessment of wife’s costs in family law case could not proceed because her husband had made an assignment into bankruptcy and the costs award was a claim provable in bankruptcy pursuant to section 69.3 of *BIA*.

**Consumer Proposals**

*Re Schryburt* 2011 ONSC 880 (Ont. S.C. de Sousa J.)

Unsecured creditors, CRA and a bank opposed the administrator’s application for approval of a joint proposal. The Court was not concerned that debtors became ineligible to file consumer proposals after filing. However, the Court did not approve the proposal because it was unfair since the Trustee had underestimated the value of assets so the unsecured creditors may receive more in bankruptcy and because the Trustee had allowed a secured creditor to vote with unsecured creditors without first proving its claim or surrendering its security.

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