PERSONAL INSOLVENCY TECHNICAL UPDATE

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I. DISCHARGES

A. AUTOMATIC DISCHARGES

1. *Re Devaux*, 2011 NSSC 82 (Registrar Cregan)

Facts: The bankrupt received an automatic discharge but three months later, the Trustee reviewed the file and discovered that there had been surplus income, meaning that the bankrupt should have been granted a conditional discharge requiring him to pay surplus income and providing that he not be discharged for 21 months from the date of the bankruptcy. The Trustee consulted with OSB and brought an application to annul the discharge.

Decision: Although an error had occurred, a post-bankruptcy spousal support order would have eliminated surplus income after 9 months. Registrar Cregan referenced the decision in *Bank of Montreal v Petty* (1997), 45 C.D.R. (3d) 183 (Sask. Q.B.) and held that in the absence of fraud or bad faith in obtaining the discharge, the order of absolute discharge effectively closes the books on relations between the bankrupt and its creditors. Application dismissed.

B. CONDITIONAL DISCHARGES

2. *Re Swerid*, 2010 MBQB 123 (Registrar Cooper)

Facts: A creditor of the bankrupt brought a motion to revoke a conditional discharge. The conditional order required the bankrupt to pay $30,000.00 to the Trustee in the minimum sum of $100.00 per month. These sums were paid. At the request of the Trustee, 26 months after the conditional order was made, the Bankrupt filed income and expense statements for two months, which disclosed no surplus income. Two months later, the bankrupt swore an affidavit in which he deposed that he had not acquired any income or property subsequent to the discharge order. The creditor contended that the bankrupt was required to file an annual affidavit verifying employment earnings in the form of precedent 103 or form 65. Though the bankrupt disputed this, pointing out that s. 176(1)(b) references income and not earnings, by the time of the hearing, he had provided evidence of his employment earnings in an effort to avoid further court proceedings.

Decision: The Registrar held that while the bankrupt is required to provide information that the trustee should have, that s. 176(1)(b) does not require annual disclosure of the bankrupt's income. The "real bone of contention" was that the trustee and creditor objected to the fact that the conditional order did not provide for a time limit for the bankrupt to pay. The Registrar dismissed the application.

3. *Osatchoff v Pinder Bueckert & Associates Inc.*, 2010 SKQB 171 (Registrar Schwann)

Facts: The objecting creditor was injured in an automobile accident in 1976. She obtained judgment against the bankrupt in 1978. Part of the judgment was satisfied from insurance. The bankrupt made two payments of $50.00 each in 1980, and thereafter made no effort to satisfy the balance owing and he ultimately assigned in 2009. Prior to the bankruptcy, he had offered to settle the matter for $4,000 (that money was no longer available to him).

There were several other small claims filed against the estate. The bankrupt's only regular source of income was a government disability pension, supplemented with income from odd jobs. It was undisputed that he did not have the means to retire the judgment or to make a significant contribution toward it. Future employment prospects were non-existent, as the bankrupt had been under psychiatric care for 31 years. He was 53 years of age, single, and had no dependents.

Decision: The Registrar noted the deficiency of assets arose from circumstances for which the bankrupt was clearly accountable, and then turned to conditions of discharge. The Registrar raised concern about why the bankruptcy process was being used at such a late date, noting the creditor's concerns about the possibility that the bankrupt receive a sizeable inheritance (though evidence was presented to the effect that the bankrupt was not a beneficiary in the likely wills). Registrar Schwann granted a conditional order requiring payment of the sum of $1,800.00 (based upon a contribution of $50.00 per month over a 3-year period). The Registrar also addressed the potential windfall by way of inheritance, and imposed a condition that the bankrupt execute an assignment in favour of the trustee equal to 20% of any inheritance he might become entitled at law after his discharge, up to the maximum sum of $40,000.00 (the unpaid principal balance on the judgment).

4. ***Re Burroughs*, 2010 SKQB 51 (Registrar Schwann)**

Facts: The bankrupt was a cattle farmer who had resisted legal proceedings brought by his principal secured creditor by raising a counterclaim which ultimately did not succeed. He assigned shortly after judgment. On examination, the trustee found virtually no assets available for creditors. Unsecured claims totalled $140,000.00 against a realized (and to be realized) amount of approximately $1,600.00. The trustee found the bankrupt evasive, uncooperative, and inattentive to his duties.

Decision: The Registrar held that the BSE crisis did not satisfactorily explain the asset deficiency, and then turned to the bankrupt's conduct in the earlier lawsuit. The trial had lasted 2 ½ days on a simple debt claim, and on the basis of the comments made by the Trial Judge, held that the creditor had been put to unwarranted expense by a frivolous and vexatious defence within the meaning of s. 173(1)(f) of the BIA. The Registrar also concluded that the bankrupt had failed to comply with his duties within the meaning of subsection 170(1)(o). The Registrar imposed a Conditional Order requiring the bankrupt to pay $10,250.00 (composed of $2,250.00 on account of surplus income and a further $8,000.00 for payment to the estate for the benefit of the creditors). This sum was to be paid at $300.00 per month with right of prepayment.

5. ***Fast v Marathon Leasing Corp.* (Trustee) 2010 SKQB 217 (Registrar Schwann)**

Facts: Marathon carried on business leasing vehicles throughout Saskatchewan. Its operating capital came from private investment, and ostensibly from its revenue stream. In 2008, the Saskatchewan Securities Commission investigated Marathon's investor arrangements, and issued a cease and desist Order. This cut off further injection of capital into Marathon, and Marathon's attempts to reorganize failed. The bankrupt owed approximately $1.4 million to Marathon and assigned in bankruptcy. The other significant creditor was CRA which was owed $538,000. The estate had assets of approximately

$650,000.00 against unsecured liabilities of approximately $2.5 million. $445,000.00 was realized for the benefit of creditors. Fast testified that some of the money was used for personal living expenses, and the remainder was invested with a view to obtaining a higher rate of return than the rate of interest being charged by Marathon. The trading activity was unsuccessful, and by the time of bankruptcy, the investments were reduced to nothing more than nominal value. The objecting creditors took the position that this was rash and hazardous speculation, and also took the position that Fast's financial misfortunes also arose from the fact that he was a gambler.

Decision: The Registrar determined that the bankruptcy was not brought on or contributed to by gambling. However, as the sole operating mind of Marathon and its related companies, Fast drained Marathon's cash assets by deploying the money into trading accounts, did the trading, did not use a broker investment specialist, and engaged in the use of margin accounts which made the speculations doubly hazardous. The Registrar accordingly found that the Fast bankruptcy was a result of rash and hazardous speculation within the meaning of Section 173(1)(e) of the BIA. The bankrupt showed no remorse, and the possibility of rehabilitation was questionable. On the other hand, the Registrar took into account the bankrupt's advanced age, and health difficulties, and the fact that he would be unlikely to find employment in the future. A Conditional Order of $8,200.00 (at $230.00 per month over 36 months) was imposed, and the discharge was suspended for a period of one year consecutive to the terms of the conditional order.

6. ***Re Bil*, 2010 NBQB 394 (Registrar Bray)**

Facts: The bankrupt began operating a trucking business in 1991. CRA filed Proofs of Claim totalling $514,000, arising from tax debt for the years 1992, 1993, 1995 and 1997. These were over 99% of the bankrupt's unsecured debts. The debts owing to CRA had resulted in a charge of income tax evasion to which the bankrupt entered a guilty plea in 1999 and paid a fine of $40,0000.00. The bankrupt took the position that he had no assets or income. CRA took the position that the bankrupt had divested himself of all property and assets in order to defeat collection, noting that he had received money from his daughter for the purchase of his half-share of the matrimonial home, and the assets of the trucking company since 1991.

Decision: The bankrupt's assets were less than 50 cents on the dollar of his unsecured liabilities, and 99% of the liabilities were tax debts. The Registrar noted that the question was accordingly the stringency of the condition to be imposed on the basis of the bankrupt's conduct. The conviction for income tax evasion was problematic for the bankrupt. While the bankrupt had taken the position that he did not contest the charge because he was too tired to fight it, the Bankruptcy Court could not treat the conviction as a nullity. Conversely, the Registrar held that the evidence tendered to the effect that the bankrupt had denuded himself of assets, was insufficient to allow the Registrar to draw inferences to support its position. The bankrupt had satisfactorily performed his duties, but that however extenuating the circumstances, the tax obligation and the conviction required a condition to be imposed. A discharge was granted subject to the condition that the bankrupt pay the Trustee the sum of $28,800.00 in monthly instalments of $600.00. The bankrupt was obligated to remain current with all obligations to CRA until the date of discharge.

7. ***Pyne v FBDB*, 2010 SKQB 201 (Registrar Schwann)**

Facts: The bankrupt borrowed to build a welding shop, and commence a welding business. The business did not prosper, and shortly before the assignment, the bankrupt delivered his mobile welding unit to an auction house. He left it there for two weeks but it never sold. After receiving legal advice with respect to possible exemption claims, he retrieved the unit, and it remained in his possession along with the associated tools. Following his assignment, he did some small welding repair jobs and otherwise, he was employed by a welding company. The mobile welding unit was not required for the purposes of his job. After the assignment and before the hearing, the matrimonial home was sold and the bankrupt was in possession of proceeds. At the discharge hearing, he was not employed, but hoped to resume the welding business using the truck and equipment.

Decision: Notwithstanding the apparent decision to abandon the welding business, the bankrupt did conduct business before and after the discharge. The welding equipment was accordingly exempt. A liberal and remedial approach to exemptions required the Registrar to conclude that notwithstanding the sale of the home before discharge, the exemption was not lost, and the bankrupt was permitted to retain his share. There was a clear deficiency of assets and the bankrupt failed to satisfactorily explain this. Although he chose bankruptcy rather than a proposal, on the facts, a proposal was not a viable option. Of significant concern was the fact that the bankrupt borrowed a large sum of money barely two years prior to assigning in bankruptcy, that he subsequently sold some of the assets funded by the debt he contracted, and that he had grossly overvalued his assets when he obtained financing. A conditional order was made requiring the bankrupt to pay $500.00 per month over two years for a total contribution of $12,000.00 to the estate.

C. SUSPENSION

8. ***Re Brown*, 2010 SKQB 426 (Registrar Schwann)**

Facts: The bankrupt was employed by a mining company and a farmer. He earned a good salary from his mining job, but farming losses offset the income. As a result the bankrupt had accumulated over $300,000.00 in debt that could not be repaid and assigned in bankruptcy. The applicant was a second-time bankrupt. The previous bankruptcy was also due to farming losses.

Decision: The Registrar looked to the "unique circumstance" of substantial off-farm income, significant exemptions, and the fact that the farming operation had resulted in two bankruptcies. The bankrupt did not exert a great deal of effort to satisfy his creditors prior to assigning, nor did he make a proposal. The Registrar did not accept the explanation of the bankrupt that he felt that his major creditor would simply vote down the proposal – the Registrar indicated the bankrupt could have made the attempt, in any event. While the discharge application was not a process by which the Bankruptcy Court could require the bankrupt to choose one occupation over the other, it would be unjust to prefer the bankrupt's rehabilitation over a return to his creditors and the integrity of the bankruptcy system. If there had been a requirement to pay surplus income over a period of 21 months, a surplus income obligation in the range of $60,000.00 to $70,000.00 would have been imposed. That sum, when combined with estate receipts would result in a return to

creditors of approximately one-third of the total unsecured debts. The Registrar granted discharge condition upon the payment of a $70,000.00 Conditional Order and imposed a six-month suspension.

9. ***Re Goldstein*, 2011 ONSC 561 (Morawetz J.)**

Facts: The bankrupt was disbarred by the Law Society of Upper Canada. He ultimately made an assignment in bankruptcy. The Law Society claimed for the costs of its investigation and prosecution, and opposed discharge.

Decision: Justice Morawetz noted that the costs awarded to the Law Society did not survive a discharge in bankruptcy, as they did not arise from any fraud or defalcation. The bankrupt's license to practice law and his consequent inability to earn income was his own fault, thus s. 173(1)(a) of the BIA applied. However, as there was no evidence of surplus income, Justice Morawetz was not persuaded that a discharge should be refused. Accordingly, the bankrupt's discharge was suspended for a period of one year.

D. REFUSAL

10. ***Re Owen*, 2010 NBQB 299 (Registrar Bray)**

Facts: The bankrupt was a self-employed pest control officer. CRA filed proofs covering the years 2003 to 2006, totalling $150,000.00 for personal income tax, and unremitted HST of $183,000.00. The HST claim arose from a notional assessment, as the bankrupt had failed to file a HST return between 2003 and 2008. This tax debt constituted over 99% of the unsecured liabilities. The bankrupt has previously filed in 2002 and was discharged in 2003. In that bankruptcy, CRA also proved for substantial unpaid income tax and unremitted HST.

Decision: Registrar Bray held that the bankrupt had demonstrated no meaningful steps towards rehabilitation. There was no point in discharging the debtor, as he had learned nothing from his previous bankruptcy. Given the substantial debt to CRA in two bankruptcies less than 7 years apart, and in the absence of any convincing proof of rehabilitation, the Registrar refused the discharge application. The Registrar permitted the bankrupt to submit another application after 18 months with proof of: a) tendering a monthly financial statement to the Trustee and paying over surplus income; b) being current in all filing obligations with CRA; and c) having demonstrated attempts to significantly improve his financial position or to make meaningful contributions to his estate.

11. ***Re Rahman*, 2010 ONSC 4377 (Registrar Nettie)**

Facts: The bankrupt was 54 years of age, married and with two adult children. He came to Canada in 1999, and in 2004 filed a Division II proposal. In that proposal, he declared unsecured debts of $40,000. One-half was owed to the Federal and Provincial student loan Programs. Under the proposal, the bankrupt made payments over 5 years totalling $7,500.00. The proposal expressly acknowledged that the student loan debts would not be released, but only reduced by the dividends paid. The proposal was fully performed, but the bankrupt did not pay off the remainder of the student loan. Rather, the day following full performance of the proposal, he filed an assignment in bankruptcy. Almost all of the

unsecured debt was owing for student loans or to the Canada Revenue Agency. At the discharge hearing, the bankrupt was unable to provide any reason for not making a second proposal. The bankrupt further testified that his wife owned the property which was listed as his residence, which had been purchased during the term of the consumer proposal. Under questioning, the bankrupt admitted that he had funded a significant portion of the house costs, and that his wife held part of the house in trust for him. There was approximately $100,000 in equity in the house at the time of the hearing. The house had not been disclosed as an asset on the Statement of Affairs. During cross examination, additional testimony was elicited which disclosed that the bankrupt's wife had sold the residence and had purchased another.

Decision: The Registrar considered the timing of the assignment and queried whether the intention all along had been to make a modest proposal to postpone matters until 5 years, after which the bankrupt could assign and expect a discharge of the student loans. The Registrar was confirmed in his concerns by the admission respecting the house, as the asset had never been disclosed to the Trustee. The failure to disclose was a fact within s. 173(1)(o) (failure to disclose to the Trustee). It was also a fact under s. 173(1)(d) (failure to account for deficiency of assets). The Registrar considered that the evidence respecting the home pointed to perjury, and held that the bankrupt had committed an offence under s. 198(1)(b) of the BIA (to refuse or neglect to fully and truthfully answer all proper questions at any examination held pursuant to the BIA). Registrar Nettie recommended that all necessary proceedings be instituted by the Attorney General to bring the bankrupt before the criminal bar. The discharge was refused, and the bankrupt was required to pay costs of the opposing creditor in the sum of $1,000.00, payable forthwith as a post-bankruptcy debt.

E. DEBTS SURVIVING DISCHARGE

12. *Bruni v Garlicki*, 2010 MBCA (Steel, Freedman and Chartier JJ.A.)

Facts: The bankrupt held certain shares in trust for Bruni. She refused to turn them over to him when requested to do so. He obtained judgment for the value of the shares, after which the bankrupt assigned. After discharge, Bruni sought an order that the judgment survived discharge. The motions judge held that while there was a breach of trust, there was no "wrongful" conduct and that the judgment did not survive. A related claim for misappropriate of funds survived. Bruni appealed.

Decision: Misappropriate involves a fiduciary taking something for his or her own use, and imports wrongful conduct. It is not limited to misapplication of money. The court noted that defalcation involves the failure of the fiduciary to meet his or her obligations. Other jurisdictions were split on whether wrongful conduct was required. The court held that wrongful conduct is required. The bankrupt's subjective belief that she was entitled to withhold the shares was irrelevant. She was clearly required to do so under the written agreement, and her refusal to do so was persistent, wilful, and deliberate. It was not inadvertently negligent or mistaken. The required standard of wrongful conduct was met and the appeal was allowed.

13. ***Ste. Rose and District Cattle Feeders v Geisel*, 2010 MBCA 52 (Hamilton, Freedman and Beard JJ.A.)**

Facts: The cooperative entered an agreement with the father to authorize funding (by a bank) to permit him to purchase cattle. He was to care for the cattle and deliver them to market by a stipulated date. Title remained in the cooperative and the father granted a purchase money security interest in the cattle and proceeds to the cooperative. He was to brand the cattle with the cooperative's brand. He was to pay over proceeds immediately on sale. The security interest was not registered and the cattle were not branded with the cooperatives brand. Ultimately, cattle were delivered for sale. The son, knowing that they were not his, nevertheless directed that they be sold in his name. While the cooperative was notified of the sale, they were not told that the cattle would not be sold in the cooperative's name. The proceeds were deposited in the son's name at a credit union, which seized the proceeds and applied them to the son's indebtedness. The father defaulted on his loan, and the cooperative paid the bank. It then brought legal proceedings against father and son for a fraudulent conveyance. Judgment was obtained. Shortly thereafter both father and son assigned in bankruptcy. After discharge, the cooperative sought a declaration that its judgment survived the bankruptcy. The court examined the pleadings and held that the cooperative had proved a fraudulent conveyance. It then determined that the father's debt arose from the agreement and not from the conveyance, but that the son's debt solely arose from the conveyance. However, since neither acted in a fiduciary capacity to the cooperative, and neither had incurred the debt on the basis of a deceitful statement, the judgment did not survive. The cooperative appealed.

Decision: The decision below was correct to the extent that it ruled out a fiduciary relationship. However, the court below erred in its consideration of s. 178(1)(e), by focusing on the word "debt" to the exclusion of the word "liability". While the debt was contracted beforehand, property (the sale proceeds) was in fact obtained by deceitful statements (the core of s. 178(1)(e)), which were deposited to the son's account rather than to that of the cooperative. The father's deceit lay in advising the cooperative that the cattle were to be sold, but withholding other relevant information, including the fact that the cattle would be sold in the name of the son. The son participated in the scheme and falsely held out that the cattle belonged to him. The appeal was allowed.

14. ***Long & McQuade v Torres*, 2010 BCSC 1842 (Burnyeat J.)**

Facts: The bankrupt purchased a guitar from the creditor, committing to monthly payments. The creditor registered a security interest. Two months later the bankrupt assigned. The trustee released the security to the creditor. The creditor alleged conversion, on the basis that the guitar had been sold by the bankrupt and successfully applied to lift the stay of proceedings. Judgment was obtained. The creditor sought a declaration that the judgment survived discharge.

Decision: The sole grounds for the application was s. 178(1)(d). While the guitar belonged to the creditor, the taking of possession by the bankrupt was not wrongful, nor was the bankrupt a fiduciary. The debt did not arise out of fraud, embezzlement, misappropriation, or defalcation. *Compare the reasoning here to the previous two cases.*

II. STUDENT LOANS/HARDSHIP RELIEF

15. *Re Hildebrand* 2010 SKQB 321 (Registrar Schwann)

Facts: The bankrupt took out student loans to pursue study between 1994 and 2002. He assigned in bankruptcy in May of 2008. The amendments to the student loan debt provisions of the BIA came into force in July of 2008. The bankrupt received an automatic discharge on February 24, 2009. He brought application for a declaration as to which, if any, of his student loans were released upon discharge, and sought hardship relief.

Decision: As of the application in March, 2010, the new definition of the "date of bankruptcy" would apply. The transitional provisions in the BIA amendments expressly allowed a person undischarged on the effective date of the amendments to benefit from the reduction of the survival window from 10 years to 7 years. On the bankrupt's own admission, his assignment occurred within 7 years of the cessation of studies. However, only one of several student loans fell within the 7-year window. The Registrar noted the jurisprudence holding that student loans were to be "piggy-backed" onto the surviving debt, so that they all survived discharge. However, Registrar Schwann had regard to rulings from Registrar Cregan and Master Funduk, and accordingly determined that whether a student loan debt survives depends on when the bankrupt ceased to be a full-or-part-time student *in relation to that debt.* She ruled that all but one of the student loans were released upon the discharge from bankruptcy. The Registrar then turned to the hardship application under s. 178(1.1). The bankrupt had acted in good faith, and had endeavoured to meet his obligations. Although he was unemployed, it was likely the bankrupt would find alternative employment in the near future, and would be in a position to pay off the remaining student loan. The application for hardship relief was dismissed.

16. *Re Halford*, 2011 ONSC 2509 (Registrar Nettie)

Facts: The bankrupt brought an application pursuant to s. 178(1.1) for hardship relief. Although served with notice of the application, representatives of the Federal Student Loan Program did not respond. Representatives of the Ontario program opposed the application.

Decision: The Registrar inferred that the Federal Student Loan Program did not oppose the relief sought and implicitly agreed that the applicant had met the test set out in s. 178(1). The Registrar accordingly granted relief with respect to Federal Student loans. With respect to the Ontario loans, the Registrar found that the applicant had acted in good faith, and accepted her evidence that she suffered from carpel tunnel syndrome which negatively affected her ability to work. The Registrar concluded that any ability to work would be further reduced over time, and that this was not foreseen or foreseeable at the time the loans were contracted. The relief sought was granted. In an interesting aside, the Registrar noted that, given the finding with respect to the Ontario loan, it was not necessary to rule on whether the Crown was divisible, such that the application could be granted with respect to the Federal Crown, and denied with respect to the Provincial Crown.

17. *Re Cook*, 2010 NSSC 224 (Registrar Cregan)

Facts: The bankrupt studied at two universities from 1991 to 2003. After completing studies, she continued part-time employment with the naval reserve and found work as a

substitute teacher. She began permanent employment as a teacher in 2008. The bankrupt had a son aged 15 years for whom she had received minimal support. She assigned in bankruptcy in 2007 having accumulated debts of $56,000.00 in addition to the student loan, and was discharged in February, 2008. She brought a hardship application.

Decision: If the application were refused, the applicant would likely have to consider making a second assignment in bankruptcy, which would result in a discharge being postponed for 36 months, and requiring a substantial payment of excess income. The Registrar also noted that it might be that a discharge would be subject to further payments to reflect the special nature of the student loans. The Registrar was satisfied that the applicant had acted in good faith. The real issue was how long the applicant should continue to be burdened with the student loan debt. Bearing in mind that s. 178(1.1) provides only for the Registrar to grant or deny the application, given the substantial timeframe required to liquidate the loans (up to 25 years) and the fact that this would take the applicant close to retirement age, the application was granted.

III. PROPERTY OF THE BANKRUPT

18. *Potter (Trustee of) v Potter* 2010 MBQB 83 (Menzies J.)

Facts: This was an appeal from the Registrar dealing with the status of disability tax credit payable to the bankrupt. After a conditional discharge had been granted, CRA reassessed the bankrupt. As the bankrupt had not claimed a disability tax credit for a number of years prior to the bankruptcy, he was granted a refund. The trustee sought directions as to whether the funds were the property of the estate (and if so, how the funds should be distributed). The Registrar found that the refund was the property of the estate but that it was not income within the meaning of s. 68 of the BIA.

Decision: Justice Menzies concurred with the Registrar's conclusion that the refund fell within the definition of property of the bankrupt. The refund generated by the disability tax credit resulted in a rebate of tax owing by the taxpayer. Since the tax paid or owing originates from the taxpayer's income, the fact that the money is being returned to the taxpayer after already having been received by CRA did not cause the funds to lose their status as income. Accordingly, the refund was income within the meaning of s. 68.

19. *Armbruster v Armbruster*, 2010 SKCA 125 (Lane, Jackson and Ottenbreit JJ.A.)

Facts: The applicant was petitioned into bankruptcy in 1995. She received an absolute discharge in 1996. The trustee had never applied for a discharge. As there was substantial non-exempt equity in the bankrupt's home, in 1996, the trustee transmitted an 82% interest in the home to itself. The bankrupt continued to live in the home, and in 2009, the bankrupt applied to the Queen's Bench invoking the Court's authority under ss. 37 and 40 of the BIA and s. 109 of *The Land Titles Act*. She sought an order declaring that the trustee's interest was incapable of realization, and asked for an order directing that the trustee's title be cancelled, and that she be granted a new title as sole registered owner. The application was granted, and the Trustee appealed.

Decision: The Court of Appeal affirmed the 1987 decision in *Zemlak* and held that the Trustee had no power to *create* an undivided interest where one did not previously exist

without the agreement of the bankrupt (in incident of Saskatchewan land titles law). The trustee was only entitled to hold a future contingent interest in proceeds of a voluntary sale. The former bankrupt was entitled to an order re-vesting the property in her own name. The Court held that the Trustee was not entitled to file a caveat to protect any interest it might hold in the property, as it had not taken the necessary steps to preserve its interest on the original discharge application.

Note: This case will eventually be rendered largely moot on proclamation of *The Enforcement of Money Judgments Act*.

20. ***Re Funk*, 2010 MBQB 217 (Menzies J.)**

Facts: The trustee sought for advice and direction as to whether Canadian Agricultural Income Stabilization ("CAIS") payments directed to a secured creditor were taxable in the creditor's hands. On the basis of Manitoba case law, the Trustee recognized the CAIS payments as being part of the bankrupt's estate and directed them to the creditor. The creditor then took the position that it was not responsible to pay tax on the CAIS payments. Registrar Harrison determined that the payments, being "government assistance" were a grant, subsidy or similar form of assistance, and therefore were subject to income tax. The creditor was required to pay tax on received payments. The creditor appealed.

Decision: Justice Menzies agreed that the CAIS payments were property of the bankrupt. However, his Lordship overturned the Registrar in the result. The fact that the bankrupt was obligated to pay tax on his net income at the end of the taxation year did not mean that income earned carries any "obligation" related to the payment of income tax. As there was no statutory priority or a lien which applied to the CAIS payments to ensure payment of any tax liability, or to create a priority, the Credit Union was not required to pay tax on the amount received. The bankrupt's argument that the doctrine of unjust enrichment applied to require the bank to pay the tax was rejected.

21. ***Advantage Credit Union v Quibell*, 2011 SKQB 144 (Wilson J.)**

Facts: The bankrupt was the sole owner of three quarter sections of land. The Credit Union held a first mortgage. The trustee and the secured creditor agreed that the land would proceed to judicial sale, and the trustee refrained from registering any interest in the land. Surplus sale proceeds were paid into Court, and the bankrupt applied for an order requiring that they be paid to him. The Trustee opposed. The Credit Union took no position on the matter, other than seeking payment of its costs on a solicitor-and-client basis from the proceeds prior to distribution of the surplus.

Decision: Justice Wilson rejected the bankrupt's argument that the vested interest of the Trustee lapsed to the secured creditor when the trustee did not register an interest in the land upon bankruptcy, with the surplus to go to the bankrupt upon discharge. The property remained vested in the Trustee throughout, and that the Trustee was entitled to the surplus funds generated from the sale of the farmlands. The Credit Union was granted solicitor-and-client costs on the basis that the prohibition on such costs set forth in *The Saskatchewan Farm Security Act* was not capable of benefitting the Trustee. The Trustee has appealed that determination.

22. ***Re Koenne*, 2010 ONCA 524 (Goudge, Sharpe and Armstrong JJ.A.)**

Facts: The bankrupt assigned in 2004. His father died in 2006 leaving the bankrupt a share of his estate being a cottage property. The trustee was advised of this interest in 2008, and began discussions with the executor. In February 2009, the trustee wrote the Executor and advised that its position was that the bankrupt's share in the property had vested in the trustee. The bankrupt was discharged in June 2009. The trustee thereafter brought application for a declaration that the bankrupt's share in the cottage was vested in the trustee. The bankrupt opposed, claiming that the trustee was estopped from claiming the interest. The trustee's application was denied. The trustee appealed.

Decision: The court held that certain legal propositions were without doubt: a) s. 71 provides that property of the bankrupt vests in the trustee, b) s. 67(1)(c) provides that this includes property acquired before discharge, c) the definition of property includes an interest in an estate, and d) discharge of the bankrupt does not affect the provisions of the BIA that vest the property in the trustee. Absent a promise or assurance by the trustee that was intended to affect its legal position, and detrimental reliance by the bankrupt, no estoppel arises. The appeal was allowed.

23. ***Sran v Sands & Associates*, 2010 BCSC 937 (Smith J.)**

Facts: The bankrupt was the sole registered owner of property at the time of assignment. The bankrupt referenced a "trust" arrangement with his brother at the time under which the brother's interest had been transferred to the bankrupt, but did not provide information sufficient to answer the trustees concerns about the existence of a trust. Six months later, the brother filed a secured proof of claim, which appended a trust agreement signed by the bankruptcy, and a month after that, a property claim referencing the trust agreement. He claimed a 50% interest in the property. The trustee gave Notice of Dispute to the property claim, and the brother appealed. At the appeal hearing, the brother of the bankrupt sought to adduce fresh evidence.

Decision: Justice Smith noted that property in the bankrupt's possession is presumptively that of the bankrupt. Parties who wish to assert otherwise are to put their case before the trustee. If the trustee disputes a claim the appeal is taken on the basis of the record before the trustee. The "fresh evidence" was known before the property claim was filed and there was no reason it could not have been put to the Trustee. It was not to be considered. The record was not confined to the property claim, but also included land titles records, documents respecting the bankruptcy and the Statement of Affairs. The court held that the standard of review is that of correctness, and went on to consider the trust agreement. The agreement was not sufficiently certain, and contained contradictions. It accordingly did not create a trust. No resulting trust arose because the property was not transferred gratuitously, but rather in consideration of the promises made in the trust agreement.

IV. TRANSFERS FOR UNDER-VALUE

A. Preferences and Conveyances

24. ***Andrews (Trustee of) v Minister of National Revenue*, 2011 NBQB 50 (Dewar J.)**

Facts: Approximately two months prior to assigning, the bankrupt paid CRA approximately $16,000 on account of tax liability. Another small payment was made just prior to the assignment. Upon review, the trustee concluded that the taxpayer was insolvent by the time these payments were made on a balance sheet basis, and brought an application for an order compelling CRA to pay over these sums to the trustee.

Decision: Justice Dewar ruled that it was irrelevant that the trustee had not pursued other pre-assignment payments made by the bankrupt. His Lordship was satisfied that by the time the first payment was made, the liabilities of the debtor bankrupt exceeded his assets. He rejected CRA's argument that the payments did not create a de facto preference. Given that the payments had occurred within 3 months of the bankruptcy, the onus shifted to CRA to rebut the presumption that the payments were made with a view to prefer. At the time the payment was made, the bankrupt was in dire circumstances, and could not, when viewed objectively, realistically carry on further without defaulting on her financial obligations. As CRA did not rebut the presumption, the order sought by the trustee was granted.

25. ***Tsouras Estate v Tsouras*, 2010 MBQB 265 (Master Berthaudin)**

Facts: The bankrupt consulted with a trustee with respect to financial problems involving a chain of restaurants. The timing of discussion about the potential for personal bankruptcy was unclear. After the discussions first commenced, the bankrupt collapsed RSP investments, and paid funds to his wife. He ultimately assigned into bankruptcy. The trustee brought an action to set aside the transactions as fraudulent conveyances and also as settlements. The Trustee brought application for summary judgment.

Decision – Fraudulent Conveyances: As the transactions were voluntary conveyances, it was only necessary for the Trustee to establish the fraudulent intent of the bankrupt. A transfer to the bankrupt's wife gave rise to a substantial evidentiary burden on the bankrupt. It was not necessary to establish that the bankrupt was insolvent at the time of the transaction. The fraud was made out and judgment was granted

B. Settlements

26. ***Tsouras Estate v Tsouras*, 2010 MBQB 265 (Master Berthaudin)**

Facts: as above

Decision – Settlement: As the conveyances had taken place within a year of the bankruptcy, and that the transactions were gratuitous or merely nominal consideration, the transactions appeared to fall within the definition of a settlement. Retention of the benefit of the funds was held to be necessary to make out a settlement. The bankrupt's testimony was contradictory and the Master refused to prefer one version over the other for the purposes of

the application. The hiring of the bankrupt's wife to work at a business purchased with the funds did not appear to be the type of retained benefit contemplated by the Act. There was a triable issue and accordingly summary judgment could not be granted for this relief.

V. PROPOSALS

27. *Clause v R.*, 2010 TCC 410 (Boyle J.)

Facts: The debtor's husband filed a proposal. Shortly after the proposal was accepted, he transferred his joint interest in the matrimonial home to her. The proposal went into default and was annulled. The husband then made a second proposal. The second proposal was fulfilled, and included payments on account of tax debt. CRA issued a s.160 assessment against the debtor

Decision: Justice Boyle rejected the argument that the second proposal was simply a reinstatement of the first proposal, noting that the provisions in the BIA which allowed a defaulted proposal to be revived were not employed for the second proposal. Thus, upon annulment of the first proposal, the debts owing were fully reinstated, and were not compromised. There was a proper foundation for the s. 160 assessment. Section 160 can result in unjust, unfair, and unwarranted applications, but Parliament has the power to enact such a broad provision, it has enacted the provision and unfairness does not preclude CRA from relying upon it.

28. *Re Schryburt*, 2011 ONSC 880 (Linhares de Sousa J.)

Facts: The debtors filed a proposal. At the time the administrator determined that they were eligible on the basis of declared debt of $484,000 which was not secured against their principal residence. Once all proofs were filed, the total unsecured debt was actually $932,000. The proposal provided for payment of $1150 per month on two secured debts, and further payments on two other secured debts. One of the secured creditors (who voted for the proposal) was to receive $750 per month, but at a slower pace than contracted. $30,000 was to be paid to unsecured creditors at a rate of $500 per month. The unsecured creditor were to receive 4 cents on the dollar (as opposed to a projected 3 cents in bankruptcy) At a meeting of creditors, 56.57% of the votes were in favour of the proposal, 15% of which was voted by the secured creditor (who voted to the full value of the remaining secured debt), and the remainder by unsecured creditors. The OSB indicated approval, however CRA, holding the largest unsecured debt, and Banque Nationale requested a court review.

Decision: Although the debtors were ineligible, they fell within the requirements at the time the proposal was filed. Ineligibility alone will not prevent a court from approving a consumer proposal if ineligibility arose after filing. Although the trustee had conducted the vote in accordance with the Quebec decision in *Laforge*, the court did not follow the decision, and held that the secured creditor was required to surrender or value its security and vote only on the unsecured portion. The court also determined that the administrator had underestimated the value of the assets, raising the possibility that bankruptcy would yield a better return than the proposal. The motion for approval was refused.

29. ***Edell v Canada Revenue Agency*, 2011 ONSC 1943 (Pepall J.)**

A lawyer with a history of difficult dealings with CRA filed a proposal. It was defeated and the lawer brough action against CRA, the Superintendent in Bankruptcy, and the proposal trustee as defendants. He sought damages for CRA's rejection of the proposal, an order requiring it to accept the proposal and a stay of the deemed assignment. CRA moved to strike the action, and the bankrupt sought a temporary stay of the deemed assignment. The court granted CRA's application on the basis that the claim disclosed no reasonable cause of action. The bankrupt's application was dismissed on the basis that there was no legal authority to stay the deemed assignment. The bankrupt appealed to the Federal Court of Appeal. The court permitted the action against CRA to continue, but ordered that the Superintendent and the trustee be removed. The appeal respecting the stay of the deemed assignment was dismissed. The bankrupt then moved in the Ontario courts for an order annulling or an order staying the deemed assignments so he could enjoy a normal life until the action was determined on its merits. Alternatively he sought court approval of the proposal.

Decision: While there is no express provision to annul a deemed assignment, s. 66(1) of the BIA provides that all provisions of the act apply to proposals, with such modifications as may be necessary. The bankrupt had sworn a statement of affairs clearly disclosing insolvency, and had chosen to make a proposal, knowing that CRA was his sole creditor. CRA could legitimately vote against the proposal, and accordingly, Justice Pepall refused to exercise his discretion to annul. Established case law did not support the granting of a stay, and in any event the bankrupt had recognized his insolvency and had filed a proposal. The court would not grant a stay. There is a limited power in the court to amend a proposal. Rule 92 permits the amendment of a clerical error or omission only. To sanction the proposal would be to improperly circumvent the power vested by statute in the creditors. The application was denied in its entirety.

VI. ADMINISTRATIVE & TECHNICAL

A. APPEALS FROM DISALLOWANCE

30. See ***Sran v Sands & Associates***, above on the matter of evidence on appeal from disallowance.

31. ***Mamczas Electrical Ltd. v South Beach Homes Ltd.*, 2010 SKQB 182 (Registrar Schwann)**

Facts: South Beach filed a proposal. Mamczas filed a Proof of Claim. The Trustee initially accepted part of the claim, but requested supporting evidence with respect to the balance. Ultimately, the entirety of the claim was disallowed and Mamczas appealed pursuant to s. 135(4).

Decision: Registrar Schwann took the opposite approach to that adopted in *Sran* and held that the fact-sensitive nature of the material favoured a *de novo* approach to the appeal. She accordingly allowed the filing of new evidence. The onus of proving the claim fell upon Mamczas, evidenced by the clear requirement imposed upon creditors to file sufficient and adequate materials to enable the Trustee to make an informed decision as to whether the

claim has merit. The original approval of the claim by the Trustee was not a final and conclusive determination, in the same way as a disallowance is. In the absence of reliance or prejudice being suffered by the creditor, there was no reason to hold the trustee bound by the acceptance. Accordingly the later disallowance was not a nullity. She determined that liability did not hinge on or was contingent upon invoicing. Where amounts were owing pursuant to a proved agreement, they were properly established as part of the creditor's claim. Invoices are not necessary to prove the claim, however, where interest was to commence upon the presentation of an invoice, the failure to invoice meant that interest was not payable. Accordingly, the appeal was allowed in part.

B. EXPUNGING CLAIMS OF OTHER CREDITORS

32. *Royal Bank v Insley*, 2010 SKQB 17 (Registrar Schwann)

Facts: The bankrupt was discharged on condition that she consent to judgment in the sum of $193,000 (being the amount owing to RBC for a "non-government student loan". In addition to that sum, the Statement of Affairs filed at the time of assignment listed debts to RBC on a credit card and on two government guaranteed student loans. There was a debt listed to "National Student Loans". The total debt on the Statement was $287,000. The RBC student loans were not shown as admitted. At the time of the discharge hearing, the two "additional" RBC student loans showed as not admitted, and a debt owing to CRA for a somewhat larger sum had been substituted for the "National Student Loans". At the time of distribution, a further claim was added as admitted, being for the "Trustees of Saskatchewan Student Aid Fund" in the amount of $7167. The "additional" student loans for RBC continued to be shown as unadmitted, as no proof had been filed. Both of these loans had been paid out, with the first being paid by Canada and the second having been paid by the "Trustees", hence, the reference in the Statement of Affairs. RBC asked the trustee to "expunge" the claims. When the trustee declined, RBC brought court application. RBC pointed to the considerable effort it made to oppose discharge, to the fact that some of the claims were not fully disclosed by the register at the time of the discharge hearing, the fact that the government student loans would survive bankruptcy and that the discharge decision was intended to exclude these additional creditors from distribution.

Decision: Subsection 135(5) permits the appeal from an allowance of a claim by the trustee. Accordingly, the creditor seeking to expunge the claim must show that the trustee made an error. The allegation that the claims were not identified at the time of the discharge hearing was withdrawn and there was no other evidence before the Court to suggest that the claims were not valid. RBC's decision to proceed under s. 135 meant that it was limited to challenging the validity of the claims and not any other decision made by the trustee with respect to distribution. Section 67 is available to challenge other decisions made by the trustee. In any event claims listed in s. 178(1) are properly provable in bankruptcy and are entitled to share in distribution. The earlier decision did not expressly address the issue because the argument was not before the court. Application dismissed, with costs of $500 to CSL payable from the estate.

C. LAPSED SECURITY REGISTRATIONS

33. *Re Black*, 2011 NBQB 33 (Registrar Bray)

Facts: A memorial was issued in Federal Court, and registration was effected for a 5-year term on January 10, 2005. In September, 2008, the bankrupt filed a proposal. The proposal was defeated a month later, resulting in a deemed assignment. The registration expired on January 10, 2010, and on February 4, 2010, the CRA applied to re-register the memorial. This occurred on February 15, 2010. The trustee then took the position that the judgment was not property re-registered because of the BIA stay, such that CRA was no longer a secured creditor

Decision: Registrar Bray held that, as there is no legislative requirement that any registration effected under provincial legislation remain current for the duration of administration, it was not open to the Court to insert the requirement by inference. The provincial statutory requirements for maintaining priority did not fall within the definition of a proceeding, and the BIA stay did not, accordingly, prohibit re-registration. As there was no prejudice suffered by the creditors of the estate in maintaining the Crown's security, CRA had fulfilled its responsibilities and the Trustee's disallowance was reversed.

34. ***Decker v Canada (Superintendent of Bankruptcy)*, 2010 ABCA 189 (Côté, O'Brien and Gill JJ.A.)**

Facts: The bankrupt assigned in 1996. His discharge application was adjourned *sine die* in 1997. Four proofs were filed and allowed, and a distribution took place in 1998. The trustee was discharged later that year. After the trustee's discharge, one creditor took action against the bankrupt, garnisheeing wages. No other creditor took action. The trustee was reappointed in 2008. Funds were realized and were available for distribution. The trustee applied for advice and directions. The chambers judge examined the previous Alberta decision in *Dryland* and followed it, directing payment to only those creditors whose claims had not expired in the meantime under the provincial limitations legislation. The decision was appealed.

Decision: *Dryland* was in error. The trustee's determination of claims was "final and conclusive" under s. 135(4), and the lifting of the stay did not undo that determination. *Dryland* also failed to give effect to s. 121 of the BIA which provides that the time for determining the validity of a claim is the date of bankruptcy. While the quantum can be reassessed (see *Abacus Cities*), the validity is inextricably tied to the date of the bankruptcy. To determine otherwise would allow provincial legislation to interfere with paramount federal legislation. Sections 67(1)(c) and 178(2) give a clear right to share in distribution to those creditors whose claims have been accepted by the trustee. Discharge of the trustee merely creates a hiatus in the administration of the estate.

D. LIFTING STAY OF PROCEEDINGS

35. ***Re Sheikh*, 2011 ONSC 939 (Registrar Nettie)**

Facts: A lawsuit had been commenced against the bankrupt prior to an assignment in bankruptcy. The assignment took place on the eve of a motion to amend by the Plaintiff, by

adding other defendants, and amending the claims against the bankrupt to include claims in the nature of fraud, which if proven, would survive discharge under s. 178 of the BIA. The Plaintiff brought an application to lift the stay of proceedings.

Decision: The Registrar noted that while it is not the role of the Court on an application to lift the stay to determine if there is a *prima facie* case, it is appropriate to consider if there is any case at all. If there is not, it is difficult to find sound reasons for lifting the stay. Upon cross-examination, the Plaintiff's deponent admitted to having no evidence linking the bankrupt to fraud. Given this, and the fact that the discoverability principle (and s. 69.3 of the BIA) would toll the limitation period, the Registrar found no evidence of material prejudice, and no equitable grounds for relief from the stay. The application was dismissed.

36. ***Polar Oils Ltd. v Hood*, 2010 SKQB 399 (Rothery J.)**

Facts: The bankrupt allegedly retained money from customer's deposits to a bank for his own use. The applicant alleged that the bankrupt's conduct as a fiduciary brought the liability within s. 178(1)(d) and sought leave to lift the stay.

Decision: Justice Rothery referred to *Advocate Mines*, and held that, as the allegation related to a debt which would survive bankruptcy, and as the standard was not a *prima facie* case, that there were sound reasons for lifting the stay and granted the order.

E. ESTOPPEL OF BANKRUPT

37. ***Re Carlson*, 2010 ABQB 701 (Kent J.)**

Facts: The bankrupt's brother and sister in law ("Ms. Carlson") moved onto property registered in the bankrupt's name in 1990. The property was transferred to them in 1997, and in 2000, the bankrupt drew a promissory note in his favour in the sum of $72,000, which was signed by Ms. Carlson. The bankrupt assigned in 2003, and did not disclose the claim. The following year his brother died and Ms. Carlson became sole registered owner. In 2007, following discharge, the bankrupt brought court proceedings to recover title to the land. Ms. Carlson sought a declaration that she was the sole beneficial owner. She contacted the trustee and offered $70,000 for a release. The bankrupt then contacted the trustee and offered $140,000 (enough to pay all creditors) in return for an assignment of the action. Ms. Carlson then offered the same sum. Ms. Carlson brought an application to reappoint the trustee and for an order providing that upon payment she would receive a release.

Decision: The American principle of judicial estoppel is intended to prevent an abuse against the proper administration of justice. There is no need for privity between the parties or reliance. The doctrine is available in Canada in appropriate circumstances, but may not apply in bankruptcy. However, the courts retain jurisdiction to prevent abuse of their process. The bankrupt's position respecting the property was inconsistent, as he clearly knew of the claim and did not disclose it in the bankruptcy. However, the position of the trustee was not inconsistent, and accordingly the trustee's claim would not be barred. The trustee's position was that upon payment of the creditor's claims in full, the bankrupt should receive an assignment of the cause of action so that he could litigate the matter. The court should not interfere lightly with the trustee's business decisions. However, to allow

the bankrupt to acquire the cause of action would be to further an abuse of the court's process. Justice Kent ordered that the trustee be reappointed and that upon payment of $140,000, the trustee provide Ms. Carlson with a release.

F. LIMITATION PERIODS UNDER BIA

38. ***Re Edwards*, 2011 ONSC 5718 (Marocco J.)**

Facts: The bankrupt assigned on April 7, 2006. He disclosed RRSP's but when the trustee contacted the Credit Union to arrange for payment over, the Credit Union advised that they had been depleted prior to bankruptcy to pay for debts owing to the Credit Union. The trustee commenced action under s. 95 in 2008, but the Registrar ruled that the limitation period had expired. The trustee appealed.

Decision: Where the trustee relies solely on s. 95, the absence of a specific limitation period means there is no restraint other than the requirement that the transfers of property take place within three months of bankruptcy. Imposing a provincial limitation period would create a conflict of laws, which would render the provincial legislation inoperable on the basis of federal paramountcy.

G. COSTS

39. ***Re Gardner*, 2010 NSSC 393 (Registrar Cregan)**

Facts: Prior to the discharge hearing, National Bank issued a notice of intention to oppose, which listed the grounds of opposition by tracking the wording of subsections 173(1)(a)(i),(n),(h),(k),(l) and (o), being respectively the provisions dealing with asset deficiency, incurring of liabilities to reduce the value of assets, failing a proposal, making a preference, fraud, offences respecting property, and the failure to perform duties. At the hearing, however, the only real matter in issue arose pursuant to s. 173(1)(a) being whether the value of the assets were less than 50 cents on the dollar, and whether the bankrupt could be properly held responsible.

Decision: Registrar Cregan held that although the bankrupt's assets were worth less than 50 cents on the dollar, this had not arisen from circumstances for which the bankrupt could be held responsible. An absolute discharge was granted. The Registrar noted that counsel for the bankrupt was required to prepare to address all grounds listed in the notice of objection and in particular, the allegations of fraud. On the basis that no meaningful particulars had been provided by the bank, and that no prior notice had been given that one or more grounds of opposition would not be pursued, the Registrar awarded costs of $750.00 to the bankrupt's solicitor.

40. On costs of discharge hearing see ***Rahman***, above.

41. ***Re Thow*, 2010 BCSC 378 (Burnyeat J.)**

Facts: The bankrupt's proposal was not accepted by creditors and he was the subject of a deemed assignment. The trustee had to initiate a number of actions as a result of the bankrupt's failure to cooperate, failure to provide books and records, failure to provide an

explanation for his business dealings, prior to and after the bankruptcy. Applications were made for a) access to the bankrupt's house, b) to obtain an arrest warrant for the bankrupt, c) to obtain his banking records, d) for substituted service, e) for aid and assistance of the US court in examining the bankrupt, f) to obtain a US search warrant, and g) to compel the bankrupt to answer questions. Legal fees in Canada and the US exceeded $100,000. Most of the proceedings would not have been necessary if the bankrupt had kept proper books and records. The trustee applied for a lump sum costs award in the amount of $100,000. The bankrupt disputed the jurisdiction to award costs and took the position that the conduct of the bankrupt was a matter to be dealt with at a discharge hearing.

Decision: Justice Burnyeat was satisfied he had jurisdiction to award costs. Section 197(1) is general in nature, and the court has a general discretion to award costs. Under s. 197(2) the court is to award costs either on a party-and-party basis or a solicitor-and-client basis. While s. 197(2) is broad enough to permit a lump-sum award, there was insufficient information to permit such an award in this case. In addition, the court did not have jurisdiction to award costs in the US courts. The conduct of the bankrupt necessitated the legal fees incurred in Canada, and accordingly, an order was granted providing that the trustee's costs be assessed on a solicitor-and-client basis. Once assessed, the costs would be a post-bankruptcy debt not affected by the discharge of the bankrupt.

42. ***Re Helmer*, 2010 ONSC 4572 (Registrar Nettie)**

Facts: The creditor (a former spouse of the bankrupt) filed a secured claim in the amount of $75,080.31. It was disallowed. The creditor appealed. Mid hearing, a pretrial took place, which resulted in a consent dismissal of the appeal, the allowance of an unsecured claim of $5,806.50, and certain directions respecting the former matrimonial home. There was no agreement on costs, and the matter was returned to the Registrar. In addition to the foregoing, the Registrar was asked to consider a previous application brought by the creditor to lift the stay of proceedings which was dismissed because the creditor had simply failed to prove her claims against the estate. The trustee sought costs for the 2.5 years prior to the appeal. The bankrupt sought costs of having his counsel participate. The creditor sought her costs, or in the alternative, an order that all parties bear their own costs.

Decision: Registrar Nettie noted that pursuant to s. 197, he had authority to fix costs in the appeal. The other costs sought by the Trustee were not sufficiently connected to the appeal as to be amenable to the requirement that they were costs of and incidental to any proceedings. The costs arose as a result of the creditor's failure to understand her position and follow established procedure where costs arising from the administration of the estate would be dealt with under s. 152 at the appropriate time. As to the costs of the appeal, the trustee's costs were fixed on a party and party basis at $6820 plus GST, which was in excess of any distribution owing to the creditor. The Trustee was to set these off against any dividend and was permitted to charge the excess against the creditor's interest in the matrimonial home. The bankrupt was not a party to the application and his costs were those of the trustee. They were not to be borne by the creditor.

H. CONTEMPT BY TRUSTEE

43. ***Re Cowan*, 2010 ONSC 3138 (Registrar Nettie)**

Facts: The trustee brought an application to annul an assignment in bankruptcy. The assignment was the third for the bankrupt and was brought at a time when he was undischarged from the second assignment. The Registrar directed the Trustee to initiate proceedings against the bankrupt under the *Criminal Code*, and the application for annulment was adjourned until the outcome of the criminal proceedings was known. The matter of how the proceedings were to be commenced was dealt with by the Registrar who, in written reasons handed down at the time, ruled that it was not adequate for the trustee to have informed the appropriate police service. The Registrar had, in fact, directed that a private prosecution was to be commenced, and had indicated that if the Crown did not wish to take up the prosecution, it lay upon the trustee to carry the burden of prosecution, subject to reimbursement out of the estate. The ruling was not appealed. Nine months later, the trustee brought the application to annul back before the court. The trustee deposed that instead of commencing a prosecution, she had reported the earlier reasons of the registrar to the appropriate police service. The Registrar ruled that the application was premature in light of the earlier order, and adjourned the matter to permit the trustee to make submission as to why the matter ought not to be referred to a bankruptcy judge for a contempt hearing.

Decision: The OSB and the trustee both took the position that there was a jurisdictional bar to the Registrar hearing a contempt matter. Registrar Nettie concluded that he had jurisdiction to hear the contempt matter as he was not sitting as an inferior court. The bar set out in s. 192(3) only precluded the Registrar from committing the trustee to jail, but did not prevent the Registrar from binding the trustee over for a determination. While the Registrar expressed concern that the trustee had not been tested on her affidavit material by cross examination, he was content to proceed. There were questions however about the *actus reus* and the requisite intent such that the Registrar held that contempt was not made out. He concluded by suggesting that the decision respecting the Cowan estate should now make the matter sufficiently clear that there should be no confusion in the future on the point, and suggested that rather than finding themselves in the position of defending a contempt application, when confused, trustees might best apply for directions under s. 34.