

The Canadian Abridgment eDigests -- Bankruptcy and Insolvency

2007-3
January 15, 2007

BKY.I.2.d

Subject Title: Bankruptcy and insolvency

Classification Number: I.2.d

Bankruptcy and insolvency jurisdiction -- Jurisdiction of courts -- Jurisdiction of registrar

Valuation of claim -- Bankrupts held minihome mortgaged to bank, with land as security -- Search of property registry did not show lien on minihome, and bank did not provide copy of registration of any lien on home -- Trustee's appraisal put value of forced sale of minihome at \$37,000 and land at \$15,000 -- Bank valued claim at \$75,599.36 -- Trustee sought to refinance home in order to pay bank for value of land minus previous payments -- As part of discharge proceedings, trustee brought motion for order to confirm plan to refinance minihome -- Conditional discharge granted, motion granted -- Trustee ordered to take lien on minihome for \$37,000 -- Debtors required to make certain payments in order to achieve discharge -- Bank entitled to present appraisal of land subject to order and negotiate adjustment to payment -- Registrar had jurisdiction to hear matter -- Matter was not required to be determined under s. 129 of Bankruptcy and Insolvency Act as disagreement over amount of security.

Abbott, Re ([2006](#)), [2006 CarswellNB 509](#), [2006 NBQB 311](#), M.J. Bray Reg. (N.B. Q.B.) [New Brunswick]

BKY.V.3

Subject Title: Bankruptcy and insolvency

Classification Number: V.3

Interim receiver -- Powers, duties and liabilities

W was owner of numbered corporation, 530 Inc. -- W and/or 530 Inc. ("lessors") leased properties to CG Co. -- Receiver was appointed for CG Co. on January 20, 2006 -- Lessors advised receiver that they were entitled to lien over equipment remaining on leased properties -- Beginning in mid-February 2006, receiver made attempts to recover equipment -- Initial attempts were unsuccessful because W was unable to attend at properties to provide access -- Receiver's agent retrieved equipment by March 15 -- Lessors brought application for declaration that receiver was liable to pay rent to them in relation to leased properties for period from January 20 to March 16 -- Application granted in part -- Receiver was liable to lessors for storage costs of equipment from January 20 to mid-February, at rate of \$3,500 per month -- To hold otherwise would confer benefit of free storage on receiver -- Storage fee of \$3,500 per month was reasonable given that this was amount that receiver paid to store equipment once it was removed from properties -- Receiver was not liable for storage fees after mid-February -- Equipment remained on properties after mid-February solely because of lien claim by lessors -- Possessory lien claimant is not entitled to storage charges incurred for purpose of protecting its claim -- Receiver was not liable to pay rent on properties other than storage fees -- Receiving order rendered receiver liable only for services it required to discharge its obligations -- Use receiver made of properties was limited to storage of equipment.

Cox v. Crystal Graphite Corp. [\(2006\), 2006 CarswellBC 2713, 2006 BCSC 1646](#), G.M. Barrow J. (B.C. S.C.) [British Columbia]

BKY.V.5

Subject Title: Bankruptcy and insolvency

Classification Number: V.5

Interim receiver -- Miscellaneous issues

Discharge -- P Inc. purchased oil and gas property from I Ltd. -- As part of transaction, parties entered into reclamation agreement whereby P Inc. agreed to indemnify I Ltd. from environmental obligations associated with property -- P Inc. experienced financial difficulties and receiver was appointed -- Property was sold and reclamation agreement was assigned to purchasers -- Court order approving sale contained vesting provision, which required receiver to hold sale proceeds in place of claims against property -- Sale proceeds were to be paid out upon discharge of receiver -- Receiver applied for discharge -- Application granted -- Neither I Ltd. nor Crown had right to sale proceeds that justified refusing discharge -- Environmental Protection and Enhancement Act authorized Crown to order

cleanup of property and, failing that, to undertake cleanup and make claim against anyone with interest in property -- Sale proceeds held under vesting provision were available in satisfaction of cleanup claim -- However, as Crown had not yet advanced claim, it had no present enforceable right that required protection -- I Ltd. faced potential claim if purchasers failed to satisfy Crown's claim for cleanup costs -- These events were too remote and hypothetical to give I Ltd. present substantive right to proceeds -- I Ltd. had standing to raise aforementioned issues on discharge application -- I Ltd. was interested and affected party with respect to receivership of P Inc. -- Sales proceeds stood as buffer between I Ltd. and liability for cleanup, and payment out of proceeds would affect buffer.

Bank of Montreal v. Probe Exploration Inc. [\(2006\), 2006 ABQB 604, 2006 CarswellAlta 1446](#), S.J. LoVecchio J. (Alta. Q.B.) [Alberta]

BKY.V.5

Subject Title: Bankruptcy and insolvency

Classification Number: V.5

Interim receiver -- Miscellaneous issues

Compensation for services provided to receiver -- W was director and officer of CG Co. -- Receiver was appointed for CG Co. -- W assisted receiver's agent with retrieval of equipment stored on property leased by CG Co. -- W brought application claiming compensation for services provided -- Application granted -- W was awarded \$1,800 for services provided, which reflected daily rate of \$300 -- Fact that receiver sought W's help was evidence that W's skills and knowledge were necessary to retrieve equipment in most expedient manner -- Amount of \$1,686 which receiver paid to its agent for retrieving equipment was not appropriate measure for W's compensation, since W brought knowledge and skill to task.

Cox v. Crystal Graphite Corp. [\(2006\), 2006 CarswellBC 2713, 2006 BCSC 1646](#), G.M. Barrow J. (B.C. S.C.) [British Columbia]

BKY.VII.6.d

Subject Title: Bankruptcy and insolvency

Classification Number: VII.6.d

Proposal -- Effect of proposal -- Effect on other legal processes

Corporation terminated employee without notice in May 2002 -- Corporation made bankruptcy proposal in January 2003, and was granted stay under s. 69.1 of Bankruptcy and Insolvency Act -- Corporation's statement of affairs did not disclose employee as creditor, and employee received no notice of proposal or stay -- In October 2004, employee commenced action against corporation, seeking damages for wrongful dismissal and other claims -- In December 2004, employee became aware of proposal when its existence was pleaded by corporation in statement of defence to employee's action -- By this point in time, three dividend distributions had been made under proposal -- Employee brought motion that stay under s. 69.1 of Act be lifted, pursuant to s. 69.4 of Act -- Motion granted -- Employee had claim under s. 178(f) of Act -- Corporation had obligation to disclose to trustee that employee might have claim provable in proposal -- Corporation knew that it had terminated employee, and that employee might advance claim for damages -- Corporation's failure to disclose attracted continued liability for dividends that employee would have received until date that employee became aware of proposal -- It was appropriate to lift stay so that employee could pursue claim in civil court -- Amounts claimed by employee were not amenable to quantification under summary provisions of Act -- It would be inequitable to allow corporation to proceed with counterclaim against employee while main claim remained stayed.

304260 Ontario Ltd., Re ([2006](#)), [2006 CarswellOnt 7022](#), Reg. S.W. Nettie (Ont. S.C.J.) [Ontario]

BKY.VII.11.b.ii.B

Subject Title: Bankruptcy and insolvency

Classification Number: VII.11.b.ii.B

Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Effect of arrangement -- Stay of proceedings

C Co. supplied products to RAM Inc. pursuant to agreement -- Payment clause in agreement granted C

Co. security interest in products supplied -- RAM Inc. filed under Companies Creditors' Arrangement Act ("CCAA") in June 2005 -- Initial order under CCAA was provided to all known creditors of RAM Inc. in July 2005 -- RAM Inc. began negotiations with unsecured creditors on plan of arrangement -- C Co. filed formal proof of secured claim in January 2006, relying on payment clause in agreement -- Monitor disallowed secured claim and admitted C Co. as unsecured creditor -- Proposed plan of arrangement provided that secured creditors whose security was perfected prior to June 29, 2005 were unaffected by plan, and that all other creditors were to be considered as single class -- C Co. brought motion appealing monitor's disallowance of its secured claims, and motion to lift stay under CCAA to permit registration of its security interests -- Motions granted -- Stay was lifted to permit recognition of registration of C Co.'s security interest -- Relief was conditional upon C Co. bearing reasonable expenses of RAM Inc. associated with delay in perfection -- Payment clause in agreement created security interest under Personal Property Security Act ("PPSA") -- C Co. was entitled to perfect registration under PPSA -- Nothing in PPSA allowed for exercise of equitable jurisdiction to deny registration -- Monitor was not person representing creditors under PPSA for purpose of deflecting claims -- Flexibility under CCAA should not be exercised to defeat legal rights of creditor with security -- It was reasonable that C Co. bear additional costs associated with delay in perfection -- Relief ordered would necessitate reformulation of proposed plan of arrangement.

TRG Services Inc., Re ([2006](#)), [2006 CarswellOnt 7024](#), C. Campbell J. (Ont. S.C.J.) [Ontario]

BKY.IX.1.b

Subject Title: Bankruptcy and insolvency

Classification Number: IX.1.b

Property of bankrupt -- Property exempt from execution under provincial statutes -- Home of bankrupt

Valuation -- Bankrupts were spouses who were each half-owners of matrimonial home -- Bankrupts filed separate assignments for bankruptcy in October 2005 -- Under Civil Enforcement Act and regulations, each bankrupt was allowed to exempt equity in matrimonial home of \$20,000 -- Bankrupts' statements of affairs declared value of home to be \$175,000, with mortgage security of \$141,000 -- Based on declared value and mortgages, there was no non-exempt equity -- Trustee requested that bankrupts provide current appraisal of home for use in report under s. 170 of Bankruptcy and Insolvency Act -- Bankrupts failed to provide requested appraisal, but instead provided appraisal as at date of bankruptcy -- Appraisal indicated value of home to be \$193,000, resulting in non-exempt equity of

approximately \$9,720 -- Trustee obtained market evaluations of home by two realtors as of June 2006 -- Trustee averaged evaluations to estimate value of home at \$280,200, resulting in non-exempt equity of \$95,618.15 -- Hearing was held regarding calculation of non-exempt equity -- Proper valuation date was held to be date at which home was being dealt with by trustee, in and around June 2006 -- Value of home at date of bankruptcy was not relevant -- Trustee did not have bankrupts' cooperation to deal home immediately after assignment in bankruptcy -- If bankrupts and trustee were able to agree on valuation, they were to negotiate purchase of home by third parties, or purchase of non-exempt equity by bankrupts -- If bankrupts disagreed with valuation, they were required to bring independent appraisal evidence to trustee immediately.

Pelkey, Re ([2006](#)), [2006 CarswellAlta 1481](#), [2006 ABQB 814](#), Reg. K.R. Laycock (Alta. Q.B.) [Alberta]

BKY.IX.17.b.ii

Subject Title: Bankruptcy and insolvency

Classification Number: IX.17.b.ii

Property of bankrupt -- After-acquired property -- Income -- Self-employment and professional income

Farmer applied to receive payments from Canadian Agricultural Income Stabilization program (CAIS) in October 2004 -- Farmer became bankrupt in December 2004 -- While farmer was bankrupt, he and trustee received CAIS funds for period 2003 to 2004 -- Farmer paid CAIS funds over to trustee -- Farmer was granted discharge in November 2005 -- As part of federal budget in May 2006, federal government recalculated amount payable to CAIS participants for years 2003 to 2005 -- Trustee received amount of \$56,196 as result of recalculation ("recalculated amount") -- Issue arose as to who was entitled to recalculated amount -- Hearing was held -- Trustee was ordered to release recalculated amount to farmer, after deducting amount of consent judgment -- Farmer was entitled to recalculated amount -- Recalculated amount was income and not assets under Bankruptcy and Insolvency Act -- Right to recalculated amount did not crystallize during bankruptcy -- Right to recalculated amount arose only after announcement of 2006 budget, at which time bankrupt had been discharged for at least six months -- Furthermore, date that recalculated amount was received was after bankruptcy.

Petterson, Re ([2006](#)), [2006 CarswellAlta 1403](#), [2006 ABQB 792](#), Reg. J.B. Hanebury (Alta. Q.B.) [Alberta]

BKY.XII.2.e.i

Subject Title: Bankruptcy and insolvency

Classification Number: XII.2.e.i

**Avoidance of transactions prior to bankruptcy -- Fraudulent preferences -- View to prefer --
General principles**

Bankrupt was contacted by bank regarding credit card debt in September 2003 -- Bankrupt informed bank that she would pay debt out of marital property equalization funds that she expected to receive -- Bankrupt received equalization funds in late January 2004 -- On January 28, 2004, bankrupt made credit card payment of \$12,418.71 to bank, and paid some other creditors in full -- Bankrupt's request for loan to avoid bankruptcy was declined -- Bankrupt made assignment in bankruptcy on March 25, 2004 -- In statement of affairs, bankrupt declared that she had assets worth \$10,460 and liabilities of \$42,365 -- Trustee brought action for declaration that disputed payment constituted fraudulent preference, and for judgment against bank in amount of disputed payment -- Action allowed -- Disputed payment was fraudulent preference pursuant to s. 95 of Bankruptcy and Insolvency Act -- Bankrupt was insolvent at date of disputed payment -- Bankrupt was presumed to have made disputed payment with view to prefer, pursuant to s. 95(2) of Act -- Bankrupt failed to rebut presumption that her dominant intention was to prefer -- Bankrupt selected accounts to pay in full knowing that other creditors would receive minimal or no payment -- Bankrupt's plan to secure financing to consolidate debt was not objectively reasonable since she was hopelessly insolvent -- There was no binding agreement between bankrupt and bank to make disputed payment out of equalization funds -- Alleged agreement was not confirmed by any document -- Fact that bankrupt advised bank that she expected to pay in future did not constitute agreement required to defend preference action -- Bank failed to prove that it would have initiated legal proceeding to recover debt.

Dubois-Vandale (Trustee of) v. MBNA Canada Bank ([2006](#)), [2006 MBQB 258](#), [2006 CarswellMan 377](#), Hanssen J. (Man. Q.B.) [Manitoba]

BKY.XV.1.a

Subject Title: Bankruptcy and insolvency

Classification Number: XV.1.a

Administration of estate -- Inspectors -- Who may be appointed inspector

M was building manager of complex in which trustee in bankruptcy had offices -- M was listed as inspector in estate under consideration as well as in 10 others -- Issue arose as to appointment of inspector -- Office of Superintendent of Bankruptcy opposed practice by trustee in bankruptcy of asking M to act in capacity of "standby inspector" -- There was no statutory requirement that inspector to estate be creditor thereof -- Will of creditors prevailed over wishes of trustee in bankruptcy or Official Receiver when it came to appointing inspectors -- When no such will was manifested, alternative approach was required -- Inspector stood in fiduciary relationship to general body of creditors in fulfilling responsibilities imposed by s. 120 of Bankruptcy and Insolvency Act -- There was no negative inference to be drawn from appointment of non-creditor to be inspector as long as that person had been made aware of fiduciary responsibilities, duties and restrictions imposed by Act -- Principle that inspectors were to be supervisors of trustee in bankruptcy rendered problematic unilateral appointment of inspector by trustee in bankruptcy -- In such situations it would be appropriate for trustee in bankruptcy to make summary ex parte application to court pursuant to s. 34 of Act for approval of suggested candidate for inspector -- Measure would not be unduly onerous in time or cost requirements that would protect both integrity of Act from public question and trustee in bankruptcy from unwarranted suspicion.

Monahan, Re ([2006](#)), [2006 NBQB 386](#), [2006 CarswellNB 629](#), Reg. M.J. Bray (N.B. Q.B.) [New Brunswick]

BKY.XV.6.h

Subject Title: Bankruptcy and insolvency

Classification Number: XV.6.h

Administration of estate -- Sale of assets -- Miscellaneous issues

Debtors were dealers and corporation which ran hardware store -- Creditor was supplier who owned premises -- Dealers executed personal guarantees for corporate debt, as well as general security

agreement -- Creditor of store believed that inventory value was \$224,457 below stated value -- Debtor maintained that inventory was not below stated value -- Business placed in receivership in ex parte proceedings -- Debtors maintained that receiver improperly appointed as insufficient evidence was put forth that debtors were in breach of security agreements, no demand for payment had been made, and that inventory was recorded as missing in error -- Creditor brought action in debt against debtors, and debtors brought counterclaim -- Receiver operated business as ongoing concern -- Receiver sought to sell business -- Debtors maintained that order appointing receiver lacked authority to sell business -- Creditor brought application for approval of sale -- Application granted -- Sale was reasonable -- Ruling made without prejudice to debtor's ability to mount defence in actions relating to guarantees, based on assertions that receiver improperly appointed -- Although arguable challenges were raised, delaying sale was impractical -- Absence of judgment debt made sale possible -- Action as against certain debtors as personal guarantors stayed until any judgment obtained against principal debtors.

Home Hardware Stores Ltd. v. 1059231 Alberta Ltd. (2006), 2006 ABQB 815, 2006 CarswellAlta 1485, M.B. Bielby J. (Alta. Q.B.) [Alberta]

BKY.XVI.4.a

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.4.a

Discharge of bankrupt -- Considerations on application -- Assets of less than 50¢ on dollar

Bankrupt and wife negotiated equalization of property in matrimonial proceedings -- Bankrupt made assignment into bankruptcy -- Bankrupt was 60-year-old divorced man who was retired nuclear operator -- Bankrupt had \$2,564.85 per month in net pension income which equated to surplus income of \$425.93 per month -- Application was brought for discharge of bankrupt -- Wife opposed discharge -- Opposing creditor wife accounted for vast majority of declared debt -- Conditional discharge granted -- Bankrupt did not have assets equal to 50 cents on dollar of his liability -- This did not occur for reasons for which bankrupt should not be held liable -- Section 173 of Bankruptcy and Insolvency Act was found as fact -- Person should be held to account for spending entire working life well employed with reasonable pension and having no assets of any meaningful value to show for it -- Single creditor bankruptcies should and did attract special scrutiny by discharge courts -- Bankrupt negotiated, through counsel, winding up of marriage of many years and then made assignment in bankruptcy to avoid paying ensuing judgment for equalization -- Debt to opposing creditor wife was major debt and stated reason for assignment was to obtain relief from equalization payments -- Nothing appeared to have changed for

bankrupt from when he agreed to stated amount of equalization -- It was appropriate to order discharge be conditional on payment to trustee of \$50,000 in minimum monthly payments of \$400 -- Bankrupt was given credit towards conditional payment amount for all amounts paid to date as surplus income.

Geddes, Re ([2006](#)), [2006 CarswellOnt 6978](#), S.W. Nettie Reg. (Ont. S.C.J.) [Ontario]

BKY.XVI.8.a

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.8.a

Discharge of bankrupt -- Conditional discharge -- General principles

Bankrupts held minihome mortgaged to bank, with land as security -- Search of property registry did not show lien on minihome, and bank did not provide copy of registration of any lien on home -- Trustee's appraisal put value of forced sale of minihome at \$37,000 and land at \$15,000 -- Bank valued claim at \$75,599.36 -- Trustee sought to refinance home in order to pay bank for value of land minus previous payments -- As part of discharge proceedings, trustee brought motion for order to confirm plan to refinance minihome -- Conditional discharge granted; motion granted -- Trustee ordered to take lien on minihome for \$37,000 -- Debtors required to make certain payments in order to achieve discharge -- Bank entitled to present appraisal of land subject to order and negotiate adjustment to payment -- Registrar had jurisdiction to hear matter -- Matter was not required to be determined under s. 129 of Bankruptcy and Insolvency Act as disagreement over amount of security.

Abbott, Re ([2006](#)), [2006 CarswellNB 509](#), [2006 NBQB 311](#), M.J. Bray Reg. (N.B. Q.B.) [New Brunswick]

BKY.XVI.8.a

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.8.a

Discharge of bankrupt -- Conditional discharge -- General principles

Costs obligations in custody dispute -- Bankrupt and his former common-law spouse were parties to contested custody trial that lasted 40 days, which resulted in custody award and child maintenance in favour of former spouse, and \$65,000 costs award against bankrupt -- During custody trial, discussions took place regarding survival of costs award in bankruptcy proceedings -- Registrar ruled that trial judge did not make formal binding direction with respect to survival of costs order, but rather was merely reacting to various hypothesis put before him -- While taxable costs occasioned in trial for alimony are to be treated as part of alimony claim, trial herein involved custody issue, and determination of maintenance was peripheral issue -- Registrar lacked authority to allocate or apportion some of costs to maintenance issue, as that is sole province of trial judge who made no such apportionment -- Trial judge found that bankrupt was largely at fault for necessity of litigation and that he prolonged process, and he remarked that bankrupt should not escape his costs obligation by declaring bankruptcy -- Registrar ordered discharge on condition of payment of \$40,000.00 together with retainer amount of \$2,056.00, totalling \$42,056.00, inclusive of funds presently in trustee's estate account -- Condition was to be met by regular payments of \$600.00 per month, approximating bankrupt's surplus income -- As incentive to bankrupt to obtain earlier discharge, he was given option of consenting to judgment for remaining balance if he faithfully made required payments for two years.

Ganden, Re ([2006](#)), [2006 CarswellAlta 1449](#), [2006 ABQB 806](#), Reg. R.B. Waller (Alta. Q.B.) [Alberta]

BKY.XVI.8.f

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.8.f

Discharge of bankrupt -- Conditional discharge -- Conduct of bankrupt

Single 30-year-old male made assignment in bankruptcy -- Bankrupt was supported by common law spouse whose income was \$1,300 per month -- Total declared debt was \$12,680 -- Application for discharge was bought -- At issue was appropriate condition for discharge of bankrupt -- Conditional discharge granted -- Bankrupt had held approximately 30 jobs since assignment in bankruptcy -- Neither bankrupt's assets nor his expenditures were extravagant except for purchase of 57-inch television set -- There was no evidence of physical or mental impairment -- It was not appropriate that single 30-year-old

male without any health problems should be able to avoid his financial responsibilities -- It was unarguable by bankrupt that he was honest but unfortunate debtor -- Absolute discharge was inappropriate -- Term of suspension alone was inappropriate -- There had to be condition imposing substantial payment into bankrupt's estate -- Bankrupt ought to pay 50 per cent of total unsecured claims or enter into consent judgment for amount -- Bankrupt could be discharged upon occurrence of either of those events.

Burgsma, Re ([2006](#)), [2006 CarswellAlta 1413](#), [2006 ABQB 408](#), Reg. W. Breitkreuz (Alta. Q.B.) [Alberta]

BKY.XVI.8.f

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.8.f

Discharge of bankrupt -- Conditional discharge -- Conduct of bankrupt

Bankrupt and wife negotiated equalization of property in matrimonial proceedings -- Bankrupt made assignment into bankruptcy -- Bankrupt was 60-year-old divorced man who was retired nuclear operator -- Bankrupt had \$2,564.85 per month in net pension income which equated to surplus income of \$425.93 per month -- Application was brought for discharge of bankrupt -- Wife opposed discharge -- Opposing creditor wife accounted for vast majority of declared debt -- Conditional discharge granted -- Bankrupt did not have assets equal to 50 cents on dollar of his liability -- This did not occur for reasons for which bankrupt should not be held liable -- Section 173 of Bankruptcy and Insolvency Act was found as fact -- Person should be held to account for spending entire working life well employed with reasonable pension and having no assets of any meaningful value to show for it -- Single creditor bankruptcies should and did attract special scrutiny by discharge courts -- Bankrupt negotiated, through counsel, winding up of marriage of many years and then made assignment in bankruptcy to avoid paying ensuing judgment for equalization -- Debt to opposing creditor wife was major debt and stated reason for assignment was to obtain relief from equalization payments -- Nothing appeared to have changed for bankrupt from when he agreed to stated amount of equalization -- It was appropriate to order discharge be conditional on payment to trustee of \$50,000 in minimum monthly payments of \$400 -- Bankrupt was given credit towards conditional payment amount for all amounts paid to date as surplus income.

Geddes, Re ([2006](#)), [2006 CarswellOnt 6978](#), S.W. Nettie Reg. (Ont. S.C.J.) [Ontario]

BKY.XVI.8.f

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.8.f

Discharge of bankrupt -- Conditional discharge -- Conduct of bankrupt

Bankrupt owned construction business -- Bankrupt pushed into insolvency through gambling debt -- Bankrupt had been criminally convicted and fined relating to gambling fraud -- Bankrupt brought application for discharge -- Conditional discharge granted -- Discharge suspended for two years -- Assets were less than 50 cents on dollar due to bankrupt's improper conduct -- Although insolvent, bankrupt continued to trade for at least one year before declaration of bankruptcy -- Bankrupt did not disclose all creditors to trustee -- Bankrupt set up other corporation for avoiding creditors -- Refusing discharge not appropriate, as bankrupt was forthcoming at hearing -- Business could be rebuilt -- Bankrupt required to pay 20 per cent of gambling debt and 25 per cent of non-disclosed debt from 2005 -- Repayment amounted to \$37,750 -- Bankrupt ordered to engage in counselling and abstain from gambling for five years.

McCague, Re ([2006](#)), [2006 CarswellOnt 7426](#), Reg. S.W. Nettie (Ont. S.C.J.) [Ontario]

BKY.XVI.10.b.ii

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.10.b.ii

Discharge of bankrupt -- Effect of discharge -- Debts not released by discharge -- Maintenance or support

Costs obligations in custody dispute -- Bankrupt and his former common-law spouse were parties to contested custody trial that lasted 40 days, which resulted in custody award and child maintenance in

favour of former spouse, and \$65,000 costs award against bankrupt -- During custody trial, discussions took place regarding survival of costs award in bankruptcy proceedings -- Registrar ruled that trial judge did not make formal binding direction with respect to survival of costs order, but rather was merely reacting to various hypothesis put before him -- While taxable costs occasioned in trial for alimony are to be treated as part of alimony claim, trial herein involved custody issue, and determination of maintenance was peripheral issue -- Registrar lacked authority to allocate or apportion some of costs to maintenance issue, as that is sole province of trial judge who made no such apportionment -- Trial judge found that bankrupt was largely at fault for necessity of litigation and that he prolonged process, and he remarked that bankrupt should not escape his costs obligation by declaring bankruptcy -- Registrar ordered discharge on condition of payment of \$40,000.00 together with retainer amount of \$2,056.00, totalling \$42,056.00, inclusive of funds presently in trustee's estate account -- Condition was to be met by regular payments of \$600.00 per month, approximating bankrupt's surplus income -- As incentive to bankrupt to obtain earlier discharge, he was given option of consenting to judgment for remaining balance if he faithfully made required payments for two years.

Ganden, Re ([2006](#)), [2006 CarswellAlta 1449](#), [2006 ABQB 806](#), Reg. R.B. Waller (Alta. Q.B.) [Alberta]

BKY.XVI.10.b.iii.A

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.10.b.iii.A

Discharge of bankrupt -- Effect of discharge -- Debts not released by discharge -- Fraud -- False pretences or fraudulent misrepresentation

Legal action was brought against bankrupt and another defendant -- Bankrupt and other defendant were held jointly and severally liable -- Other defendant paid amount of judgment and was awarded indemnity judgment against bankrupt -- Chambers judge held that discharge from bankruptcy did not relieve bankrupt from liability for indemnity judgment due to operation of ss. 171(d) and (e) of Bankruptcy and Insolvency Act -- Section 171(1)(e) of Act stated that discharge did not release bankrupt from "any debt or liability for obtaining property by false pretenses or fraudulent misrepresentation" -- Bankrupt sought to appeal decision of chambers judge on basis that Court of Appeal decision interpreting s. 171(1)(e) ("impugned decision") was wrongly decided -- Bankrupt brought application for leave to reconsider impugned decision -- Application dismissed -- Bankrupt failed to satisfy six factor test for determining whether to grant leave to reconsider -- Interpretation of s. 178(1)(e) in impugned decision was not patently unsound -- Impugned decision interpreted s. 178(1)(e) disjunctively, such that property was not

required to pass to tortfeasor in case of fraudulent misrepresentation -- Although courts have expressed concern with language of impugned decision, they have interpreted s. 178(1)(e) to achieve same result, namely, ensuring that benefits do not flow to fraudulent bankrupt -- Additional factors militating against reconsideration were that impugned decision was 20 years old, that it did not overlook binding statute or authority, and that it might have influenced other decisions.

McAteer v. Billes ([2006](#)), [2006 ABCA 312](#), [2006 CarswellAlta 1389](#), Fruman J.A., Martin J.A., Paperny J.A. (Alta. C.A.) [Alberta]

BKY.XVIII.7.b.ii.D

Subject Title: Bankruptcy and insolvency

Classification Number: XVIII.7.b.ii.D

Practice and procedure in courts -- Appeals -- To Court of Appeal -- Availability -- Miscellaneous cases

Leave for reconsideration of previous decision -- Legal action was brought against bankrupt and another defendant -- Bankrupt and other defendant were held jointly and severally liable -- Other defendant paid amount of judgment and was awarded indemnity judgment against bankrupt -- Chambers judge held that discharge from bankruptcy did not relieve bankrupt from liability for indemnity judgment due to operation of ss. 171(d) and (e) of Bankruptcy and Insolvency Act -- Section 171(1)(e) of Act stated that discharge did not release bankrupt from "any debt or liability for obtaining property by false pretenses or fraudulent misrepresentation" -- Bankrupt sought to appeal decision of chambers judge on basis that Court of Appeal decision interpreting s. 171(1)(e) ("impugned decision") was wrongly decided -- Bankrupt brought application for leave to reconsider impugned decision -- Application dismissed -- Bankrupt failed to satisfy six factor test for determining whether to grant leave to reconsider -- Interpretation of s. 178(1)(e) in impugned decision was not patently unsound -- Impugned decision interpreted s. 178(1)(e) disjunctively, such that property was not required to pass to tortfeasor in case of fraudulent misrepresentation -- Although courts have expressed concern with language of impugned decision, they have interpreted s. 178(1)(e) to achieve same result, namely, ensuring that benefits do not flow to fraudulent bankrupt -- Additional factors militating against reconsideration were that impugned decision was 20 years old, that it did not overlook binding statute or authority, and that it might have influenced other decisions.

McAteer v. Billes ([2006](#)), [2006 ABCA 312](#), [2006 CarswellAlta 1389](#), Fruman J.A., Martin J.A., Paperny

J.A. (Alta. C.A.) [Alberta]



Copyright © Carswell