The Bankruptcy Dodge

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Litigants of matrimonial causes bring great determination to the fray. Frequently both sides feel morally justified in misbehaviour to accomplish their aims; increasingly losers are making victories pyrrhic by filing in bankruptcy.

When a creditor makes an assignment subject to some exemptions, there is an automatic stay of proceeding and most of the creditors cease to have any rights against the bankrupt's property. However, if a debt is not a "claim provable in bankruptcy" the creditor still has remedies against the bankrupt and his property during the bankruptcy:

> 69.(1) On the filing of a proposal made by an insolvent person or on the bankruptcy of any debtor, *no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property* or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.[1] [Emphasis added.]

A bankrupt is specifically not discharged for an obligation pursuant to a maintenance order. That section states:

> 178.(1) An order of discharge does not release the bankrupt from ...
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> (c) any debt or liability under a maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt.[2]

There is overwhelming case authority for the proposition that maintenance and alimony claims are not "claims provable in bankruptcy" and therefore the payees of maintenance are entitled to proceed against the debtor and his property. In *Lawpla Ltd. v. Bonney*,[3] the Ontario County Court, relying on *Simon v. Simon*,[4]

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[1] *Bankruptcy Act*, R.S.C. 1985, c. B-3.

[2] Ibid.

[3] (1984), 40 R.F.L. (2d) 105 (Ont. Co. Ct.).

[4] (1984), 45 O.R. (2d) 53, 38 R.F.L. (2d) 198 (Div. Ct.).

stated that “it is now clearly established that claims from maintenance, whether by order of agreement, are not provable in bankruptcy.”

Claims for support are not provable in bankruptcy and are not stayed by section 69(1).[5] Because support is not provable in bankruptcy, it is not necessary to obtain an order from the bankruptcy court to proceed with a claim related to support or maintenance, nor is it necessary for the trustee to be made a party to the proceeding.[6] The author relies on *Simon v. Simon*,[7] *Re Taylor*,[8] and *Saberi v. Saberi*.[9]

Finally, section 172(2) of the *Bankruptcy Act* states that the court shall, upon proof of any of the facts mentioned in section 173, refuse to suspend the application of the bankrupt for a discharge, or make the discharge conditional.

One of the facts referred to in section 173 is that the assets of the bankrupt are not of a value equal to $0.50 on the dollar, unless the bankrupt satisfies the court that the deficiency in assets has arisen from *circumstances for which he cannot justly be held responsible.*

This article will deal with the interrelationship between the operation of the *Bankruptcy Act* and matrimonial property legislation in Canada. With over 50 per cent of the superior courts’ contested trials in Canada being devoted to domestic relations, the matters at issue have broad national importance. Filing in bankruptcy to avoid marital obligations is increasingly common. Cases from jurisdictions across Canada demonstrate the growing frequency of this chicanery.

1. CONSTRUCTIVE TRUST IN BANKRUPTCY

Courts have held that property held in trust by the bankrupt for the other person is not property subject to bankrupt proceedings:

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[5]See, for example, *Allen v. Morrison* (1987), 62 O.R. (2d) 790, 11 R.F.L. (3d) 225 (Div. Ct.); *Simon v. Simon*, above, note 4; *Kutschenreiter v. Kutschenreiter* (1983), 46 C.B.R. (N.S.) 1 (Ont. H.C.); *Gibson v. MacIntyre* (1981), 39 C.B.R. (N.S.) 318 (Ont. Prov. Ct.); *Dudgeon v. Dudgeon* (1980), 17 R.F.L. (2d) 204 (Alta. Q.B.); *Fortin v. Fortin* (1987), 88 A.R. 233 (Master).

[6]*Dudgeon v. Dudgeon*, above, note 5; *Droit de la famille* – 82, [1983] C.S. 1099; *DiMichele v. DiMichele* (1982), 32 R.F.L. (2d) 212 (Ont. Dist. Ct.); *Re Gurney* (1975), 22 R.F.L. 172 (Ont. Prov. Ct.) At 175; *Bennett on Bankruptcy* (Toronto: C.C.H., 1989) at 126: “A support order in favour of a spousal creditor with respect to alimony, or maintenance or support is not a claim provable in bankruptcy and, accordingly, such a creditor may proceed during the bankruptcy or subsequently.”

[7]Above, note 5.

[8](1985), 48 R.F.L. (2d) 214 (B.C.S.C.).

[9](1979), 10 R.F.L. (2d) 381 (Ont. C.A.).

> 67. The property of a bankrupt divisible among his creditors shall not comprise
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> > (a) property held by the bankrupt in trust for any other person.[10]

There is an automatic stay:

> 69.(1) On the filing of a proposal made by an insolvent person or on the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the Court may impose.[11]

In *Bedard v. Schell*,[12] a common-law wife brought an action against her common-law husband, claiming entitlement to half of his property based on an expressed trust, resulting trust, or constructive trust. The parties had cohabited for 18 years before separation. Before her claim was determined, the husband made an assignment into bankruptcy and was granted an absolute discharge, although the trustee in bankruptcy was not yet discharged. The wife applied for determination of whether she was required to seek leave of the Court to continue her action, pursuant to section 69(1) of the *Bankruptcy Act*.

Gerein J. held that the wife was not required to seek leave to continue her action in respect of her claim based on an expressed or resulting trust, but required leave to continue her action in respect of her claim based on a constructive trust:

> To my mind the Supreme Court has utilized the constructive trust simply as a remedy to right a wrong. It has not presented the constructive trust as a substantive legal institution . . . Upon this view of a constructive trust, i.e. that it is simply a remedy, I hold that it does not come within the parameters of s. 47(a).[13]

The Court also held that an expressed trust or resulting trust came within the parameters of section 47(a) of the *Bankruptcy Act* and, accordingly, no leave was required:

> Section 47(a) of the **Bankruptcy Act** is concerned with property which at the time of the bankruptcy can be identified and segregated from the other property of the bankrupt. In the case of a constructive trust such identification and segregation cannot take place until the court imposes the trust taking into

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[10] Above, note 1.

[11] Ibid.

[12] (1987), 8 R.F.L. (3d) 180, 59 Sask. R. 71 (Q.B.).

[13] *Ibid,* at 74 (Sask. R.).

> account the claims of creditors. To ensure protection to the creditors it is best that this be done only with leave of the court and subject to whatever condition it may impose.
>
> In the result, my answer to the question is that the plaintiff does not require leave to continue her action in respect to her claim based on an express or resulting trust; but she does require leave to continue her action in respect to her claim based on a constructive trust.
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> Order accordingly.[14]

In *Boe v. Boe*,[15] a matrimonial property division was ordered on October 20, 1983. The husband was ordered to pay the wife the sum of $100,000 upon certain terms and over time. Direction was made in the judgment that the judgment be registered against two quarter sections of land. After a delay caused by an appeal, on November 10, 1986, the husband filed in bankruptcy. The trustee sought to categorize Mrs. Boe as that of a simple judgment creditor. The wife brought an application for directions concerning her interests in the properties against which the judgment had been registered. Grotsky J. disagreed with the trustee that Mrs. Boe was a simple judgment creditor:

> It is clear that the judgment divided the matrimonial property, or its value, between the parties. That, from and after the date of judgment, notwithstanding the titles to the lands per se remained registered in the name of the respondent, his proprietary interest therein was reduced by the applicant's interest charged thereon. That, from and after October 20, 1983, the respondent held the titles to the lands as trustee for the applicant to the extent of her interest.[16]

Grotsky J. further stated:

> For the reasons given, I am of the view that on November 10, 1986, when the respondent made his assignment for the general benefit of his creditors, the property of which he was then possessed and entitled to, and which flowed to or became the property of the trustee to be dealt with under the **Bankruptcy Act**, did not include the interest in the matrimonial property awarded to the applicant and charged on the land.
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> It is the bankrupt's estate and not the estate of any third party which the statute makes available for distribution amongst his creditors in satisfaction of his debts.[17]

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[14] *Ibid*. at 75.
[15] (1988), 12 R.F.L. (3d) 337, 63 Sask. R. 173 (C.A.), affirming (1987), 6 R.F.L. (3d) 383, 57 Sask. R. 7 (Q.B.).
[16] Ibid. at 15 (57 Sask. R.).
[17] Ibid. at 16.

Thus, the trust imposed upon the husband defeated the claim of all unsecured creditors under the *Bankruptcy Act*. The decision in *Boe v. Boe* was confirmed by the Court of Appeal in 1988.

2. BANKRUPTCY LEGISLATION AND MATRIMONIAL PROPERTY ACTS

(a) Introduction

Mr. Justice Hutchinson of the Alberta Court of Queen's Bench in *Millar v. Millar* remarked on the problem generally:

> It is apparent that the courts are uncomfortable with the thought that a former spouse can defeat a matrimonial property division award by the expedient of a former spouse declaring bankruptcy in circumstances where the award is not specifically charged against the matrimonial property or is not otherwise secured pursuant to the terms of the order made under the Act. This is reflected in Mr. Justice Walker's comments in *Boe v. Boe*, supra, when he referred to the Court of Appeal's concerns with protecting the integrity of awards.[18]

Mr. Justice Hutchinson was faced with a transfer of the matrimonial home, sent to the husband's solicitor in trust against payment of the $42,000 matrimonial property order. The transfer was never registered, although the husband continued to live in the matrimonial home. The husband made an assignment into bankruptcy and obtained the matrimonial home pursuant to an exemption. The wife received none of her money payable under the order. Hutchinson J. granted the wife leave in the bankruptcy proceedings to pursue the matrimonial property application.

(b) Cases Where Discharge of the Bankrupt was Allowed

In *Rossal v. Rossal*,[19] upon separation, the husband and wife executed an interspousal agreement to distribute their property. Subsequently, the wife, notwithstanding the agreement, applied for equal distribution of the matrimonial property pursuant to section 21(1) of the *Matrimonial Property Act*.[20] The wife argued that the agreement was unconscionable and grossly unfair and therefore void.

The Saskatchewan Court of Queen's Bench allowed the wife's application, set aside the interspousal agreement, and divided the matrimonial property

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[18](1991), 81 Alta. L.R. (2d) 160 (Q.B.) at 174, rev'd (1991), 37 R.F.L. (3d) 113, 84 Alta. L.R. (2d) 59 (C.A.).

[19](1984), 38 Sask. R. 1(Q.B.), var'd (1987), 12 R.F.L. (3d) 15, 61 Sask. R. 169 (C.A.).

[20]R.S.A. 1980, c. M-9.

accordingly. The Court found the husband entitled to three parcels of farm land, including the homestead. The husband appealed.

The Saskatchewan Court of Appeal allowed the appeal in part. That portion of the trial judgment giving the husband title to the land was not disturbed on appeal. The wife issued execution against the property. The husband then filed in bankruptcy. The husband's trustee ruled that the wife's claim to the land was unsecured (although she had registered a lis pendens against the property) and that her claim ranked subsequent to that of the mortgage registered after the agreement. The wife appealed the trustee's order and, in a separate application, applied under section 26 of the *Matrimonial Property Act* for an order investing in her the title to the lands, in an attempt to realize on the matrimonial property judgment. The two applications were heard together.[21]

Wedge J. of the Court of Queen's Bench held that the Court was functus officio with respect to the section 26 application and the Court also refused to overturn the trustee's decision in the bankruptcy order.

The Court first held that there was no authority to revisit the property division pursuant to section 26 of the Act. Having found that, the Court also held that it could not set aside the trustee's decision regarding the wife's status in bankruptcy proceedings:

> There remains the matter of the appeal under the *Bankruptcy Act*, I am satisfied that I am unable to do under that Act, what I could not do under the *Matrimonial Property Act*.[22]

Wedge J. made it clear that the decision would cause unfairness to the wife. She indicated, however, that she was bound by the law:

> As a result of my decision, there is no need to decide what would be the effect of Mrs. Rossal's lis pendens. The Credit Union should have been alerted by the lis pendens, before registering its mortgage, that there was litigation pending in which the title to property was in question. In the *Boe* case the Court of Appeal deplored the fact that Mrs. Boe, like many other women, suffered an injustice not only because of her husband's obstructions but also because of the inability of counsel and courts to have cases of this kind determined efficiently and expediently. Mrs. Rossal has also suffered. She is in the same position as she was when the "unconscionable and grossly unfair" separation agreement was entered into and the property transferred to Mr. Rossal as a result of this agreement. She has not recovered even the costs incurred in attempting to protect the "integrity of her award". Perhaps what is necessary is a change in the various legislation including the *Bankruptcy Act* clarifying the effect of a spouse's lis pendens, and the priority of the spouses interest in marital

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[21] *Rossal v. Rossal* (1988), 16 R.F.L. (3d) 232, 70 Sask. R. 181 (Q.B.).
[22] Ibid. at 184 (Sask. R.).

> property upon being awarded a monetary judgment which is not satisfied. In the *Boe* case, there is a suggestion by the Court of Appeal that had Mrs. Boe registered a lis pendens rather than a caveat the result would have been different, and a suggestion that, had it been addressed by counsel for all parties, the bankruptcy proceeding there might have been set aside pursuant to s. 152 of the *Bankruptcy Act*. This aspect was not before me in any way, nor mentioned by counsel.
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> The appeal under the *Bankruptcy Act* is dismissed.[23]

As the many Saskatchewan precedents indicate, the jurisdiction has been bedeviled by the bankruptcy device of eluding spousal payment. In *McJannet v. McJannet*,[24] the husband consented to a monetary judgment of $25,000 in favour of his wife 10 days after he made an assignment into bankruptcy. He persuaded his wife to sell the matrimonial home just a few months earlier. The wife attempted to obtain some share of what had been matrimonial property by characterizing the debt as maintenance. The wife then applied to enforce the judgment. The husband applied to quash the enforcement proceedings. The Court allowed the husband's application and held that the discharge released him from the matrimonial property judgment. McLeod J. stated:

> The judgment which the wife seeks to enforce is a debt.
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> The judgment is not included in these debts which, pursuant to s. 178 of the *Bankruptcy Act* are not released by an order of discharge. The order of discharge of the husband has the effect of releasing him from the judgment.
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> The judgment is discharged. The garnishee is set aside. Any writ of execution issued thereunder is null and void.[25]

In *Bremner v. Bremner*,[26] the husband avoided a $50,000 obligation by declaring bankruptcy. The husband and wife were divorced on December 28, 1986. The divorce judgment made no reference to maintenance for the husband and wife. However, the parties had executed an interspousal contract and separation agreement on September 15, 1986.

The separation agreement provided that the husband would pay the wife, for her half interests in the company, $50,000. The company was the primary asset of the couple. Some of the funds were to be paid immediately and subsequent annual payments were to be made.

On September 7, 1988, the husband made an assignment into bankruptcy. The

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[23]Ibid. at 185.
[24](1988), 73 Sask. R. 20 (Q.B.)
[25]Ibid. at 22.
[26](1989), 74 Sask. R. 110 (Q.B.)

wife sought a declaration that the debt to her would survive the bankruptcy. Her application was based on section 178(1)(c) of the *Bankruptcy Act* which states:

> 178.(1) An order of discharge does not release the bankrupt from...
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> (c) any debt or liability under a maintenance or affiliation order or under an agreement for maintenance and support of a spouse or child living apart from the bankrupt.

Matheson J. reviewed the operative paragraphs in the separation agreement:

> The operative paragraphs of the agreement are numbered. The first paragraph establishes the effective date of the agreement; the second permits the parties to live separate and apart; the third contains a mutual non-molestation covenant; and the fourth states:
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> "4. Neither of the parties hereto shall seek, nor be entitled to maintenance or alimony from the other for themselves."[27]

After viewing several decisions, Matheson J. stated:

> The separation agreement does not purport to classify, as maintenance, the debt owed by Bremner – the agreement clearly states that neither party shall "be entitled to maintenance". Nevertheless, the applicant has submitted that the whole agreement must be considered as a whole.
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> . . .
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> The applicant's submission overlooks the fact that the debt was specifically categorized – not as an amount in lieu of maintenance, but as the value of the applicant's one-half interest in the shares of the named corporations. Her entitlement to that interest arose, to some extent, from the provisions of the *Matrimonial Property Act*. It was expressly stated that the purpose of the agreement was to divide matrimonial property. If the applicant's submission should be accepted, then every debt arising from an agreed, or designated, share of matrimonial property could similarly be converted into a debt for maintenance should the circumstances so require.
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> . . .
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> The characterization of the debt owed by Bremner to the applicant, as representing the balance of the applicant's one-half "share of the parties interests in the corporations hereinbefore mentioned", does not permit – particularly the view of the other provisions of the separation agreement – of any reasonable inference that the debt represents maintenance. Consequently, there will be a declaration that the debt owed by Bremner to the applicant is not a debt or liability under an agreement for maintenance and support of the application within the meaning of s. 178(1)© of the *Bankruptcy Act*.[28]

Clearly, Matheson J. would have held differently had the debt ben owing for

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[27]Ibid. at 111.

[28]Ibid. at 114.

maintenance. The husband kept the entire corporation and avoided payment of $50,000.

In *Schmidt v. Schmidt*,[29] the Court allowed the husband to avoid payment of $143,800. The case involved an application by the husband for an order removing two writs of execution filed against him by his former spouse. The issue in the case was whether the debts giving rise to the writs survive the intervening bankruptcy of the applicant.

The parties were divorced in 1984 and in the judgment of the Court, the husband, among other things, was ordered to pay $142,800 to his wife in instalments of $35,700 forthwith, and $35,700 on December 31 in the years 1984, 1985 and 1986.

The husband defaulted on the last two payments which resulted in the subsequent court order requiring him to pay $500 per month as payments on the matrimonial property division. The husband made an assignment into bankruptcy on June 21, 1989, and the wife was listed as an unsecured creditor.

McLellan J. held that in the circumstances of the case, the judgment for $142,800 could not be characterized as maintenance and the interim payments of $500 per month were held to be advances on the wife's share of the matrimonial property and not maintenance payments. Therefore, the payments were not capable of being characterized as maintenance within section 178(1)(c) of the *Bankruptcy Act*.

(c) Cases Where Discharge Was Refused

The 1988 Saskatchewan decision of *Boe v. Boe*[30] (considered by two separate trial judges and the Court of Appeal) is summarized by Matheson J. in *Bremner v. Bremner*[31]:

> In *Boe v. Boe*, [1988] 3 W.W.R. 88 (Sask. C.A.), the wife had obtained an order, pursuant to the *Matrimonial Property Act*, entitling her to a one-half share of the matrimonial property. The order directed that the judgment be entered against the title to certain of the property. When the wife sought an order for the sale of the land, the husband made an assignment in bankruptcy. Several months later the judge who had granted the judgment to the wife rendered a further judgment "explicating" his previous judgment.
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> The explicating judgment was appealed to the Saskatchewan Court of Appeal, which

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[29] [1991] Sask. D. 1639-01.
[30] Above, note 15.
[31] Above, note 26 at 112.

> ordered that title to the farm lands vest in the name of the wife. At p.95, it was further stated:
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> > "It follows, then, that upon title to the lands vesting in the wife, there will remain owing to her the sum of $76,374.31, which sum includes interest and costs to date."
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> One month later the husband was granted an absolute discharge as a bankrupt. A month thereafter the wife garnisheed the husband's wages to satisfy the debt established by the Saskatchewan Court of Appeal. The husband thereupon applied for a declaration that there was no debt due to the wife, alleging that the discharge order had released him from all claims provable in bankruptcy.
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> In *Boe v. Boe* [1988] 6 W.W.R. 122; 69 Sask. R. 72, Walker, J., dismissed the husband's application. At p.127, he stated:
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> > "The effect of s. 148(2) is to permit the rehabilitation of the bankrupt unfettered by past debts. It is not to permit the bankrupt to avoid the operation of the *Matrimonial Property Act* of this province and avoid operation of a court judgment and deprive the respondent of her one-half share in the matrimonial property. . . . It is, with respect, difficult to think of the Court of Appeal going through all the calculations and estimates necessary to arrive at the final figure they did of $76,374.31 knowing that s. 148(2) would make the whole exercise futile. . . Section 148(2) does not extend to the circumstances of this application."
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> There was no reference, of course, to the exceptions to the operation of s. 148(2) (now s. 178(2)) as set out in s. 142(1) (now s. 178(1)), presumably because the wife's judgment would not fit into any of the exceptions.

The conclusion in *Boe* was premised to some extent by this statement in the judgment of the Saskatchewan Court of Appeal that, if a different conclusion had been reached, the Court of Appeal "would have permitted an application to have the bankruptcy proceedings set aside pursuant to section 152 of the *Bankruptcy Act*." The reference to section 152 [now section 181] permits the court to annul a bankruptcy where "in the opinion of the Court, the receiving order ought not to have been made."

In that case, the Saskatchewan Court of Appeal was maintaining fairness and equity between the parties. It must have seemed extremely unfair and grossly unconscionable that Mrs. Boe would receive nothing due to her husband's assignment in bankruptcy.

The 1974 Supreme Court of Canada decision in *Kozack v. Richter*[32] dealt with section 172(2) of the *Bankruptcy Act*. That case, while not dealing with marital property, addressed the issue of when a court could intervene to refuse to grant a discharge. In *Kozack*, the bankrupt made an assignment into bankruptcy to

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[32] [1974] S.C.R. 832.

avoid the effect of a judgment in damages for wilful and wanton misconduct in the operation of a motor vehicle. The Supreme Court of Canada ordered the bankrupt to pay approximately 50 per cent of the judgment as a condition of his discharge. The order was made pursuant to section 142 and 142 of the *Bankruptcy Act* [now section 172 and 173].

Section 172(2) states that the court shall, upon proof of any of the facts mentioned in section 173, refuse or suspend the application of the bankrupt for a discharge or make the discharge conditional. One of the facts referred to in section 173 is that the assets of the bankrupt satisfies the court that the deficiency in assets has arisen "from circumstances for which he cannot justly be responsible."

The debt in tort was held to be different in substance from a commercial debt. So too, the courts might characterize marital debts as flowing from a closeness of relationship which goes beyond a commercial partnership and visit a special debt upon the bankrupt. Some novel judicial thought would be appropriate.

This is a situation where the Supreme Court of Canada ordered the bankrupt to pay 50 per cent of the judgment as a condition of his discharge. It is submitted that that is a factor that the courts can look to when faced with an application by a spouse seeking to make an assignment into bankruptcy.

The Nova Scotia Court of Appeal deal with an application by a former spouse for a discharge in bankruptcy in *Craig v. Bassett.*[33] The case involved an appeal from a judgment declaring that a debt owed by a bankrupt to his ex-wife was not released by an order discharging the appellant from bankruptcy.

The debt in *Craig v. Bassett* arose from the provisions of a comprehensive agreement incorporated into the decree nisi of divorce. The agreement dealt with child custody, maintenance, disposition of the matrimonial home, automobiles and R.R.S.P.s and the transfer of the wife's share in the limited partnership business in which the husband and wife were sole partners. Both parties had been employed full-time by the partnership. The wife's sole source of income, from her employment had been the partnership. She had been earning $42,000 per year. The agreement provided that the husband would purchase, from the wife, a half interest in the partnership. The balance owing for interest was to be paid in equal monthly instalments over a period of 52 months.

The Nova Scotia Court of Appeal stated that the trial Judge had correctly interpreted section 148(b) and (c) [now section 178(b) and (c) of the *Bankruptcy*

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[33](1988), 17 R.F.L. (3d) 225, 87 N.S.R. (2d) 216 (C.A.)

Act] in that he had acted "to protect the former spouse from losing her support when her former husband goes into bankruptcy." The Nova Scotia Court of Appeal concluded that the question of whether the debt to the ex-wife survived the bankruptcy was a question of fact and the evidence justified the conclusion of the trial Judge:

> I find that monies owing the applicant were basically intended for maintenance and support for a period to give her an opportunity to start again, or get other work. I am therefore saying the amount of Forty some Thousand Dollars ($40,000.00 ±), as set out, is protected by s. 148 of the *Bankruptcy Act* and this money will not be released or discharged on this bankruptcy proceeding.[34]

The Alberta Court of Appeal recently reviewed the trial decision in *Millar v. Millar*.[35] In proceedings under the *Matrimonial Property Act*,[36] the husband was ordered to pay a sum of money and the wife was to give up all legal title to the matrimonial home. The wife's lawyer sent a transfer of her interest in the home to the husband's lawyer in trust pending payment of settlement money. The husband subsequently made an assignment into bankruptcy, having made no payment to the wife.

The wife claimed a declaration that she had charge against the home and sought judicial sale in payment of the proceeds from the sale. The Chambers Judge dismissed the application on the basis that the judgment did not create a charge against the home in the wife's favour and that she was just an unsecured creditor for the amount due under the judgment. The wife appealed and the Alberta Court of Appeal allowed the appeal. The Court of Appeal ordered the sale of the home and ordered that the wife was entitled to half of the net proceeds.

The Court held that part of the order directing the wife to give up her title to the home was contingent upon the settlement money being paid. Until that contingency was met, the Court held, the property had not vested in the husband. Therefore, at the time of the bankruptcy, the wife retained her interest in the home and the husband was able to assign into bankruptcy only a half interest in the home. Accordingly, the wife was entitled to half the net proceeds of the home and could rank as an unsecured creditor for the balance of the settlement money subject to the *Bankruptcy Act*.

Foisy J.A., speaking for the Court, distinguished *Millar* from the *Maroukis* and *Hebert* decisions. He stated:

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[34]Ibid. at 220 (N.S.R.).
[35]Above, note 18.
[36]R.S.A. 1980, c. M-9.

> The case at bar can be distinguished from *Maroukis v. Maroukis* [1984] 2 S.C.R. 137, 41 R.F.L. (2d) 113, 34 R.P.R. 228, 5 O.A.C. 182, 54 N.R. 268, 12 D.L.R. (4th) 321, one of the cases relied upon by the respondents. In *Maroukis* the transfer of the title in the matrimonial home to the wife was not contingent upon the payment of a monetary settlement. In this case "(a) the sum of $42,000.00 shall be paid" and, concurrently, "(b) the wife shall give up all legal right and title to the matrimonial home herein." (B) is contingent upon the happening of (a). Dixon J. did not order the wife to give up her title to the home ownership in return for a possibility of receiving a $42,000 settlement. Until the contingency is met, the property does not vest in the husband.
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> This does not conflict with *Maroukis*, which some have held stands for the proposition that in all cases property vests as at the date of the order. It must be remembered that *Maroukis* was decided in the context of determining the relative right of spouses to deal with property prior to the date of the order.
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> Similarly, the case at bar can be distinguished from *Hebert v. Hebert* (1988), 17 R.F.L. (3d) 355, 71 C.B.R. (N.S.) 163, 88 N.S.R. (2d) 107, 225 A.P.R. 107 (T.D.), where the court did not find a sufficient nexus between the transfer of the property right and the receipt of the monetary payment to create a contingency.

The Court then held:

> At the time of bankruptcy, both legal and beneficial title of the wife's interest remained in her. This being the case, on bankruptcy the husband was able to assign only his interest in the matrimonial home to the trustee. Accordingly, the wife is entitled to, on the sale of the property, one half of the net proceeds of the sale. She could rank as an unsecured creditor for the balance of the $42,000 subject, of course, to the provisions of the *Bankruptcy Act*, R.S.C. 1985, c. B-3.[37]

Millar is another example of a court effectively addressing an unfairness being visited upon a spouse.

As noted, the decision in *Boe v. Boe* was creatively confirmed by the Saskatchewan Court of Appeal, although it is arguably inconsistent with their disposition of *Gresham (Trustee of) v. Gresham*.[38]

Mr. Gresham owed some hundreds of thousands of dollars in matrimonial property and over $200,000 in arrears of support. He spirited assets from Saskatchewan to British Columbia and England. Upon returning to Saskatchewan, he was arrested and held in custody for contempt of court. On the eve of his return, he filed in bankruptcy. He disclosed $86,000 on deposit in England and purged his contempt by posting those funds as against his contempt. The Court of Queen's Bench held that there had been a charging

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[37] Above, note 18 at 115-116 (R.F.L.).

[38] (1992), 89 D.L.R. (4th) 43 (Sask. C.A.).

order pursuant to the Saskatchewan *Matrimonial Property Act*[39] on Mr. Gresham's property and ordered the funds released to Mrs. Gresham. The Court of Appeal referred to Mr. Gresham's "desperate maneuvering" to avoid payment but overturned the Queen's Bench disposition and ordered the funds paid out to the trustee in bankruptcy.

The Saskatchewan Court of Appeal was dealing with section 26 of the Saskatchewan *Matrimonial Property Act.* Similar sections across Canada are: Nova Scotia, section 10 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275; Prince Edward Island, section 6 of the *Family Law Reform Act*, R.S.P.E.I., c. F-3; Newfoundland, section 26 of the *Family Law Act*, S.N. 1988, c. 60; New Brunswick, section 10 of the *Marital Property Act*, S.N.B. 1980, c. M-1.1; Ontario, section 9 of the *Family Law Act*, S.O. 1986, c.4 [now R.S.O. 1990, c. F.3]; Manitoba, section 21 of the *Matrimonial Property Act*, R.S.M. 1987, c. M45; Alberta, section 9 of the *Matrimonial Property Act*, R.S.A. 1980, c. M-9; and British Columbia, section 52 of the *Family Relations Act*, R.S.B.C. 1979, c. 121.

Perhaps early control of the assets by the courts would avoid problems over bankruptcy and an application for a specific charge could avoid subsequent misapplication of funds. The Court of Appeal in *Gresham* thought the section broad:

> [I]t seems that the power granted the court is not restricted to matrimonial property but extends to all property owned by the debtor spouse when the charge is created. Such an approach is consistent with the language of s. 26 which refers to "property" rather than the more specific term "matrimonial property". Such a broader interpretation is also in keeping with the general purpose of the legislation. If one spouse is indebted to another, there is no apparent need to restrict the right of the creditor spouse to security on matrimonial property when other property owned by the debtor spouse may be much more appropriate for the purpose and provide a greater assurance of payment. Indeed, even future property may be subject to such a charge if it is covered by a security interest ordered by the court to be granted by the debtor spouse.[40]

If the courts are going to address the abuse that bankruptcy can visit upon the successful spouse (usually a woman), then the thinking will flow from the kind of approach that arises with constructive trusts and cases applying the rule in *Ex parte James*.[41]

(d) Constructive Trust

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[39]S.S. 1979, c. M-6.1.

[40]Above, note 38 at 47.

[41]*Re Condon*; *Ex parte James*, 9 Ch. App. 609, [1874-80] All E.R. 388 (C.A.)

This approach would hold that the funds of the bankrupt were held by the marital creditor in a constructive trust for the other spouse. Where a person wrongfully holds property to which another has a rightful claim, the courts should find that the party held that property in trust for the claimant. This occurs wherever that party had a fiduciary relationship to the claimant and has made a gain or caused a loss to the claimant within the scope of that fiduciary relationship. *Waters on Trusts* retraces the history of the constructive trust:

> It became evidence as early as the eighteenth century that, though no trust created by any person existed, claimants wished to invoke the jurisdiction of the equity Courts and the trust doctrine of accountability when others had made profits by allegedly taking advantage of their claimants. Proceedings from analogy with the trust arising from express or implied intention, the Courts made it clear that they were prepared to hear these claims and award equitable relief provided that the particular claimant could show there was a fiduciary relationship between the claimant and the person who had allegedly taken advantage of the claimant. Such a fiduciary relationship gives rise to the placing of a trust and confidence by the claimant in the fiduciary, it was said, and Equity would impose express trust obligations upon the fiduciary who abused that trust and confidence. The fiduciary therefore became, and was described as, a constructive trustee.[42]

Courts have frequently used the doctrine of constructive trust in common law marriage situations. Where women have contributed to building up a "common assets" with their partner, courts will give judgment against the partner who obtains the benefit in the amount of the woman's contribution.[43]

A.H. Oosterhoff, in his text *Cases and Materials on the Law of Trusts*, 2d edition, describes the type of wrongs which courts have remedied in finding a constructive trust:

> If a person who stands in some fiduciary relationship to another gains some advantage for himself arising out of his position, the court will hold him constructively a trustee of the advantage he has gained in favour of the other person. Two things should be noted. First, constructive trusts are not restricted to trustees properly so called. A constructive trust can be imposed on all persons who obtains property from an express trustee without consideration, to a trustee who has made a profit, even though innocently, through his office, and to the position of a stranger to the trust who meddles with the trust property – a *trustee de son tort* – but it has also been applied to real estate brokers, solicitors, agents, executors and administrators, guardians, and a host of other persons. Moreover, while a constructive trust normally arises out of a pre-existing fiduciary relationship, such a relationship is not required to raise this trust.
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> Second, it should be noted that the term "constructive" does not mean that the court

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[42] At 343.

[43] *Becker v. Pettkus*, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, 2 R.F.L. (3d) 225; *Crispen v. Topham* (1986), 3 R.F.L. (3d) 149 (Sask. Q.B.), aff'd (1987), 9 R.F.L. (3d) 131 (Sask. C.A.).

construes a trust from certain documents or from the intention of the parties, but rather from a certain relationship or factual situation. That is to say, the word "constructive" in this sense does not imply "as interpreted", but "established" or "declared", quite apart from the parties' intention, and it is usually related to redressing a wrong or preventing unjust enrichment.[44]

The important questions left at large relate not just to unjust enrichment in the presence of insolvency or bankruptcy as regard matrimonial judgments, but as regards unjust enrichment generally. These questions have not been overlooked in the texts.

Equity, Fiduciaries and Trusts addresses the issue:

> Unconscionable conduct was the Crown's offence in the *Guerin* case and the majority of the court chose to condemn that conduct by characterizing it as a breach of fiduciary obligation. This necessarily entailed finding also that a fiduciary relationship existed . . .
>
> Nevertheless, the remedying of unconscionable conduct does not, of course, necessitate that a pre-existing or an *ad hoc* fiduciary relationship be established. Once the remedying of unjust enrichment was put on the basis of the enforcement of a restitution obligation, as occurred in common law Canada in 1954, there was no need for the constructive trust, the lien or subrogation which compelled restitution to be necessarily associated with a breach of fiduciary relationship, through such a relationship would itself attract restitution remedies. Because of its doctrinal roots, the constructive "trust" in particular was capable of being seen as the sole enforcement of the obligation of a fiduciary and it was this confusion that was finally removed in *Pettkus v. Becker* . . . .The first problem for the courts is to determine what circumstances call for relief and, given the need for relief, the second is to determine which of those remedies is an appropriate response. When two parties only are involved, such as in a dispute between two persons who have cohabited for a period of time, whether the appropriate remedy is damages or the right to claim specific property will depend on what is enough to rectify the enrichment and deprivation simply as between them, but where C, a third party, has acquired title to the disputed property from A, or A is insolvent or bankrupt, further considerations arise. .
>
> When A is insolvent or bankrupt, the concern is the effect of a proprietary restitution order upon A's creditors. It is not now a case of A surrendering property which he might otherwise have enjoyed, but a surrender to the disadvantage of those who have independently advanced credit to A or simply remain unpaid having performed an independent contractual obligation in favour of A. It is easy enough to say that A's creditors advanced credit at risk and should not benefit as the result of A's unjust enrichment at the expense of B, a benefit which would constitute in their hands a mere windfall, but the spotlight is now on the issue of what it is that makes the enrichment unjust. . .
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> In that connection one possible line of argument in favour of B is that unjust

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[44] *Cases and Materials on the Law of Trusts*, 2d edition (Toronto: Carswell, 1983) at 14.

> enrichment, so found, is enough in itself to justify a constructive trust order in B's favour, whatever form the injustice takes. If B is a cohabitee, has given contributory assistance to A, reasonably expecting that she and A were sharing in equity the title to the assets in A's name but enjoyed by them together in the course of the cohabitation, should it make any difference that A's bankruptcy coincides with the termination of the cohabitation? By asserting his legal title, A does no wrong and B has made no mistake recognized in law. Yet A's assets, we are supposing, have been in part acquired or significantly improved or maintained by reason of B's services. The conclusion we would probably reach is that B should recover ahead of A's unsecured creditors. Property subject to a restitution order is not part of A's assets, even if the unsecured creditor acquired his claim against A before B's services were rendered. If the creditor wants protection, he will take security from A and in an effective manner so that, having followed the legal requirements for the taking of security, he will prevail over B, whenever B's services were applied.[45]

In a footnote to the above quotation, the text points out an important developing conflict between the law in Ontario and the law in Saskatchewan. The footnote reads as follows:

> Perhaps because A has deliberately allowed B to form the reasonable expectation that by her contribution she was obtaining an interest in A's property. A's unsecured creditors would gain from A's unconscionable withholding from B. In *Rawluk v. Rawluk* (1987), 61 O.R. (2d) 637, the Ontario Court of Appeal in a *Family Law Act* (R.S.O. 1986, c. 4) setting clearly considered that the constructive trust establishes substantive property rights in B, which would then prevail (one would suppose) as against A's creditors. In *Bedard v. Schell* (1987), 26 E.T.R. 223, however, a Saskatchewan court, faced with A's bankruptcy, concluded that B had no property rights against A's creditors. The constructive trust in purely remedial; it confers no substantive "trust rights."[46]

Arguably, at least each case might be examined on its facts. The court would examine the likely disposition of the funds if committed to the bankruptcy court. Did unsecured creditors advance funds against the credit of the husband? Did unsecured creditors advance funds after the contribution of the wife? Is there just one preferred creditor (often Revenue Canada)? These are questions of fact. In all events, it is submitted that the courts in Canada would appropriately have to examine the nature and timing of the claims against the property of a debtor which was subject to the claim of another for unjust enrichment. In that regard, the text continues:

> However, whether or not wrongful conduct, including breach of fiduciary obligation, and mistake are to be the sole bases for restitution when the enriched party is insolvent or bankrupt, it is a different situation again when B has entered into a

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[45] D.W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (Toronto: Carswell, 1989) 411 at 425-427.

[46] Ibid. at 426-427.

contract with A involving pre-payment in some form by B and A's insolvency or bankruptcy occurs before A has completely or at all carried out his own performance. Is A thereby unjustly enriched if B's reasonable expectations are defeated by the insolvency or bankruptcy, and B is left to take his share in whatever distribution is available to A's general creditors?

. . .

In an express trust setting, but involving such considerations of justice, Megarry V.-C. in *Re Kayford Ltd.* certainly considered it an appropriate course of action when he gave legal effect to the actions of the managing director of a mail order house. The managing director, foreseeing an impending insolvency and likely voluntary liquidation of his company, put into a separate account the moneys of customers whose orders could not be met until the company was in a position to supply. The director's intention was to protect these customers from the effect of the likely liquidation and cessation of company business; Megarry V.-C. agreed that this effect was produced. The moneys were thereby held in trust for the customers in question and no issue of fraudulent preference could therefore arise. In this case, the moneys were not the subject of a restitution order, they remained in equity's terms the property of the payors and the Vice-Chancellor said he regarded this outcome as socially and economically desirable.

In Canada, however, where we have gone beyond other Commonwealth jurisdictions and embraced the concept of unjust enrichment, two decisions of the Saskatchewan Court of Appeal have warmly adopted the restitution proprietary claim, applauding this remedy as an appropriate response to what was seen as a policy-poor inadequacy in provincial and federal legislation. In each case the purchaser had contracted for the construction of a frame house by a building contractor, the house to be built to agreed specifications either on the purchaser's land or on the contractor's premises and later moved to the purchaser's site. Both contracts required instalment payments on plan readiness and stages of construction being reached. In each case the contractor went into bankruptcy while the identifiable house was in the course of construction and in both cases the purchaser was permitted by the court to take away the incomplete house as the equivalent of moneys already paid.[47]

(e) The Rule in *Ex parte James*

Re Condon; Ex parte James[48] stands for the proposition that the Queen will impose her principals of equity and fairness upon the trustee. Maher J. in *Re Smith*[49] quoted this excerpt from the leading case in England:

> I am of the opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as

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[47] Ibid. at 427-428.

[48] Above, note 41.

[49] [1984] 6 W.W.R. 167, 53 C.B.R. (N.S.) 264 (Sask. Q.B.).

> honest as other people.[50]

A bank had forwarded funds to the Trustee, although it was not legally entitled to do so. Although such a mistake of law would not ordinarily entitle the bank to the return of the funds, equity and justice required it.

Re Smith was expressly referred to and followed in *Re Ryan*.[51] The same principal was used to remedy an injustice, in similar fact patterns, in the following cases: *Re Kelly; Re Reed;* and *Toronto-Dominion Bank v. Fortin*.[52] These cases deal with moneys paid under a mistake of law but the rule in *Ex parte James* is not so limited.

In *Re Tyler*,[53] Buckley L.J. held that this was a rule of general application. He said:

> That is to say, assuming that he has a right enforceable in a Court of justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do.[54]

This was referred to with approval in *Re McDonald*.[55] It was also so held in *Re Hardy*[56]: "The rule is of general application and not just referable to situations where a mistake has occurred."
A review of various examples in the common law also shows that this principle is not restricted to simple instances of moneys paid under a mistake of law. The hallmark of this principle is justice and equity. Even though the trustee may have a perfectly legal right to make a claim to some funds, if the operation of that trustee's right would cause an injustice or inequity, the court has the power to prevent the trustee from unjustly taking advantage of that right.

In *Re McDonald*,[57] a bankrupt failed to pay a nominal amount which would discharge him. He died prior to a discharge and, upon his death, a life insurance policy became payable to his estate. The trustee, as it has a legal right to do, claimed the proceeds of the insurance. Houlden J. refused to allow this injustice. He said:

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[50]Ibid. at 267. (C.B.R.).
[51](1985), 55 C.B.R. (N.S.) 293 (N.S. T.D.).
[52](1980), 27 O.R. (2d) 478, 33 C.B.R. (N.S.) 250 (S.C.); (1980), 28 O.R. (2d) 790, 34 C.B.R. (N.S.) 83 (C.A.); and [1978] 5 W.W.R. 302, 27 C.B.R. (N.S.) 232 (B.C.S.C.), respectively.
[53][1907] 1 K.B. 865.
[54]Ibid. at 873.
[55](1971), [1972] 1 O.R. 363, 16 C.B.R. (N.S.) 244 (S.C.).
[56](1984), 51 C.B.R. (N.S.) 21 (N.S.T.D.).
[57]Above, note 55.

> However, the injustice in the present case calls out for a remedy. In my view, it would be inconsistent with natural justice and fair dealing to deprive the bankrupt's family of $37,768 in insurance, paid for by the bankruptcy out of his earnings, by reason of his failure to pay $1. I am not unmindful that creditors are not receiving any dividend in this estate and there is an injustice to them in depriving them of this asset. But on the balance, I believe the injustice to the dependents of the deceased outweighs the injustice to creditors. The creditors are, in the main, trade creditors who have likely written off their accounts and charged their losses against the profits. The family of the deceased has nothing but this asset to look to, in the estate.[58]

Other examples highlight the court's willingness to exercise the discretion in favour of significant family hardships. In *Re Waterloo*,[59] a bankrupt had earlier arranged his affairs so that dividends were paid to him, rather than salary. Because the provisions of the *Bankruptcy Act* allowed for a different method of disposal of "dividends", the trustee then claimed those dividends. The evidence showed that such dividends were, in fact, salary upon which the bankrupt and his family lived. Sutherland J. stated:

> I find as a fact, based largely on the evidence of Mr. Barry Sinclair, to the effect that the payments of $500 per week were what he and his family lived on, that had the payments not been made to him under the guise "at least for tax purposes" of "dividends" he would have drawn from the company at least those amounts in the form of a salary.
>
> . . .
>
> In my view the payments in question are quite different from the sort of transactions sought to be controlled by the provisions of s. 79 of the Act.[60]

In *Re Hardy*,[61] a real estate agent had attempted to negotiate the sale of a property on behalf of a bankrupt; however, the sale was not completed prior to the assignment into bankruptcy. The trustee negotiated directly with the purchaser and ultimately concluded a deal. The real estate agent claimed his commission even though he was not privy to the concluded sale. Rodgers J. held:

> There is no question but that the trustee knew of the efforts of Mr. Roberts in consummating a sale of Mrs. Hardy's farm to Mr. Hardin or, if it did not, it certainly should have known that the correspondence to which it had access. Equity demands, in my view, that the trustee not be allowed to benefit from the efforts of Mr. Roberts without paying just compensation.
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> Similarly, it is my opinion that the trustee is acting as I have described, without regard

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[58]Ibid. at 249 (C.B.R.).

[59](1983), 49 C.B.R. (N.S.) 196 (Ont. S.C.).

[60]Ibid. at 200, 202.

[61]Above, note 56.

> to the efforts and services provided by A.E. LePage, has offended against the rule in *Ex parte James* which imposes a duty on a trustee to act fairly in the administration of a bankrupt estate.
> . . .
> In my view, the conduct of the trustee in taking advantage of the services performed by A.E. LePage under the listing agreement and then refusing to pay for those services, constitutes an infraction of this rule. Such conduct is manifestly unfair. A.E. LePage should be paid for its services of which the trustee has had the benefit.[62]

Although cases such as *Re McDonald* and *Re Waterloo* saw an exercise of the court's equitable jurisdiction when "family" matters were broadly considered, the doctrine of fairness and equity even extends to such enterprises as real estate negotiations.

In *Re Sefel Geophysical Ltd.*,[63] a company doing business in Canada, the United States, and the United Kingdom was in financial difficulty and was petitioned into bankruptcy in Canada. Of the proceeds available for distribution among creditors, more than 90 per cent had been obtained from the sale of assets in the United States. According to the *Bankruptcy Act*, preferential status was not conferred on foreign creditors. Forsythe J., however, felt that this was a classic example for the application of the rule in *Ex parte James*. He stated:

> I conclude that, with respect to the United States creditors, the rule in *Ex parte James* is applicable. The estate of the bankrupt has been enriched at their expense and accordingly equity demands that they be treated fairly. I make this holding notwithstanding the fact that we are dealing with revenue based claims of a foreign state . . . When money has become available at the expense of the United States creditors, equity allows me to focus on the unjust enrichment aspect of the situation. Canadian creditors should be accorded a windfall to the bankrupt's estate on the basis of a public policy rule against the enforcement of foreign revenue statutes in a fact situation such as this one.
> . . .
> Whether the United States creditors received preference on the *Ex parte James* line of cases or on the basic principles underlying the constructive trust remedy, the analysis appears to be essentially the same. Both methods recognize the inherent inequity in a situation and the constructive trust remedy is really an enunciation of the basis principles upon which *Ex parte James* is based.[64]

If a trustee is not entitled to insurance moneys payable to a deceased bankrupt's family, or, as in *Re Waterloo*, if a trustee is not entitled to the moneys used earlier to support a family, or if the court is willing to protect a realtor on his commission, as in *Re Hardy*, this principal of law should be thoroughly investigated for the purpose of protecting a marital partner who, in most cases,

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[62] Ibid, at 27, 28.

[63] (1988), 70 C.B.R. (N.S.) 97 (Alta. Q.B.).

[64] Ibid. at 109, 110.

has worked likely for decades with the spouse to accumulate the marital estate which the spouse would then spirit away through the process of bankruptcy.

In analyzing the disposition that the courts should take with regard to marital bankrupts, examination of the purpose of bankruptcy proceedings is germane. Bankruptcy came into effect to protect honest unfortunate debtors who were destroyed for life by trade debts amassed through no particular fault of their own. Marital bankrupts rarely permit of the description of hones unfortunate debtors.

Upon an assignment into bankruptcy, most property of the bankrupt vests in the trustee, except for trust property and exempt property (section 67 of the *Bankruptcy Act*). Further, property which vests in the trustee is subject to the claims of secured creditors. Section 71(2) states as follows:

> On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, *subject to this Act and to the rights of secured creditors*, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer. [Emphasis added.]

Section 69(1) suspends legal proceedings against a bankrupt. However, section 69(2) states that secured creditors are not affected by bankruptcy. That subsection states as follows:

> Subject to section 79 and 127 to 134, a secured creditor may realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed, unless the court otherwise orders. . .

Further, section 70(1) reinforces the rights of secured creditors. It states:

> Every receiving order and every assignment made in pursuance of this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or his agent, and *except the rights of a secured creditor*. [Emphasis added.]

Upon distribution of the bankrupt's estate, secured creditors are again given a special priority. The relevant portion of section 136(1) states:

> *Subject to the rights of secured creditors*, the proceeds realized from the property of the bankrupt shall be applied in the priority of payment as follows . . .[Emphasis added.]

In *Re Martha*,[65] the following is stated:

> The policy of the *Bankruptcy Act* is that the trustee takes property subject to the burdens against the property. Bankes L.J. in *Re Lind*; *Indust. Finance Syndicate Ltd. v. Lind*, [1915] 2 Ch. 345 at 371, stated:
>
> > "The policy of the *Bankruptcy Act* with regard to burthens placed upon his property by the bankrupt is that the property shall at the option of the secured creditor remain subject to all burthens legitimately placed upon it prior to the bankruptcy."

The question is whether the courts, based upon the breadth and scope of the *Bankruptcy Act* and its intent, will breathe into marital creditors a claim as a secured creditor under charging orders, or a claim in equity under a constructive trust, or the rule in *Ex parte James.*

The Saskatchewan Court of Appeal could not find that Mrs. Gresham became a secured creditor under the charge granted by the *Matrimonial Property Act*, but a charge properly sought and obtained with sufficient specificity is likely to prove fertile ground for protection against a subsequent marital bankruptcy. Although the *Bankruptcy Act* is federal, charges under provincial legislation have been upheld except in circumstances where a change in the priority of distribution has been the imputed purpose of the legislation.

In *Ecarnot (Trustee of) v. Western Credit Union Ltd.*,[66] a credit union was classified as a secured creditor based upon a charge which had been created under section 34 of the Saskatchewan *Credit Union Act*, which states as follows:

> 34(1) A credit union has a lien on a share or any amount standing to the credit of a member or shareholder or his legal representative for a debt due by that member or shareholder to the credit union.[67]

Re Martha[68] held that a bankrupt who delivers to a creditor the certificate of title to his or her land is the holder of the title of a secured interest for the purpose of bankruptcy. See also *Union Bank v. Engen*,[69] the secured interest is created by the *Land Titles Act*.[70]

The British Columbia *Cattle Lien Act* creates a secured interest in a person who

[65](1979), 10 Alta. L.R. (2d) 155 (T.D.) at 159.
[66][1990] 6 W.W.R. 550 (Sask. Q.B.), aff'd [1991] 5 W.W.R. 268 (Sask. C.A.).
[67]S.S. 1984-85-86, c. C-45.1.
[68]Above, note 65.
[69][1917] 2 W.W.R. 395 (Sask. C.A.).
[70]Ibid.

cares for cattle: *Estate of Canadian Exotic Cattle Breeders.*[71]

In *South Saskatchewan River Irrigation District No. 1 v. Agricultural Credit Corp. of Sask.*,[72] the Saskatchewan Court of Appeal held that an irrigation district which held a lien pursuant to section 36 of the *South Saskatchewan River Irrigation Act*,[73] was a secured creditor pursuant to that lien when the land owner became a bankrupt.

Holders of a lien pursuant to the former Saskatchewan *Mechanics Lien Act*[74] are secured creditors for bankruptcy proceedings: *Pisiak v. Dyck*.[75]

In *Re Sara*,[76] the Court in Ontario held that a court charging order on specific funds gave the beneficiary of the charge the standing of a secured creditor in bankruptcy proceedings.

In *Re Rodenhizer*,[77] it was held that a charge pursuant to the *Registry Act* in Nova Scotia gave the holder of the charge secured creditor status in bankruptcy.

In *McLean Co. v. Newton*,[78] it was held that a charging order given to an individual caused that individual to be a secured creditor.

Provincial legislation cannot change the priority of distribution for various government claims, such as municipal taxes, workers compensation claims, unemployment insurance claims, and income tax arrears (Vide).[79] Provinces are not capable of passing legislation which contravenes the distribution scheme set out in section 136 of the *Bankruptcy Act* but that is not what a charging order under the *Matrimonial Property Act* would intend.

The task of the legal system is to do justice as best we can. There are few more determined than a determined matrimonial litigant. Few litigants believe themselves more morally correct than marital litigants. Without hesitation, they

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[71](1979), 14 B.C.L.R. 183 (S.C.).

[72][1988] 5 W.W.R. 504 (Sask. C.A.).

[73]R.S.S. 1978, c. S-56.

[74]R.S.S. 1978, c. M-7.

[75](1986), 63 C.B.R. (N.S.) 151 (Sask. Q.B.).

[76](1985), 56 C.B.R. (N.S.) 282 (Ont. S.C.).

[77](1923), 3 C.B.R. 609 (N.S. C.A.).

[78][1926] 3 W.W.R. 593 (Man. C.A.).

[79]*W.C.B. v. Deloitte Haskins & Sells Ltd.*, [1985] 1 S.C.R. 785, 38 Alta. L.R. (2d) 169; *British Columbia v. Henfrey Samson Belair Ltd.* [1989] 2 S.C.R. 24, 38 B.C.L.R. (2d) 145; *Robinson, Little & Co. (Trustee of) v. Saskatchewan (Minister of Labour)* (1989), [1990] 1 W.W.R. 354 (Sask. C.A.).

will waste the marital estate on lawyers and accountants to avoid a perceived unfairness being visited upon them. The dodge of bankruptcy, cutting off one's nose to spite one's face, is the growing final solution of the self-perceived victims of injustice.