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OUT IN THE COLD: *SCHREYER v SCHREYER*'S CALL FOR LAW REFORM

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In *Schreyer v Schreyer,*[1] the Supreme Court of Canada dealt with "a perceived clash between family law and bankruptcy law."[2] This case illustrates a problem that many spouses have encountered when attempting to obtain marital property settlements in the face of their spouse's bankruptcy, particularly in provinces with equalization regimes. In its decision, the Supreme Court outlined the problem, suggested that its hands were tied, and issued a clarion call for law reform in the face of its apparent inability to redress unfairness in outcomes. *Schreyer* also highlights the fact that some marital property regimes in Canadian provinces fail to actually give a proprietary remedy to a spouse at the time of separation or divorce, instead creating a debt relationship between spouses. Serious consequences can arise for the creditor spouse, usually a woman, when a debtor spouse declares bankruptcy.

This comment outlines the facts in *Schreyer*, looks briefly at the sometimes competing objectives of the

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1 *Schreyer v Schreyer*, 2011 SCC 35, [2011] 2 SCR 605 [*Schreyer*].

2 *Ibid* at para 1.

bankruptcy law and marital property regimes, explains the operation of each system, and then examines the apparent collision of the two systems in the *Schreyer* case. We then consider alternative paths that could have been taken in this case, and review some law reform options, including those mentioned by the Supreme Court of Canada.

THE *SCHREYER* STORY

Susan and Anthony Schreyer married in 1980, raised four daughters, and separated in 1999.[3] During their marriage, they tried numerous times to establish a farming operation in Manitoba. From 1991, they lived on Anthony's parents' family farm; the parents moved away in 1993. Both Susan and Anthony had at various times taken employment off the farm, due to the fact that the farm operation "was not an unqualified success."[4] Anthony continued to live on the family farm after the separation. He was the sole registered owner, having bought from his parents the part of it that included the family residence and farm building in 1997.

Susan filed for divorce in 2000. In December 2000, both parties consented to a family law accounting and valuation of their assets under Manitoba's equalization regime for marital property.[5] However, in December 2001, before a master undertook this valuation, Anthony made an assignment in bankruptcy. Because Anthony had not disclosed to the trustee in bankruptcy that Susan was a creditor, she received no notice

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3 These facts are drawn from all of the judgments in *Schreyer v Schreyer*, especially the Master's Report at 2007 MBQB 263, 26 CBR (5th) 14.

4 *Ibid* at para 12.

5 Pursuant to *The Marital Property Act*, CCSM c M45 [*MPA*], since replaced by *The Family Property Act*, CCSM c F25 [*FPA*], but the relevant provisions were identical. *Ibid* at para 4.

of the assignment. Anthony was discharged from bankruptcy in 2002.[6] The master later proceeded with the family law valuation of assets and found that Susan was entitled to an equalization payment of $41,063.48. This amount was calculated by allowing Anthony to deduct his debts from his assets, even though he was no longer obligated to pay his creditors as a result of the discharge from bankruptcy. The master's report, which was confirmed by the Court of Queen's Bench, did not address the effect of Anthony's bankruptcy and discharge on Susan's equalization claim.[7] On appeal, however, the Court of Appeal held that her equalization claim was provable in bankruptcy and had therefore been extinguished by the discharge of Anthony's bankruptcy.[8] As a result, Susan was deemed to have no remedy via the family law process, a result that, the Court of Appeal said, "appears to be most unfair to the wife."[9]

In a decision authored by LeBel J., the Supreme Court of Canada unanimously dismissed Susan's appeal without costs, confirming that her equalization claim was provable in Anthony's bankruptcy and was released by the discharge. It observed that section 121 of the *Bankruptcy and Insolvency Act ("BIA")*[10] contains a broad definition of a provable claim, which includes all debts and liabilities to which the bankrupt is subject on the day on which s/he becomes bankrupt or to which s/he may become subject before discharge from bankruptcy by virtue of an obligation incurred prior to bankruptcy. Anthony was released from the equalization claim by the bankruptcy and his subsequent discharge. Susan's claim was found to be neither

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6 *Ibid* at para 5.

7 2007 MBQB 263, 26 CBR (5th) 14.

8 2009 MBCA 84, 57 CBR (5th) 157.

9 *Ibid* at para 127.

10 *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 [*BIA*].

a proprietary right that would survive the bankruptcy process and give her priority over the other creditors, nor was it exempt from the effect of a discharge as a claim for support or maintenance.

In the result, Susan was denied recovery of an equalization payment that she was owed pursuant to the division of the marital property. In contrast, Anthony retained ownership of the family farm after being discharged from bankruptcy, because the farm was exempt from seizure under Manitoba law. He was no longer liable to pay his former spouse any of the equalization payment, or indeed, any of his other debts that had been used to calculate the equalization payment.

OBJECTIVES OF BANKRUPTCY LAW AND MARITAL PROPERTY LAW

Canada's federal laws on bankruptcy and its provincial laws on marital property are both aimed at codifying division of the value of property on the occurrence of specific events, that is, bankruptcy and/or separation or divorce. The *BIA* provides a mechanism for the orderly liquidation of a bankrupt's estate and the fair distribution of the value of the assets in that estate to the bankrupt's creditors.[11] Its objective, for individuals, is to permit an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the community.[12] Hence, one of its objectives is to balance the interests of unsecured creditors and insolvent individuals.

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11 Lloyd Houlden, Geoff Morawetz & Janis Sarra, *The 2011 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2010) at 1-2.

12 *Re Irwin* (1994), 24 CBR (3d) 211, 89 BCLR (2d) 144, 112 DLR (4th) 164 (CA); *Markis v Soccio* (1954), 35 CBR 1 (Qc SC); *Re Neiman* (1953), 33 CBR 230 (Ont SC).

The objective of marital property regimes, on the other hand, is to provide for the equitable division of property between spouses on the breakdown of marital or, in a few jurisdictions, common law relationships. The preamble of the statute that applied to the *Schreyer* case referred to marriage as "an institution of shared responsibilities and obligations between parties recognized as enjoying equal rights" and stated that it "is advisable to provide for a presumption, in the event of the breakdown of the marriage, of equal sharing of the family and commercial assets of the parties to the marriage acquired by them during the marriage."[13] The Supreme Court of Canada has highlighted the importance of this equitable division to female spouses especially, given the link between the economic effects of divorce and the feminization of poverty.[14] Despite women's struggles for employment and pay equity, it remains the case that women in opposite sex relationships see their incomes plummet on separation or divorce, whereas men's tend to increase.[15] As a result,

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13 *Marital Property Act*, RSM 1987, c M45. This preamble was repealed on August 9, 2002, but was still in force at the pertinent time for the Schreyer's equalization process. It was repealed by *The Common-Law Partner's Property and Related Amendments Act*, SM 2002, c 48, s 16, presumably because the preamble referred to marriage but the 2002 Act expanded the equalization provisions to common law partners.

14 *Moge v Moge,* [1992] 3 SCR 813 at 853-854. See also *Marzetti v Marzetti*, [1994] 12 SCR 765 at para 80. For a useful analysis of the relationship between feminization of poverty and insolvency, see MJ Bray, "To Whom the Swords, for Whom the Shields? The Feminization of Poverty in Canadian Insolvency Practice" in J P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Thomson Carswell, 2009) 455.

15 T M Gadalla, "Impact of Marital Dissolution on Men's and Women's Income: A Longitudinal Study" (2009) 50 Journal of Divorce & Remarriage 55.

entitlements to redistribution of marital property and income on separation and divorce remain crucial for women's economic equality. Given the still gendered nature of most farm holdings, with sons tending to inherit property and women's contributions to farming being undervalued, this remedy is of particular importance in cases such as *Schreyer*.[16]

The collision between bankruptcy and marital property regimes typically arises when one spouse has declared bankruptcy prior to the vesting of a property interest in marital assets, which often does not occur until final adjudication or settlement of the family law issues. Although this collision can arise in any of Canada's marital property regimes, depending on the timing and, specifically, whether a property interest has arisen prior to bankruptcy, the *Schreyer* case arose in relation to Manitoba's equalization regime for marital property. We briefly describe the bankruptcy process and the equalization regime below.

THE BANKRUPTCY PROCESS

When an insolvent individual, or 'debtor', files for bankruptcy or the creditors make an application to place the person in bankruptcy, the 'bankrupt' ceases to have any authority to deal with his or her assets. These assets vest in the trustee in bankruptcy ('trustee') for the benefit of creditors to the bankruptcy estate.[17] Creditors are given notice of the proceedings and file claims for the amounts they are owed. They are then paid in accordance with their place in the

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16 See Lori Chambers, "Women's Labour, Relationship Breakdown and Ownership of the Family Farm" (2010) 25:1 CJLS 75; Ella Forbes-Chilibeck, "Have You Heard the One About the Farmer's Daughter? Gender-bias in the Intergenerational Transfer of Farm Land on the Canadian Prairies" (2005) 24:4 Canadian Woman Studies 26.

17 *Burson v Burson,* 1990 CarswellOnt 154 (Gen Div).

hierarchy of claims set out in the *BIA*.[18] Frequently, and especially in equalization regimes such as Manitoba's, the non-bankrupt spouse is only an unsecured creditor. In such cases, the public policy goals of family law and insolvency law can conflict.

Important for understanding the *Schreyer* case is that the property of a bankrupt that is divisible among the bankrupt's creditors does not comprise any property that, as against the bankrupt, is exempt from execution or seizure under provincial laws.[19] Hence, in jurisdictions where the homestead or family home is partially or completely exempt, such as in Manitoba, that property does not vest in the trustee. As a result, Anthony retained the family farm even though Susan received no share of its value. It is also important to note that where property is held by the debtor in trust for the creditor spouse, that property is not available for distribution to other creditors.[20] Susan did made a constructive trust argument based on unjust enrichment, but it failed, mainly due to lack of evidence.[21]

The bankruptcy process works on the basis of "provable claims", which include "all debts and liabilities, present or future, to which the bankrupt is subject on the day on

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18 *BIA*, *supra* note 10, s 136.

19 *Ibid*, s 67(1): "67.(1) Property of bankrupt—The property of a bankrupt divisible among his creditors shall not comprise (a) property held by the bankrupt in trust for any other person, (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides."

20 *Ibid.* See also *CP Air Lines Ltd v CIBC* (1987), 71 CBR (NS) 40, 61 OR (2d) 233, (HC), aff'd (1990), 4 CBR (3d) 196, 71 OR (2d) 63, 3 ETR 1 (Ont CA).

21 *Schreyer*, *supra* note 1 at para 42.

which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt."[22] This broad definition captures most liabilities of the debtor, including to a former spouse. On bankruptcy, unsecured creditors (which spousal claimants usually are) are prohibited from commencing or continuing any enforcement or other proceedings for claims that are provable in bankruptcy.[23] This 'stay' on proceedings prevents a rush to the assets by creditors and ensures the orderly realization and distribution of assets by the trustee. However, a creditor, including a spousal claimant, can seek to have the stay lifted, and the court may grant a lifting of the stay on whatever conditions it determines appropriate, if it is satisfied that the applicant creditor is likely to be materially prejudiced by the continued operation of the stay; or that it is equitable on other grounds to make such a declaration.[24] Susan had not obtained such an order, likely because she did not know about the bankruptcy for some time.

The exit from the bankruptcy process is 'discharge', which occurs after a specified period, and releases the bankrupt person from many debts. However, special protection has been granted under the *BIA* to some claims, including child support and spousal support. According to section 178(1), an order of discharge under the *BIA* does not release the bankrupt from any

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22 *BIA, supra* note 10, s 121.

23 *Ibid*, s 69.3(1). "Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy. (1.1) Subsection (1) ceases to apply in respect of a creditor on the day on which the trustee is discharged."

24 *Ibid,* s 69.4.

debt or liability for alimony or alimentary pension; any debt or liability arising under a judicial decision respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt; any debt or liability arising out of fraud, embezzlement, misappropriation, or defalcation while acting in a fiduciary capacity; and any liability resulting from obtaining property on false pretences or fraudulent misrepresentation.[25] Section 178(1)(f) also specifies that an order of discharge under the *BIA* does not release the bankrupt from any "liability for the dividend that a creditor would have been entitled to receive on any provable claim *not disclosed to the trustee*, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim."[26] Hence, such claims are provable claims, but are not released by discharge and can still be pursued.[27] Finally, section 187 of the *BIA* gives a court the power to review, rescind or vary any order made by it under its bankruptcy jurisdiction. As we shall see, despite Anthony Schreyer's failure to disclose that Susan was a creditor, and, arguably, his fraudulent activity in so failing, neither section 178(1) nor section 187 offered remedies to Susan.[28]

MARITAL PROPERTY STATUTES

Provincial and territorial governments in Canada have adopted two primary approaches to family property division: equalization schemes and division of property schemes. There are a number of differences in the statutory language even

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25 *Ibid*, ss 178(1)(b)-(f).

26 *Ibid,* ss 121(4), 178(b)-(f) (emphasis added).

27 *Ibid,* s 121(4).

28 LeBel J. notes that it had not been alleged by Susan Schreyer that the failure to disclose was fraudulent: *Schreyer*, *supra* note 1 at para 34.

within these approaches.[29] While the federal insolvency law framework is consistent across Canada, its application in relation to the different family law systems can generate inequitable results. In particular, in equalization regimes, in Ontario, Manitoba, North West Territories, Nunavut, Québec, and P.E.I., the declaration of bankruptcy by one spouse can seriously prejudice the marital property claims of the other, as *Schreyer* illustrates.

The Manitoba *Family Property Act* ("*MFPA*") that was at issue in *Schreyer* is an equalization regime and, importantly, explicitly states that the *Act* does not vest any property of one spouse in the other.[30] Instead, section 13 of the *MFPA* specifies that "[e]ach spouse and common-law partner has the right upon application to an accounting and, subject to section 14, an equalization of assets." Section 15 sets out the parameters of accounting and valuation and section 14(1) grants the court discretion to vary equal division of the value of family assets if the court is satisfied that equalization would be grossly unfair or unconscionable. Payment of the amount owed can be made in a lump sum, by instalments, or by the transfer, conveyance

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29 RA Klotz, *Bankruptcy, Insolvency and Family Law*, 2d ed (Toronto: Carswell, 2001) at 4-29 – 4-30; Janis Sarra & Susan Boyd, "Competing Notions of Fairness: a Principled Approach to the Intersection of Insolvency Law and Family Property Law in Canada" in Janis Sarra, ed, *Annual Review of Insolvency Law* (Toronto: Carswell, 2012) 207.

30 *FPA, supra* note 5, s 6(1): "6(1) No provision of this Act, nor the giving of an accounting under this Act, vests any title to or interest in any asset of one spouse or common-law partner in the other spouse or common-law partner, and the spouse or common-law partner who owns the asset may, subject to subsections (7), (7.1), (8), (8.1), (9), (9.1) and (10) and to any order of the court under Part III or IV, sell, lease, mortgage, hypothecate, repair, improve, demolish, spend or otherwise deal with or dispose of the asset to all intents and purposes as if this Act had not been passed."

or delivery of an asset or assets in lieu of the amount, or a combination of these means, as the spouses agree or the court orders.[31]

At the other end of the spectrum, under British Columbia's division of property regime, section 56 of the *Family Relations Act* gives each spouse an undivided half interest in the family assets on the occurrence of a triggering event.[32] Although this half interest may be satisfied in various ways, including a compensation order, it is clear that a property interest arises at the triggering event in British Columbia, which can in turn be more favourable to the non-bankrupt spouse if the triggering event occurs prior to bankruptcy. Other provinces, specifically, Saskatchewan, Alberta, Nova Scotia, New Brunswick, Newfoundland and Labrador, also grant a proprietary right, but generally only at the time of a court order or a contract granting the property interest.[33] These differences in the vesting of a proprietary interest can be highly significant, depending on when the bankruptcy is declared, an event that is largely in the control of the bankrupt spouse. If the half interest vests prior to bankruptcy, the creditor spouse will have priority over the trustee in relation to the interest in this property. In this comment, we focus primarily on the equalization regimes that posed the particular problem in the *Schreyer* case.

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31 *Ibid,* s 17.

32 According to the *Family Relations Act*, RSBC 1996, c 128 s 56, the triggering event will be the first of the following events: a separation agreement, a declaratory judgment (that there is no reasonable prospect of reconciliation), an order for dissolution of marriage or judicial separation, or an order declaring the marriage null and void. Although the new *Family Law Act* in BC changes the method of property division, an undivided half interest in the family property still arises on separation: SBC 2011, c 25 s 81(b).

33 For details on the various marital property regimes, which vary in important respects, see Sarra & Boyd, *supra* note 29; Klotz, *supra* note 29, c. 4.2.

SCHREYER v SCHREYER AND MANITOBA'S EQUALIZATION REGIME FOR MARITAL PROPERTY

In *Schreyer*, the Supreme Court of Canada held that under the Manitoba equalization scheme, neither spouse acquires a proprietary or beneficial interest in the other's assets. Instead, the scheme is one of equalization, based on a principle of equal division of the value of the family assets after a process of accounting and valuation.[34] The accounting process results in a value that is divided between the spouses; a debtor spouse can retain the property he or she owns, but must pay a sum of money, the equalization payment, if the spouses did not own assets of equal value.[35] LeBel J. said that "assets are transferred only at the remedial stage, as agreed by the parties or as ordered by the family court in exercising its discretion, as a form of payment or execution of the judgment."[36] Because the remedial stage had not yet been reached and a property interest had not been established, Susan was left out in the cold.

This holding in *Schreyer* is consistent with other bankruptcy decisions in equalization jurisdictions, including a recent one in *Thibodeau v Thibodeau*, where the Ontario Court of Appeal overruled the efforts of Backhouse J. to create a remedy for the wife.[37] In that case, the husband had declared

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34 *Schreyer, supra* note 1 at para 16, citing *FPA*, ss 13-14.

35 *Ibid*, citing *FPA,* s 15. The Court observed that "the court retains a discretion to alter the equal division of the value of the assets where 'the court is satisfied that equalization would be grossly unfair or unconscionable' (s. 14(1) *FPA*). No provision of the *FPA* vests title in one spouse to the other spouse's property (s. 6(1) *FPA*) in the course of the accounting and valuation. At the end of the equalization process, a monetary debt is owed."

36 *Ibid* at para 15.

37 *Thibodeau v Thibodeau*, 2011 ONCA 1001.

bankruptcy the day after an arbitration award under which the jointly owned home was to be sold and the wife was to receive from the husband's half share of the proceeds her equalization payment of $264,468 and a lump sum spousal support arrears of $89,293, all plus interest and costs to the wife. The Court of Appeal held that an order providing for an equalization payment to one spouse out of the payor spouse's share of proceeds from sale of the home, without more, does not create property rights in the payee spouse.[38]

The Supreme Court in *Schreyer* confirmed that the equalization claim in relation to marital property was a debt owed, not a property right. LeBel J. stated that the "interpretation of the *BIA* requires the acceptance of the principle that every claim is swept into the bankruptcy and that the bankrupt is released from all of them upon being discharged unless the law sets out a clear exclusion or exemption."[39] As a result, the Supreme Court dismissed the "hybrid" argument made on behalf of Susan Schreyer by Robert Klotz, suggesting that "where an equalization claim gives a former spouse a right to a monetary payment, it is a provable claim and the bankrupt will be released from it upon being discharged, but because of the proprietary remedy attached to it pursuant to section 17 *FPA*, the equalization claim is also a proprietary claim and will therefore survive the bankruptcy process."[40] If the Court were to accept this hybrid argument, LeBel J. said, equalization provinces would be brought into line with division provinces, thus conflating the equalization and division of property models, which would be contrary to the Manitoba legislature's policy choice not to give a former spouse a proprietary interest in the family property.[41]

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38 *Ibid* at para 43.

39 *Schreyer, supra* note 1 at para 20.

40 *Ibid* at para 22.

41 *Ibid* at para 24.

The date of the bankruptcy is thus of critical importance. If the equalization claim is liquidated before the bankruptcy, the claim is provable (and, therefore, potentially released by the discharge). If it is still unliquidated as of the date of the bankruptcy, the trustee must determine whether it remains too uncertain to be valued.[42] On the facts in *Schreyer*, LeBel J. found that a "right to payment existed in this case from the time of separation of the spouses, and hence existed at the time of the bankruptcy. All that remained was to determine the quantum by applying a clear formula that left little scope for judicial discretion," and in such circumstances, the claim was not so uncertain that a trustee could not value it.[43] Consequently, it was a provable claim and subject to release by the discharge from bankruptcy that Anthony received.

Observing that the outcome "looks unfair," LeBel J. nevertheless held that in the absence of legislative amendment, "the outcome of this case was unavoidable."[44] He noted that the "only way Ms. Schreyer could have avoided it would have been to obtain an order from the bankruptcy court lifting the stay of proceedings imposed by operation of s. 69.3 *BIA* so that she could seek a proprietary remedy under s. 17 *FPA*."[45] As will be recalled, the Schreyer family farm was exempt from execution by creditors.[46] As a spouse, Susan would, in theory, have been entitled to pursue the enforcement of her equalization claim against the exempt property, as it was out of the reach of the trustee in bankruptcy.[47] Hence, LeBel J. noted

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42 *Ibid* at para 27, citing *BIA, supra* note 10, s 135.

43 *Ibid* at para 27.

44 *Ibid* at para 25.

45 *Ibid.*

46 *The Judgments Act*, CCSM c J10 s 13.

47 *Schreyer, supra* note 1 at para 31.

that she should have sought leave to lift the stay, which would not have prejudiced the assets available for distribution to ordinary creditors, and then asked the family court to attribute a proprietary interest in the family farm to her in satisfaction of her equalization claim.[48] Because Susan had not done so during the bankruptcy proceeding and prior to Anthony's discharge, LeBel J. suggested that this route was now unavailable, notwithstanding that Anthony had failed to disclose the fact that she was a creditor during the bankruptcy and that she therefore received no notice of the claims process from the trustee.[49]

The Court also dismissed remedies related to Anthony's conduct, notably his failure to disclose his debt to Susan, which might have been available under the *BIA's* sections 178(1)(f) (e.g. the bankrupt not being released from a liability for a dividend that a creditor would have been entitled to receive on any provable claim not disclosed) or 187(5) (a court's power to review, rescind or vary any order made by it).[50]

In relation to section 178(1)(f) *BIA*, LeBel J. observed that "Parliament did not intend that every omission from a list of creditors would deprive the discharge of its effect."[51] He adopted a narrow reading of the subsection, finding that Parliament had chosen "a more limited remedy that enables a creditor to claim a dividend he or she did not receive." In the *Schreyer* case, he said, "this remedy would have been irrelevant, because no dividend was paid to Mr. Schreyer's

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48 *Ibid* at para 32.

49 *Ibid* at para 33.

50 *Ibid* at paras 34-36.

51 *Ibid* at para 34.

creditors."[52] 'Dividend' is not defined in the *BIA*. If, as the Supreme Court found, the wife's claim was provable, then the 'dividend' or payment she would have been entitled to arose from her claim to one half of the homestead, which, as we have seen, was exempt from other creditors' claims. Arguably, it is inconsistent to have interpreted 'provable claim' in such a broad manner and then to have interpreted 'dividend', the next step, in such a narrow manner. In relation to the intersection between bankruptcy law and employment standards legislation, the Supreme Court of Canada has previously held that the words of the statute are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, and that attention must be paid to the scheme of both bankruptcy and provincial remedial statutes.[53] In *Schreyer*, the Court could have interpreted 'dividend' to mean amounts that would have been payable to creditors, including to a creditor spouse under family property equalization legislation, which in turn would have resulted in the Court finding that pursuant to section 178(1)(f), the debt was not released by order of discharge as the claim had not been disclosed to the trustee.

As for section 187 *BIA*, LeBel J. acknowledged that a bankruptcy court could review, rescind or vary a discharge order based on the bankrupt's misconduct, so that a wife could then seek leave to pursue her equalization claim and "ask the family court to grant her a proprietary interest in the family farm in satisfaction of her equalization claim."[54] Yet he added: "It would be hazardous here to try to determine whether the

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52 *Ibid*. LeBel J. also noted that it had not been alleged that the failure to disclose was fraudulent, which might have brought into play another exception to the effect of the discharge, that of fraud under section 178(1)(d) *BIA*.

53 *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 SCR 27 at paras 21-23.

54 *Schreyer*, *supra* note 1 at para 35.

theory translates well into practice," asking whether the circumstances of this case would be sufficient to justify suspending the discharge.[55] LeBel J. did not consider imposing this remedy, again, apparently because it was not argued by Susan, nor did he consider the above noted case law. He observed that judges must exercise a broad discretion and that "any interpretation of the scope of the bankruptcy court's discretion under s. 187(5) *BIA* must be consistent with the policies underlying the provisions that specifically set out the circumstances in which a court may suspend or annul a discharge or grant a conditional discharge."[56]

One important policy underlying the *BIA* is to protect the integrity of the system. LeBel J. ignored the jurisprudence where the integrity of the bankruptcy system is considered when assessing the bankrupt's actions in decisions to approve or decline a bankruptcy order or a request to refuse or annul a discharge.[57] In one case where a bankrupt failed to disclose assets, the Saskatchewan Court of Queen's Bench held that it constituted a failure to perform his duties under the *BIA* and that it would offend reasonable people if the bankrupt were to exit bankruptcy with a sizeable amount of exempt assets,

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55 *Ibid* at para 36.

56 *Ibid.* The Court further wrote: "It should be noted that s. 187(5) *BIA* is a residual section that applies to all orders made by the bankruptcy court. As such, it serves to complement the more specific provisions of the *BIA*, not to create an exception to them."

57 *Re Yould*, 2010 CarswellNS 604 (NS SC); *Re Rahman*, 2010 CarswellOnt 5841 (Ont SCJ); *Re Churchill Forest Industrial (Manitoba) Ltd* (1971), 16 CBR (NS) 158 (Man QB); *Re Kenwood Hills Development Inc* (1995), 30 CBR (3d) 44 (Ont Gen Div); *Re Shakell* (1988), 70 CBR (NS) 270 (Ont SC); *Re Raftis* (1984), 53 CBR (NS) 19, aff'd (1985) 57 CBR (NS) 318 (Ont CA); *Re Wensley (Trustee of)* (1985), 59 CBR (NS) 95, 67 AR 184 (QB).

harming the integrity of the bankruptcy system.[58] In a case where failure to disclose was discovered after discharge, the Alberta Court of Queen's Bench found there was an abuse of process, which permits a judge to take steps to ensure the proper administration of justice, in that case, reappointing the trustee in bankruptcy to take specific steps.[59]

The outcome in *Schreyer* effectively creates incentives for bankrupts to violate the *Act* by failing to disclose assets or liabilities, because, if they succeed in not having that failure discovered before discharge, they walk away with assets that they should not be entitled to retain. In contrast, in the non-family law bankruptcy context, the courts have annulled bankruptcy discharge where the bankrupt has failed to disclose assets or liabilities.[60] The Nova Scotia Supreme Court has held that bankruptcy discharge does not release a bankrupt from the responsibilities imposed by the *BIA;* the duties to disclose to the trustee all liabilities under section 158 of the *BIA* are continuing duties, until fulfilled, notwithstanding discharge.[61] Even where a discharge is not annulled, the non-disclosing bankrupt can still be prosecuted for an offence and fined.[62]

In our view, the Court could – and should – have taken a different path. As Susan argued, the purpose of each Act could have been realized without prejudice to the other.[63]

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58 *Re Biblow* (2009), 51 CBR (5th) 303, 2009 CarswellSask 118 (Sask QB).

59 *Re Carlson*, 2010 CarswellAlta 2197 (Alta QB).

60 *Re Lannigan* (2008), 49 CBR (5th) 183, 2008 CarswellNS 658 (NS SC); *Re LeBlanc* (2007), 27 CBR (5th) 299, 2007 CarswellNS 27 (NS SC); *Re De Grandpré* (1969), 15 CBR (NS) 262 (Qc SC).

61 *Re Lannigan, ibid*.

62 *R v Levac-Barton* (2001), 39 CBR (4th) 108, 2001 CarswellOnt 5395 (Ont SCJ).

63 *Schreyer, supra* note 1 (Factum of the Appellant at para 21).

While LeBel J. clarified the limits of property equalization legislation and suggested that Susan should have applied for a stay, he did not take appropriate account of the husband's failure to disclose a significant debt, which should have been sufficient not to discharge the equalization claim. On the facts of this case, no creditors would have been prejudiced had the court granted this remedy because the farm property was exempt in any case. LeBel L. also failed to take account of the fact that the bankrupt had failed to meet his duties under section 158(d) of the *BIA* to disclose to the trustee the particulars of all his liabilities and the names and addresses of all creditors, including the spouse with the equalization claim.

LeBel J. went on to suggest that spousal support could be a remedy for someone in Susan's position, given that these claims remain unaffected by a discharge pursuant to sections 178(1)(b) and (c) *BIA*. He observed that if a spousal support order were made by the family court, "the court might well aim to mitigate the inequities arising from the bankruptcy, such as the release of the debtor spouse from an equalization claim or the retention by the debtor spouse of an exempt asset."[64] An

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64 *Schreyer, supra* note 1 at para 37, citing *Turgeon v Turgeon*, [1997] OJ No 4269 (Gen.Div) and *Sim v Sim* (2009), 50 CBR (5th) 295 (Ont SCJ). In *Sim v. Sim,* the Ontario Superior Court of Justice held that the former spouse of a discharged bankrupt could not claim an interest in the bankrupt's pension in satisfaction of an order for an equalization payment. The family law order required payment of a money debt representing the equalization payment and no security was ordered; the debt was extinguished by the bankruptcy proceedings such that there was no existing debt to secure. However, the court held that the bankruptcy had left the applicant without the benefit of the equalization payment and had left the bankrupt with entitlement to his pension. This situation constituted a material change in circumstances entitling the applicant to lump sum support that should be secured against the pension entitlement. Accordingly, an order was issued requiring the bankrupt to pay lump sum spousal support, secured against the pension entitlement. The order for

impediment to this route of using spousal support to compensate for the inability to enforce a property claim is that a number of cases have held that support orders should not be made to divide or equalize property.[65]

That said, whilst affirming this principle, and stating that the governing legislation does not recognize redistribution of assets as one of the purposes of a spousal support award, the Ontario Court of Appeal said recently that "a lump sum order can be made to "relieve [against] financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home)": *Family Law Act*, s. 33(8)(d)."[66] This ruling was, however, rooted in the particular wording of the Ontario legislation. As well, in 2011, in *Lipinska v Lipinsk*a, the Ontario Superior Court varied its original order for an equalization amount to a lump sum spousal support amount, secured against the bankrupt's house, after the respondent filed a consumer proposal a few days after the order was given.[67] The Court found that the actions of the respondent ignored a preservation order to not dissipate family assets. The Court held that:

> While he has not directly dissipated family assets, there is no question that by his unexplained actions in accumulating significant debt and rendering himself insolvent, the

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periodic spousal support remained in full force and effect. See also *Shea v Fraser*, 2007 ONCA 224, 85 OR (3d) 28.

65 *Young v Young*, [1993] 4 SCR 3; *Newstone v Newstone* (1994), 2 RFL (4th) 129 (BCCA); *Mannarino* v *Mannarino* (1992), 43 RFL (3d) 309 (OCA). *Willemze-Davidson v Davidson*, [1997] OJ No 856 (CA); *Davis v Crawford,* 2011 ONCA 294.

66 *Davis v Crawford, ibid* at para 60, 61.

67 *Lipinska v. Lipinsk*a, 2011 CarswellOnt 654, [2011] OJ No 332 (QL) (Sup Ct J).

> respondent has not preserved the former matrimonial home for its purpose of securing the unpaid equalization amounts owed to the applicant. In fact, by means of his actions and the consumer proposal filed, the respondent has succeeded in preserving his own rights in the former matrimonial residence while simultaneously eliminating the intended protection afforded the applicant by [the preservation] order.[68]

Not all judges have, however, taken such a purposive approach to the interpretation of family law protections.

MOVING FORWARD

Significantly, despite denying Susan's claim, the Supreme Court of Canada went on to reference the problem of the feminization of poverty that can be exacerbated by the economic effects of divorce, compounded by insolvency, and to make a fairly direct recommendation for law reform.[69] Noting that Parliament had taken action in relation to protecting spousal and child support claims in the *BIA*, LeBel J. stated:

> [T]he possibility of mitigating the consequences of this litigation by means of a decision with respect to spousal support should not overshadow the problems created by the failure in the *BIA* to differentiate between equalization schemes and division of property schemes. The best way to address the potentially inequitable

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68 *Ibid* at para 37.

69 LeBel J. cited Bray, *supra* note 14, in *Schreyer*, *supra* note 1 at para 28.

> impact of bankruptcy law on the division of family assets would be to amend the *BIA* ...[70]

LeBel J. suggested that the *BIA* should be amended along the lines suggested by the Standing Senate Committee on Banking, Trade and Commerce in 2004. Specifically, bankruptcy should not "stay or release any claim for equalization or division against exempt assets under provincial/territorial legislation regarding equalization and/or the division of marital property."[71] Such an amendment would go some way towards eradicating the difference between the equalization regimes and the proprietary regimes for division of marital property. LeBel J. concluded that:

> It seems to me that this matter is ripe for legislative attention so as to ensure that the principles of bankruptcy law and family law are compatible rather than being at cross-purposes.[72]

CONCLUSION

Given the missed opportunity in *Schreyer v Schreyer* to develop a set of principles regarding interpretation of the intersection of family law and bankruptcy law, it is urgent that legislative change be made so that non-bankrupt spouses are treated fairly and consistently across Canada, notwithstanding differences in family law legislation. We would suggest amending the *BIA* to prohibit the stay or release of any spousal

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70 *Schreyer*, *supra* note 1 at para 38.

71 *Ibid* at para 39, LeBel J. cited: Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Honourable Richard H Kroft).

72 *Ibid* at para 40.

claim regarding equalization or division of property in bankruptcy discharge, as against typically exempt assets such as homes or pensions. As well, consideration should be given to going further to prohibit the release of any spousal claim for equalization or division of property, on the basis that spousal property debts are at least as important as fines and restitution orders imposed by a court in respect of an offence.[73] Although the bankrupt's property is diminished on exiting from discharge, the outstanding claim could be enforceable against future property acquired or future income. Alternatively, there could be a statutory presumptive exclusion of all equalization payments from the property of bankrupt for the purposes of discharge. Authority could be granted to courts to make exceptions for spousal collusion, prejudice to particular unsecured creditors, or other equitable reasons, as is currently done with student loans.[74] Finally, equalization and division of property claims could be given the same 7th ranking that is currently accorded spousal and child support claims under section 136 of the *BIA*. The creditor spouse would thereby be given priority over general unsecured creditors, but secured creditors would not be affected.

The *BIA* should also be amended to explicitly require that any failure of a bankrupt to disclose outstanding claims under family property and support legislation triggers the non-bankrupt spouse's right to proceed to enforce the claim, which would essentially be a statutory lifting of the stay. Secured creditors would not be affected and there would be considerably greater fairness to spouses and consistency in the treatment of family law claims across the country, advancing the objectives of family law. As well, the *BIA* could specify that failure to disclose family property equalization or property division claims results in the claim not being discharged.

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73 *BIA*, *supra* note 10, s 178.

74 *Ibid*, ss 178(1)(g), (1.1).

In the meantime, there is room for improvement in the family law system. Judges who adjudicate marital property claims might consider making more routine orders that vest property, grant security or impose a trust in relation to the equalization or division of property, such that spouses' claims are more likely to be protected in the event of bankruptcy. Family courts should also consider whether it is unconscionable, unjust, or unfair to allow a bankrupt spouse to deduct debts that will be released or reduced by bankruptcy. LeBel J. also suggested in *Schreyer* that it was possible "that, even after the debtor has been released from a claim in a bankruptcy proceeding, it would remain within the discretion of the family court to order a transfer of exempt asset."[75] Earlier, he had clarified that discharge from bankruptcy does not extinguish claims that are provable, but rather it "releases" the debtor from such claims.[76] He declined to comment further, given that this argument had not been explored in the case at hand, but it is possible that family court judges might do so in the future. Finally, some judges have been creative in using spousal support to address situations where bankruptcy has defeated marital property entitlements. As Robert Klotz has said, "[t]he appeal of an activist approach is that judges themselves can modernize the law, to keep it vibrant and responsive to social change, in the face of moribund legislative reform."[77]

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75 *Schreyer*, *supra* note 1 at para 23. Robert Klotz argues that this remedy is "standard fare" in division of property provinces, R Klotz "Case Comment: *Schreyer v. Schreyer*" in Janis Sarra, ed, (2012) *Annual Review of Insolvency Law* (Toronto: Carswell, 2012) 269.

76 *Ibid* at para 21.

77 Klotz, *supra* note 29 at c 2-7.