

**SUPREME COURT OF CANADA**

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| **Citation:** Schreyer *v.* Schreyer, 2011 SCC 35, [2011] 2 S.C.R. 605 | **Date:** 20110714**Docket:** 33443 |

**Between:**

**Susan Wilma Schreyer**

Appellant

and

**Anthony Leonard Schreyer**

Respondent

**Coram:** McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**(paras. 1 to 43) | LeBel J. (McLachlin C.J. and Binnie, Deschamps, Abella, Rothstein and Cromwell JJ. concurring) |

Schreyer *v.* Schreyer, 2011 SCC 35, [2011] 2 S.C.R. 605

Susan Wilma Schreyer *Appellant*

v.

Anthony Leonard Schreyer *Respondent*

**Indexed as:** Schreyer ***v.*** Schreyer

2011 SCC 35

File No.: 33443.

2010: November 9; 2011: July 14.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Rothstein and Cromwell JJ.

on appeal from the court of appeal for manitoba

 *Family law — Family assets — Bankruptcy and insolvency — Spouses agreeing upon separation to valuation of assets under the Manitoba Family Property Act — Family farm owned by husband — Husband making an assignment in bankruptcy and obtaining discharge before valuation of assets — Valuation subsequently confirming that wife entitled to equalization payment — Effect of bankruptcy and discharge on equalization payment — Whether equalization claim provable in bankruptcy — Whether husband released from equalization claim by discharge from bankruptcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B‑3, ss. 69.4, 121(1), 121(2), 135, 178(1)(f), 178(2) — The Family Property Act, C.C.S.M. c. F25, s. 17.*

 The parties married in 1980, separated in 1999 and filed for divorce in 2000. The husband continued to live on the family farm, of which he was the sole registered owner. In December 2000, the parties consented to an accounting and valuation of their assets. Before a master undertook the valuation, the husband made an assignment in bankruptcy. The wife was not listed as a creditor and received no notice of the assignment. The husband was discharged from bankruptcy in November 2002. The master subsequently proceeded with the valuation and found that the wife was entitled to an equalization payment of $41,063.48. The master’s report, confirmed by the Court of Queen’s Bench, did not address the effect of the husband’s bankruptcy and discharge on the wife’s equalization claim. The Court of Appeal held that the wife’s equalization claim was provable in bankruptcy and had been extinguished by the discharge of the husband’s bankruptcy.

 *Held*: The appeal should be dismissed.

 Manitoba is an equalization jurisdiction, not a division of property jurisdiction. The equalization scheme is based on a principle of equal division of the value of family assets after a process of accounting and valuation. The accounting process results in a value that is divided between the spouses, and any amount payable must be paid to the creditor spouse. A debtor spouse retains the property he or she owns, but must pay a sum of money to the creditor spouse. The assets themselves are not divided and neither spouse acquires a proprietary or beneficial interest in the other’s assets. No provision of *The Family Property Act* of Manitoba (“*FPA*”) vests title in one spouse to the other spouse’s property. Proprietary interests are not granted until the stage of payment of the equalization claim, as a form of execution pursuant to s. 17 *FPA*. Accordingly, under the *FPA*, an equalization claim is a debt owed by one spouse to the other.

 The wife’s equalization claim was provable in the husband’s bankruptcy. Section 121 of the *Bankruptcy and Insolvency Act* (“*BIA*”) contains a broad definition of a provable claim, which includes all debts and liabilities that exist at the time of the bankruptcy or that arise out of obligations incurred before the day on which the bankrupt went into bankruptcy. In the instant case, given the nature of Manitoba’s equalization scheme, the wife’s claim was provable. A right to payment existed 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. In such circumstances, the claim could not be considered so uncertain that s. 135 *BIA* could not apply. The husband was released from the equalization claim by the bankruptcy and his discharge. The wife’s claim was neither a proprietary claim, nor was it exempt from the effect of a discharge as a claim for support or maintenance under ss. 178(1)(*b*) or (*c*) *BIA*.

 Under Manitoba’s *The Judgments Act*, the family farm was exempt from execution by creditors. The appropriate remedy for a creditor like the wife would be to apply to the bankruptcy judge under s. 69.4 *BIA* for leave to pursue a claim against the exempt property. Since this property is beyond the reach of the ordinary creditors, lifting the stay of proceedings cannot prejudice the estate assets available for distribution. In keeping with the wording of s. 69.4(*b*), it would be “equitable on other grounds” to make such an order. This process would also accord with the policy objective of bankruptcy law of maximizing, under the *BIA*, returns to the family unit as a whole, rather than focussing on the needs of the bankrupt, and with Parliament’s concern for the support of families.

 In its current form, the *BIA* offers limited remedies to a spouse in the wife’s position. In this regard, family law may provide them with other forms of remedies after the bankrupt has been discharged, more particularly through spousal support.

**Cases Cited**

 **Distinguished:** *Lacroix v. Valois*,[1990] 2 S.C.R. 1259; **referred to:**  *Balyk v. Balyk* (1994), 113 D.L.R. (4th) 719; *Burson v. Burson* (1990), 4 C.B.R. (3d) 1; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Thibodeau v. Thibodeau*, 2011 ONCA 110, 104 O.R. (3d) 161; *Re Kryspin* (1983), 40 O.R. (2d) 424; *Ross, Re* (2003), 50 C.B.R. (4th) 274; *Hildebrand v. Hildebrand* (1999), 13 C.B.R. (4th) 226; *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765; *Turgeon v. Turgeon*, [1997] O.J. No. 4269 (QL); *Sim v. Sim* (2009), 50 C.B.R. (5th) 295; *Shea v. Fraser*, 2007 ONCA 224, 85 O.R. (3d) 28.

**Statutes and Regulations Cited**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B‑3, ss. 69.3, 69.4, 121, 135, 136(*d.1*), 178(1)(*b*), (*c*), (*d*), (*f*), 178(2), 187(5).

*Civil Code of Québec*, S.Q. 1991, c. 64, art. 427.

*Family Property Act*,C.C.S.M. c. F25, ss. 6(1), 13, 14, 15, 17.

*Judgments Act*, C.C.S.M. c. J10, s. 13.

*Marital Property Act*, C.C.S.M. c. M45.

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Houlden, L. W., G. B. Morawetz and Janis Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 3, 4th ed. Toronto: Carswell, 2009 (loose‑leaf updated 2011, release 5).

Klotz, Robert A. *Bankruptcy, Insolvency and Family Law*, 2nd ed. Scarborough, Ont.: Thomson Carswell, 2001 (loose‑leaf updated 2007, release 1).

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.

 APPEAL from a judgment of the Manitoba Court of Appeal (Hamilton, Freedman and MacInnes JJ.A.), 2009 MBCA 84, 245 Man. R. (2d) 86, 466 W.A.C. 86, 57 C.B.R. (5th) 157, 70 R.F.L. (6th) 237, [2009] 10 W.W.R. 588, [2009] M.J. No. 299 (QL), 2009 CarswellMan 403, varying an order of Guertin‑Riley J. (unreported). Appeal dismissed.

 Martin W. Mason, Robert A. Klotz, Alain J. Hogue and Matthew Estabrooks, for the appellant.

 Gerald S. Ashcroft, for the respondent.

 The judgment of the Court was delivered by

 LeBel J. —

I. Overview

1. This appeal concerns a perceived clash between family law and bankruptcy law. The appellant sharply challenges the outcome of the litigation in this case, which results from her separation and divorce from the respondent: she has been denied recovery of an equalization payment owed after the division of the family assets, whereas the respondent has retained ownership of the family farm after being discharged from bankruptcy, as the farm is exempt from seizure under Manitoba law. I would uphold the judgment of the Manitoba Court of Appeal, which dismissed the appellant’s claim. I find no error in law and would thus dismiss the appeal. However, the result calls for some comments about the interplay of bankruptcy law and family law and about how they can be made to work together rather than at cross-purposes.

II. Background

1. The appellant, Susan Wilma Schreyer, and the respondent, Anthony Leonard Schreyer, were married in 1980. During their marriage, they tried a number of times to set up a farming operation in Manitoba. Finally, in 1997, the respondent bought part of a farm belonging to his parents, including a house and farm buildings. Title to the property issued solely in his name as registered owner. The respondent obtained a mortgage to finance the purchase.
2. In December 1999, the marriage broke down. There was a bitter separation. The appellant left the farm, and the respondent continued to live on it. In March 2000, the appellant filed for divorce and sought, among other relief, an equal division of the marital property, which included the farm.
3. In December 2000, the parties consented to an order referring to the master an accounting and valuation of the assets pursuant to *The* *Marital Property Act*, C.C.S.M. c. M45 (“*MPA*”). That Act has since been replaced by *The Family Property Act*,C.C.S.M. c. F25 (“*FPA*”)*.* As the relevant provisions of these two Acts are identical, the parties have based their submissions in this Court on the *FPA.* The valuation date was set as the date of separation of the parties, December 4, 1999.
4. Before the master undertook the valuation, Mr. Schreyer made an assignment in bankruptcy on December 20, 2001. Ms. Schreyer was not listed as a creditor and received no notice of the assignment, and she claims that she was not aware of it. The respondent was discharged from bankruptcy on November 29, 2002. The appellant must have been informed of the bankruptcy some time later, but before the master undertook the valuation. This can be inferred from changes made in a new consent order for the reference to the master dated October 8, 2004. The new order was identical to the original consent order but for the addition of two paragraphs, one of which, as the Manitoba Court of Appeal mentioned in its judgment (paras. 14-15), authorized the master to deal with all issues arising out of Mr. Schreyer’s bankruptcy. The master proceeded with the valuation, which led to the present litigation.

III. Judicial History

A. *Manitoba Court of Queen’s Bench (Master Sharp), 2007 MBQB 263 (CanLII)*

1. Master Sharp issued a detailed report after a lengthy hearing. For the purposes of the appeal, I need not review the valuation of the parties’ assets and liabilities. Suffice it to say that the master noted that the farm property was exempt from execution and that the trustee in bankruptcy, presumably ascertaining that it was exempt, would have released it to the respondent. After computing the parties’ liabilities and assets at the time of separation, the master found that the appellant was entitled to an equalization payment of $41,063.48. But the master did not address the effect of the respondent’s bankruptcy and discharge on the appellant’s claim that resulted in the determination of an equalization payment.

B. *Manitoba Court of Queen’s Bench, Family Division (Guertin-Riley J.), June 23, 2008 (Unreported)*

1. Both parties opposed confirmation of the master’s report. Despite their objections, Guertin-Riley J. confirmed it in its entirety and ordered the respondent to make the equalization payment as determined by the master. The two parties appealed that order to the Manitoba Court of Appeal.

C. *Manitoba Court of Appeal (Hamilton, Freedman and MacInnes JJ.A.), 2009 MBCA 84, 245 Man. R. (2d) 86*

1. MacInnes J.A., writing for a unanimous court, considered several issues, most of which are now irrelevant for the purposes of the appeal. The main question addressed by the Court of Appeal was the effect of the bankruptcy and discharge on Ms. Schreyer’s claim for an equalization payment. The court held that Ms. Schreyer’s equalization claim was only a personal claim against her former husband. She held no interest in the farm itself, since Manitoba is an “equalization province”, as opposed to a “division of property province”. Her claim was a claim provable in bankruptcy, and it had been extinguished by the discharge of the bankrupt. As a result, the Court of Appeal found that the Court of Queen’s Bench had erred in confirming the report and holding, in effect, that the equalization payment remained an outstanding obligation of the respondent even after he had been discharged from bankruptcy.

IV. Analysis

A. *Issues*

1. The parties have raised several issues. But the core issue in this appeal is whether the application of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”), has released the respondent from Ms. Schreyer’s equalization claim in respect of the family assets under the *FPA*, formerly the *MPA*. (The relevant statutory provisions are reproduced in the Appendix.) Despite the apparent injustice of the outcome, it is impossible to wish away the fact and problem of the respondent’s bankruptcy. The issue of the legal effect of Mr. Schreyer’s bankruptcy and discharge must be resolved. To answer this question, I must first determine the legal nature of the equalization claim. I will then consider whether that claim was provable in bankruptcy and whether the respondent was released from it upon being discharged. I will also comment briefly on other issues, such as the appellant’s claim for unjust enrichment, that are not determinative of this appeal.

B. *Positions of the Parties*

1. The appellant raises several arguments in support of her assertion that her equalization claim has survived her husband’s bankruptcy and the judgment can be executed against the exempt property, the family farm. First, she argues that her claim is a proprietary one and that, for this reason, it was not affected by the application of the *BIA* and was not provable in bankruptcy. She also states that the claim was not provable because it remained unliquidated. In the alternative, if it was in fact provable, she argues that the respondent is estopped from asserting his discharge against her claim because he failed to list her as a creditor and proceeded with the valuation before the master. Had she been made aware of his bankruptcy in a timely manner, she could have sought leave from the bankruptcy court under s. 69.4 *BIA* to pursue her claim against the exempt property*.*
2. In the further alternative, should these first two arguments fail, the appellant submits that the respondent has been unjustly enriched. He has retained the farm free from the equalization claim, and his debts to his ordinary creditors have been wiped out. In her view, this situation, which results from Mr. Schreyer’s failure to inform her of his bankruptcy, gives rise to a claim for unjust enrichment that this Court should remedy by imposing a constructive trust over half of the family farm.
3. The respondent relies, in substance, on the Court of Appeal’s judgment. In his opinion, the equalization claim is a monetary claim that was provable in bankruptcy, and he was released from it upon being discharged. Moreover, the appellant did nothing to set aside or suspend the discharge under the *BIA.* The respondent adds that the constructive trust issue was never raised in the courts below, that no evidence was adduced on this issue and that this Court should therefore not consider it.

C. *Legal Nature of the Equalization Claim Under the MPA and the FPA*

1. The key issue here is the legal characterization, in Manitoba family law, of a claim for equalization following the breakup of a marriage. Does a spouse like Ms. Schreyer obtain a proprietary interest in the family assets or a monetary claim at the end of the equalization process? As we will see, Manitoba remains an equalization jurisdiction. It has not joined the ranks of the provinces which have adopted division of property systems. As a result, a spouse is entitled to an order setting the amount payable from one spouse to the other under the equalization scheme and may ask either to be paid this amount in money or to receive a transfer of assets in lieu of that amount.
2. Every Canadian province has tried to address in some way the inequities or difficulties arising out of the distribution of family assets after the breakdown of a marriage or of a common law relationship to which the same rules apply. Broadly speaking, the provincial legislatures have chosen between two different models: equalization and division of property (R. A. Klotz, *Bankruptcy, Insolvency and Family Law* (2nd ed. (loose-leaf)), at pp. 4-29 to 4-30).
3. The equalization model involves a valuation of the family assets and an accounting. The value of the assets is then divided between the spouses, usually in equal parts, although family courts have a limited discretion to order an unequal division. The valuation and the division give rise to a debtor-creditor relationship in the sense that the creditor spouse obtains a monetary claim against the debtor spouse. But the assets themselves are not divided. Each spouse retains ownership of his or her own property both before and after the breakdown of the marriage. Neither acquires a proprietary or beneficial interest in the other’s assets. 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 (T. A. Gutkin, “Family Law and Bankruptcy”(1999), 16 *Nat’l Insolv. Rev.* 26, at pp. 31-32; *Balyk v. Balyk* (1994), 113 D.L.R. (4th) 719 (Ont. Ct. (Gen. Div.)), at pp. 723-25; *Burson v. Burson* (1990), 4 C.B.R. (3d) 1 (Ont. Ct. (Gen. Div.)), at paras. 24-25). The division of property schemes, on the other hand, give rise to a proprietary or beneficial interest in the assets themselves, not just in their value (*Balyk*,at pp. 723-24).
4. The Manitoba scheme is one of equalization. It is based on a principle of equal division of the value of the family assets after a process of accounting and valuation (ss. 13 and 14 *FPA*). The accounting process results in a value that is divided between the spouses, and any amount payable must be paid to the creditor spouse. A debtor spouse retains 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 (s. 15 *FPA*). 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.
5. Proprietary interests are not granted until the stage of payment of the equalization claim, at which point they may be granted as a form of execution, to ensure that the payment is actually made. Section 17 *FPA* provides that the amount established in the accounting may be paid by means of a money payment, a transfer of assets, or both. The mode of payment may be agreed on by the parties or ordered by the court. Section 17 reads as follows:

 **17** The amount shown by an accounting under section 15 to be payable by one spouse or common-law partner to the other may be satisfied

 (a) by payment of the amount in a lump sum or by instalments; or

 (b) by the transfer, conveyance or delivery of an asset or assets in lieu of the amount; or

 (c) by any combination of clauses (a) and (b);

 as the spouses or common-law partners may agree or, in the absence of agreement, as the court upon the application of either spouse or common-law partner under this Act may order, taking into account the effect of any interim order made under section 18.1.

1. Under the *FPA*, an equalization claim is a debt owed by one spouse to the other. The Court of Appeal did not err in treating the appellant’s claim as a debt. The characterization of the equalization claim is particularly important here — in the context of the application of the *BIA* — for the purpose of determining whether the appellant’s claim survived her husband’s discharge from bankruptcy.

D. *Effect of the Respondent’s Bankruptcy*

1. The very design of insolvency legislation raises difficult policy issues for Parliament. Legislation that establishes an orderly liquidation process for situations in which reorganization is not possible, that averts races to execution and that gives debtors a chance for a new start is generally viewed as a wise policy choice. Such legislation has become part of the legal and economic landscape in modern societies. But it entails a price, and those who might have to pay that price sometimes strive mightily to avoid it. Despite the proven wisdom of the policies underpinning the insolvency legislation, it is understandable that few appreciate the “haircuts” or even outright losses that bankruptcies trigger. So creditors seek to obtain security or third-party guarantees. In other cases, statutory exemptions from the application of the *BIA* may apply. For a long time, governments took care to protect their own interests, but they now generally accept, albeit with some reluctance, that they should share the fate of ordinary creditors (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379). Other types of exemptions that seem fair or even necessary are set out in the *BIA.* However, the more exemptions there are, the less likely it is that the basic policy objectives of insolvency legislation can be achieved.
2. As a consequence, 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. As I will explain below in greater detail, the appellant’s equalization claim was provable in the respondent’s bankruptcy. In light of the provisions of the *BIA*, it is therefore difficult, subject to one minor reservation concerning the terminology used, to find fault with the Court of Appeal’s holding that the equalization claim had been “extinguished” by the respondent’s discharge. That holding appears to be faithful both to the words of the *FPA* and to the provisions of the *BIA*. In this respect, given that Ontario is also an equalization province, it is worth mentioning that the Ontario Court of Appeal recently espoused this reasoning in *Thibodeau v. Thibodeau*, 2011 ONCA 110, 104 O.R. (3d) 161. I agree with the following comments by Blair J.A.:

 Separating spouses are not entitled to receive a division of property. Rather, they are entitled (generally speaking) to receive one-half of the *value* of the property accumulated during the marriage. An equalization *payment* is the chosen legislative default position. On the bankruptcy side, unsecured creditors are to be treated equally and the bankrupt’s assets to be distributed amongst them equally subject to the scheme provided in s. 136 of the *BIA*. Parliament has not accorded any preferred or secured position to a claim for an equalization payment. While it has recently chosen to amend the *BIA* to give certain debts or liabilities arising in relation to claims for support and/or alimony a preferred status, Parliament has made no such provision for equalization claims in relation to family property. [Underlining added; para. 37.]

1. The only reservation I have with the decision of the Court of Appeal in the case at bar relates to its numerous statements that the operation of s. 178(2) *BIA* has the effect of “extinguishing” the equalization claim. With respect, this provision does not purport to extinguish claims that are provable in bankruptcy pursuant to s. 121 *BIA*, but “releases” the debtor from such claims: see, on this point, *Re* *Kryspin* (1983), 40 O.R. (2d) 424 (H.C.J.), at pp. 438-39; and *Ross,* *Re* (2003), 50 C.B.R. (4th) 274 (Ont. S.C.J.), at para. 15. As is clear from the words of s. 178(2) *BIA*, the discharge operates to release the bankrupt from all claims provable in bankruptcy. For creditors, the discharge means that they “cease to be able to enforce claims against the bankrupt that are provable in bankruptcy” (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 3, at p. 6-283).
2. During oral argument, Mr. Klotz, counsel for the appellant, urged the Court to view the equalization claim as a “hybrid claim”. Thus, 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 s. 17 *FPA*, the equalization claim is also a proprietary claim and will therefore survive the bankruptcy process.
3. This submission cannot be accepted for two reasons. First, it alters the role of s. 17 *FPA*. As I mentioned above, that section provides a mechanism for ensuring that the equalization payment is made. Although the mechanism does include, under ss. 17(b) or (c) *FPA*, the possibility of having assets transferred to a former spouse to satisfy the amount found to be payable by the other spouse, this does not change the fact that no property interest arises unless and until the parties agree to, or the family court — upon an application — orders, such a transfer. In the circumstances of this case, I need not consider a possible argument 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 assets. Such an argument could raise important issues and difficulties that have not been explored or argued and on which I do not intend to comment further.
4. Second, the “hybrid claim” argument, if accepted, would in substance bring equalization provinces into line with division provinces and would in essence conflate the equalization and division of property models. By adopting a novel interpretation of s. 17 *FPA*, this Court would interfere with the Manitoba legislature’s policy choice not to give a former spouse a proprietary interest in the family property. This Court must give effect to this clear legislative intent, not read it out of the *FPA*.
5. I do not doubt that an outcome like the one in this appeal looks unfair, given that the appellant’s equalization claim was based primarily on the value of an asset — the farm property — which was exempt from bankruptcy and therefore not accessible to other creditors. None of the policies underlying the *BIA* require that the appellant emerge from the marriage with no substantial assets. Parliament could amend the *BIA* in respect of the effect of a bankrupt’s discharge on equalization claims and exempt assets. But the absence of such an amendment makes the outcome of this case unavoidable. 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*. As will be discussed below, however, the circumstances were such that Ms. Schreyer did not pursue these recourses.

E. *What Is a Provable Claim?*

1. Section 121 *BIA* contains a broad definition of a provable claim, which includes all debts and liabilities that exist at the time of the bankruptcy or that arise out of obligations incurred before the day the debtor went into bankruptcy. Thus, s. 121 provides that “[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on 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” are deemed to be provable claims. According to s. 121(2), the trustee must apply s. 135 *BIA* to determine whether contingent or unliquidated claims are provable*.* If the debt exists and can be liquidated, if the underlying obligation exists as of the date of bankruptcy and if no exemption applies, the claim will be deemed to be provable.
2. The date of the bankruptcy is of critical importance. If the equalization claim was liquidated before the bankruptcy, there is no doubt that the claim is provable. If it was still unliquidated as of the date of the bankruptcy, the issue becomes whether it remained too uncertain to allow the trustee to value it under s. 135 *BIA.* In the instant case, given the nature of Manitoba’s equalization scheme, I consider the claim to have been provable. The *FPA* establishes a principle of equality between spouses. The accounting of assets and liabilities under s. 15 *FPA* leads to an equal division, subject to a limited judicial discretion under s. 14 to depart from the formula provided for in s. 15. 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. In such circumstances, the claim could not be considered so uncertain that s. 135 *BIA* could not apply. On the contrary, the appellant’s claim, which had arisen before the bankruptcy and was determinable under the *FPA*, was provable (Klotz, atpp. 5-3 to 5-5 and 5-9).
3. The situation in this case differs from the one the Court considered in *Lacroix v. Valois*,[1990] 2 S.C.R. 1259. In that case, the Court held that a claim for a compensatory allowance under Quebec family law after the breakdown of a marriage was not provable in bankruptcy and that the debtor was not released from it upon being discharged. Unlike in Manitoba, Quebec’s compensatory allowance scheme established a particular mechanism for compensation for unjust enrichment that gave the judge a broad discretion. In Quebec, unlike under the *FPA*, a right to a compensatory allowance does not flow directly from the breakdown of a marriage. The right arises solely from the judgment rendered in the circumstances and for the reasons set out in what is now art. 427 of the *Civil Code of Québec*, S.Q. 1991, c. 64. Thus, no claim for a compensatory allowance would be provable in bankruptcy before a judgment granting such an allowance was rendered. Moreover, in *Lacroix*, the legislation establishing the compensatory allowance scheme had come into force after the bankruptcy. Given these circumstances, that case should not be interpreted as establishing that unliquidated claims under the equalization schemes of the common law provinces are not provable in bankruptcy.
4. In the instant case, the appellant’s claim is not a proprietary claim. It was provable under ss. 121 and 135 *BIA.* It was not exempt from the effect of a discharge as a claim for support or maintenance under ss. 178(1)(*b*) and (*c*). The bankruptcy and discharge had the effect of releasing the respondent from it. The *BIA* and the possible remedies create an exception that applies solely to alimony or support. Although it is of equal importance, a claim under an equalization of property scheme cannot be considered to constitute support (R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at pp. 291-92).
5. I will now consider whether the farm’s status as property exempt from execution and the respondent’s failure to list the appellant as a creditor in the bankruptcy have any impact on the legal status of the equalization claim.

F. *Status of the Family Farm as an Exempt Property*

1. Under s. 13 of Manitoba’s *The* *Judgments Act*, C.C.S.M. c. J10, the Schreyers’ family farm was exempt from execution by creditors. But the appellant, as a spouse, would have been entitled to pursue the enforcement of her equalization claim against the exempt property, as we shall see. This property lay out of the reach of the trustee in bankruptcy, who could not dispose of it on behalf of the bankrupt’s estate in order to distribute it to his creditors.
2. In such circumstances, the appropriate remedy for a creditor like the appellant would be to apply to the bankruptcy judge under s. 69.4 *BIA* for leave to pursue a claim against the exempt property. Since this property is beyond the reach of the ordinary creditors, lifting the stay of proceedings cannot prejudice the estate assets available for distribution*.* In keeping with the wording of s. 69.4(*b*) *BIA*, this is why it would be “equitable on other grounds” to make such an order. This procedure would also accord with the policy objective of bankruptcy law of maximizing, under the *BIA*, returns to the family unit as a whole rather than focussing on the needs of the bankrupt: see, on this point, *Hildebrand v. Hildebrand* (1999), 13 C.B.R. (4th) 226 (Man. Q.B.), at para. 15; and, generally, on Parliament’s concern for the support of families, *Marzetti v. Marzetti*, [1994] 2 S.C.R. 765, at pp. 800-801.
3. After the stay was lifted, the appellant would then have been able to ask the family court to attribute a proprietary interest in the family farm to her in satisfaction of her equalization claim. Such an interest would not have been affected by the bankruptcy. The problem, however, is that the appellant asserts that she was unable to pursue this remedy because Mr. Schreyer had failed to disclose the equalization claim in the statement of affairs he submitted to the trustee upon his assignment into bankruptcy. As a result, the appellant claims, she learned of the existence of the bankruptcy only after the respondent had been discharged.
4. The appellant now seeks a remedy based on the respondent’s failure to list her as a creditor at the time of the bankruptcy. In substance, she argues that because of that failure, which was a breach of the statutory duties of a bankrupt debtor, she should be allowed to disregard her husband’s discharge and to pursue her claim against the family farm, which is an exempt property for the purposes of the *BIA.* In this respect, s. 178(1)(*f*) *BIA* appears to provide the creditor with only a limited remedy (Wood, at pp. 294-95). Parliament did not intend that every omission from a list of creditors would deprive the discharge of its effect. Parliament realized that many such omissions may be accidental omissions or administrative oversights. It thus chose a more limited remedy that enables a creditor to claim a dividend he or she did not receive. In the case of a failure to list a creditor, a discharged bankrupt may be sued, but only for the amount of the dividend the creditor would otherwise have received. In the case at bar, this remedy would have been irrelevant, because no dividend was paid to Mr. Schreyer’s creditors. I note that it has 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 s. 178(1)(*d*) *BIA*.
5. The alternative remedies appear to be complex, and fraught with difficulties. The obstacle to any course of action contemplated by a creditor in Ms. Schreyer’s position is the discharge of the bankrupt. It is true that any order made by the court in exercising its bankruptcy jurisdiction, including an order of discharge, can be reviewed, rescinded or varied under s. 187(5) *BIA*. In theory at least, the appellant might file a motion for suspension of the discharge on the basis of misconduct on the respondent’s part, particularly in view of the fact that he failed to notify her of his assignment into bankruptcy. If the discharge were suspended, the appellant could then seek leave from the bankruptcy court to pursue her equalization claim, which would be revived by the suspension, against the exempt property. She could ask the family court to grant her a proprietary interest in the family farm in satisfaction of her equalization claim.
6. It would be hazardous here to try to determine whether the theory translates well into practice. Would the circumstances of this case be sufficient to justify suspending the discharge? Would such a remedy be available under s. 187(5) *BIA*? In such matters, judges must exercise a broad discretion, but they must also bear in mind the underlying policies of the *BIA*.Several years have gone by since the discharge. Would it be appropriate to review it now? What might be the condition of the property itself, which was heavily mortgaged at the time of separation of the parties? Given that the appellant has not taken this approach, I will refrain from expressing any view about the practicality or the soundness of following such a procedure in this case. Nevertheless, it bears mentioning 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. 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.
7. In its current form, therefore, the *BIA* offers limited remedies to spouses in the appellant’s position. In this regard, family law may provide them with a safer harbour after the bankrupt has been discharged, more particularly through spousal support. The record in this case does not disclose whether a support order has been made, and the issue of whether support should be granted or varied is not before this Court. The appropriateness of awarding or varying spousal support and the quantum of support are matters that fall within the discretion of the family court. If a support order were made in a case like this one, 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 (see *Turgeon v. Turgeon*, [1997] O.J. No. 4269 (QL) (Gen. Div.); and *Sim v. Sim* (2009), 50 C.B.R. (5th) 295 (Ont. S.C.J.)). Such determinations must be made on a case-by-case basis.
8. However, the 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 impact of bankruptcy law on the division of family assets would be to amend the *BIA*: see, on this point, *Shea v. Fraser*, 2007 ONCA 224, 85 O.R. (3d) 28, at para. 48. Over the last two decades, Parliament has made positive steps in amending the *BIA* to address the economic effects of divorce when those effects are compounded by insolvency, and the role of such situations in the “feminization of poverty” (M. J. 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* (2009), 455).
9. Before 1997, claims for support or alimony were not expressly provable under the *BIA*, potentially giving spouses no access to the bankrupt’s estate. After the 1997 amendments (S.C. 1997, c. 12), s. 121(4) *BIA* was added to specifically provide that these claims were provable. They remained unaffected by a discharge pursuant to ss. 178(1)(*b*) and (*c*) *BIA*. Parliament has also shown a willingness to give spouses limited priority over unsecured creditors for support payments that accrued before the bankruptcy (s. 136(*d.1*) *BIA*). Further amendments to address the issue of the division of matrimonial property have also been considered by the Standing Senate Committee on Banking, Trade and Commerce. In its report released in November 2003 (*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act* *and the Companies’ Creditors Arrangement Act*), the Committee took the view that inequities like the one perceived to exist in the case at bar required “prompt resolution” (p. 85). To this end, it recommended that the *BIA* be amended to provide that “bankruptcy does 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” (p. 86).
10. More than seven years have elapsed since the Committee issued its report. 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.
11. However, until such legislative changes are made, creditor spouses should be alive not only to the pitfalls of the *BIA*, but also to the importance of the remedies available under it in such situations. In the case at bar, however, given the nature and the state of the proceedings now before this Court, I am of the view that the Court of Appeal made no errors and that the specific remedies sought by the appellant may not be granted.
12. I agree with the respondent that the unjust enrichment claim and the request for imposition of a constructive trust should fail. The issue was not properly raised at first instance, and no evidence was adduced on this issue.

V. Conclusion

1. For these reasons, I would dismiss the appeal, but in light of the particular circumstances of this case, I would not award costs.

**APPENDIX**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3

PROPERTY OF THE BANKRUPT

 **67.** (1) 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;

. . .

*Stay of Proceedings*

. . .

 **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.

. . .

 **69.4** A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

 (*a*) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or

 (*b*) that it is equitable on other grounds to make such a declaration.

*Claims Provable*

 **121.** (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on 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 shall be deemed to be claims provable in proceedings under this Act.

 (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

 (3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

 (4) A claim in respect of a debt or liability referred to in paragraph 178(1)(*b*)or (*c*)payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

*Admission and Disallowance of Proofs*

*of Claim and Proofs of Security*

 **135.** (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

 (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

 (2) The trustee may disallow, in whole or in part,

 (*a*) any claim;

 (*b*) any right to a priority under the applicable order of priority set out in this Act; or

 (*c*) any security.

 (3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

 (4) A determination under subsection (1.l) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee’s decision to the court in accordance with the General Rules.

 (5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

*Duties of Bankrupts*

 **158.** A bankrupt shall

. *. .*

 (*d*) within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt’s affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt’s assets and liabilities, the names and addresses of the bankrupt’s creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;

. . .

*Discharge of Bankrupts*

. . .

 **178.** (1) An order of discharge does not release the bankrupt from

. . .

 (*b*) any debt or liability for alimony or alimentary pension;

 (*c*) any debt or liability arising under a judicial decision establishing affiliation or 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;

 (*d*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others;

 (*e*) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim;

 (*f*) 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;

 (*g*) any debt or obligation in respect of a loan made under the *Canada Student Loans Act*, the *Canada Student Financial Assistance Act* or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

 (i) before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or

 (ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student; or

 (*h*) any debt for interest owed in relation to an amount referred to in any of paragraphs (*a*) to (*g*).

 (1.1) At any time after five years after a bankrupt who has a debt referred to in paragraph (1)(*g*) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

 (*a*) the bankrupt has acted in good faith in connection with the bankrupt’s liabilities under the debt; and

 (*b*) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

 (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

 **180.** (1) Where a bankrupt after his discharge fails to perform the duties imposed on him by this Act, the court may, on application, annul his discharge.

 (2) Where it appears to the court that the discharge of a bankrupt was obtained by fraud, the court may, on application, annul his discharge.

 (3) An order revoking or annulling the discharge of a bankrupt does not prejudice the validity of a sale, disposition of property, payment made or thing duly done before the revocation or annulment of the discharge.

 **181.** (1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

 (2) If an order is made under subsection (1), all sales, dispositions of property, payments duly made and acts done before the making of the order by the trustee or other person acting under the trustee’s authority, or by the court, are valid, but the property of the bankrupt shall vest in any person that the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate, or interest or right of the trustee in the estate, on any terms and subject to any conditions, if any, that the court may order.

 (3) If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.

*Authority of the Courts*

 **187.** . . .

 (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

*The Family Property Act*, C.C.S.M. c. F25

**PART I**

**APPLICATION OF ACT**

. . .

**DIVISION 2**

APPLICATION TO ASSETS

. . .

 **Disposal of assets**

 **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.

. . .

**PART II**

**SHARING OF ASSETS**

 **Right to accounting and equalization of assets**

 **13** Each spouse and common-law partner has the right upon application to an accounting and, subject to section 14, an equalization of assets in accordance with this Part.

 **Discretion to vary equal division of family assets**

 **14(1)** The court upon the application of either spouse or common-law partner under Part III may order that, with respect to the family assets of the spouses or common-law partners, the amount shown by an accounting under section 15 to be payable by one spouse or common-law partner to the other be altered if the court is satisfied that equalization would be grossly unfair or unconscionable having regard to any extraordinary financial or other circumstances of the spouses or common-law partners or the extraordinary nature or value of any of their assets.

. . .

 **Conduct not a factor**

 **14(3)** In exercising its discretion under this section, no court shall have regard to conduct on the part of a spouse or common-law partner unless that conduct amounts to dissipation.

 **Accounting and division**

 **15(1)** In an accounting of assets between spouses or common-law partners under this Act, there shall be ascertained

 (a) the value of the total inventory of assets of each spouse or common-law partner, after adding to or deducting from the inventory such amounts as are required under this Act to be added or deducted;

 (b) the value of the share to which each spouse or common-law partner is entitled upon the division, to be determined by combining the values ascertained under clause (a) and dividing the total into two equal shares or, where the application for an accounting is not under Part IV, such other shares as the court may under section 14 order; and

 (c) the amount payable by one spouse or common-law partner to the other in order to satisfy the share of each spouse or common-law partner as determined under clause (b).

 **Fair market value**

 **15(2)** The value of any asset for the purposes of subsection (1) shall be the amount that the asset might reasonably be expected to realize if sold in the open market by a willing seller to a willing buyer.

 **Valuation of non-marketable assets**

 **15(3)** Where an asset is by its nature not a marketable item, subsection (2) does not apply and the value of the asset for the purposes of subsection (1) shall be determined on such other basis or by such other means as is appropriate for assets of that nature.

 **Closing and valuation dates**

 **16** In any accounting under section 15, the closing date for the inclusion of assets and liabilities in the accounting, and the valuation date for each asset and liability shall be as the spouses or common-law partners may agree and, in the absence of agreement,

 (a) the date when the spouses or common-law partners last cohabited with each other; or

 (b) where the spouses or common-law partners continue to cohabit with each other, the date either of them makes an application to the court under Part III for an accounting of assets.

 **Method of payment**

 **17** The amount shown by an accounting under section 15 to be payable by one spouse or common-law partner to the other may be satisfied

 (a) by payment of the amount in a lump sum or by instalments; or

 (b) by the transfer, conveyance or delivery of an asset or assets in lieu of the amount; or

 (c) by any combination of clauses (a) and (b);

 as the spouses or common-law partners may agree or, in the absence of agreement, as the court upon the application of either spouse or common-law partner under this Act may order, taking into account the effect of any interim order made under section 18.1.

*The Judgments Act*, C.C.S.M. c. J10

 **Exemptions**

 **13(1)** Subject to subsections (2), (3) and (4), unless otherwise provided, no proceedings shall be taken under a registered judgment or attachment against

 (a) the farm land upon which the judgment debtor or his family actually resides or which he cultivates, either wholly or in part, or which he actually uses for grazing or other purposes, where the area of the land is not more than 160 acres;

. . .

 *Appeal dismissed without costs.*

 Solicitors *for the appellant:  Gowling Lafleur Henderson, Ottawa.*

Solicitors *for the respondent:  Thompson Dorfman Sweatman, Winnipeg.*