Court of Queen's Bench of Alberta

Citation: Chan (Re), 2022 ABQB 424

Date: 20220621
Docket: 25 2768130
Registry: Calgary

In the Matter of the Bankruptcy of David Chiu Chan

Between:

Charla Smith & Company Ltd, Trustee in Bankruptcy of the Estate of David Chiu Chan

Applicant

- and -

Office of the Public Trustee for Alberta, on Behalf of Yui Hing Chan, also known as Karen Chan, and Office of the Superintendent of Bankruptcy

Respondents

- and -

Alberta Association of Insolvency and Restructuring Professionals

Intervenor

Reasons for Decision of the Honourable Mr. Justice K.D. Yamauchi

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I. Introduction

[1] On September 21, 2020, David Chiu Ki Chan (the "Bankrupt") assigned all his property for the general benefit of his creditors (the "Assignment") pursuant to section 49(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*]. He appointed the Applicant Charla Smith & Company Ltd. (the "Trustee") as his licensed insolvency trustee. The Trustee seeks this Court's advice and direction concerning the Bankrupt's exemption in his former principal residence located in Calgary, Alberta (the "Property"). The Respondents are the Office of the Superintendent of Bankruptcy and the Office of the Public Trustee for Alberta (the "Public Trustee"), which Justice Wilson appointed as trustee for Yui Hing Chan, also known as Karen Chan ("Ms. Chan"), on May 22, 2018. Ms. Chan is the Bankrupt's spouse.

[2] On April 7, 2022, this Court ordered that the Alberta Association of Insolvency and Restructuring Professionals ("AAIRP") be granted intervenor status.

II. Background

[3] There is no dispute that the Bankrupt occupied the Property on the date of his Assignment. The Bankrupt and Ms. Chan purchased the Property in 1993. They held the Property in joint tenancy until January 2018. On January 5, 2018, they signed a transfer of land in which they transferred title to the Property into the Bankrupt's name alone, for nominal consideration. Title to the Property remained in the Bankrupt's name on the date he filed the Assignment. The Trustee does not know why the Bankrupt and Ms. Chan transferred the Property into the Bankrupt's name alone.

[4] The Bankrupt is 85 years old, and Ms. Chan is 76 years old. Ms. Chan lives in a long-term care facility, and has not lived on the Property since 2018, because of her ill health. She moved from the Property and resided in the Peter Lougheed Hospital for an extended time until space became available in the long-term care facility. Ms. Chan suffers from dementia and is not likely to recover or be able to live with the Bankrupt.

[5] To protect Ms. Chan's interest in the Property, the Public Trustee registered Justice Wilson's Order and a caveat against title to the Property following its appointment.

[6] The Bankrupt does not work. He receives about $1,855 per month in government pensions and benefits. His largest asset is the Property. The Trustee determined that there was non-exempt value in the Property. As Mr. Chan did not have the ability to pay the non-exempt value of the Property into his bankruptcy estate, the Trustee took steps to sell the Property.

[7] The Trustee sold the Property for $650,000, which was well-above the list price of $485,000. The sale was conditional on providing clear title to the purchaser. On a without prejudice basis, the Trustee and the Public Trustee agreed that 50% of the net sale proceeds would be held in trust pending either an agreement regarding Ms. Chan's interest or a determination by the court. There were net sale proceeds of approximately $284,000. The Bankrupt has not received any portion of the net sale proceeds.

[8] The Public Trustee claims that Ms. Chan had a 50% beneficial interest in the Property and its proceeds, based on a resulting trust and other equitable principles, despite the 2018 transfer of title into the Bankrupt's name alone. The Trustee accepts the Public Trustee's position, subject to this Court's approval, which this Court grants.

[9] The Bankrupt currently resides at Beaverdam Lodge, a seniors' care facility in Calgary, Alberta. His daughter is his attorney pursuant to an enduring power of attorney that the Bankrupt signed on July 26, 2021.

III. Legislation

[10] *BIA* ss 49(1), 67(1), 71, 72(1), and 92(1) provide as follows:

> 49(1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors.

> 67(1) The property of a bankrupt divisible among his creditors shall not comprise
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> ...
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> (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;
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> ...
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> but it shall comprise
>
> (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge (...)
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> 71 On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.
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> 72(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[11] Section 88(g) of the *Civil Enforcement Act*, RSA 2000, c C-15 [*CEA*] makes the following exempt from writ proceedings or seizure:

> (g) the principal residence of an enforcement debtor, including a residence that is a mobile home, up to the value prescribed by the regulations for that residence but if the enforcement debtor is a co-owner of the residence, the amount of the exemption allowed under this provision is reduced to an amount that is proportionate to the enforcement debtor's ownership interest in the residence;

[12] The *Civil Enforcement Regulations*, Alta Reg 276/95 [*CEARegs*] provide:

> 37(1) The following are the maximum amounts allowed for exempt property under section 88 of the Act:
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> ...
>
> (e) the maximum exemption for a principal residence referred to in section 88(g) of the Act is $40 000.
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> (2) In addition to the property referred to in section 88 of the Act, the following property is exempt from writ proceedings:
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> (a) where an enforcement debtor sells
>
> (i) exempt property, or

(ii) property that is exempt up to a prescribed value,

the proceeds from that sale, or the proceeds from that sale up to the stated value, as the case may be, are exempt for a period of 60 days from the day of the sale if those proceeds are not intermingled with any other funds of the enforcement debtor;

IV. Issues

[13] The only issue before this Court is to determine the Bankrupt's entitlement to an exemption arising from the Property and status of any such exemption. In particular, the parties question whether property that is exempt from seizure, or writ proceedings, using *CEA* terminology, can lose its exempt character during a bankruptcy trustee's administration of the bankrupt's estate.

V. Discussion

[14] The issues before this Court are brought to the fore because of ***Perry (Re)***, 2021 ABQB 609, 29 Alta LR (7^{th}) 403, a recent decision of a learned Bankruptcy Registrar. In *Perry*, a husband and wife assigned their property for the general benefit of their creditors on December 19, 2012, and they remained undischarged bankrupts. Their principal residence was registered in the husband's name alone. The husband died on January 28, 2018, and the wife was the sole beneficiary under the husband's will. The wife moved from the residence following the husband's death and the trustee sold the residence. The husband had no dependents.

[15] The bankruptcy trustee obtained a court order approving the sale, in which the $40,000 exemption amount would be held in trust pending further court order. The trustee sought the court's advice and direction on whether the $40,000 exemption continued to exist given the husband's death and if not, whether the exempt amount vested in the trustee for the benefit of the husband's creditors. If the exemption continued to exist, the question became whether the exempt amount vests in the bankruptcy trustee of the wife's estate for the benefit of *her* creditors, on the basis that the funds are the wife's after-acquired property by virtue of her inheritance.

[16] As the Bankruptcy Registrar correctly noted, there is no dispute among Alberta courts on that the date for the determination of whether an enforcement debtor (or bankrupt) has an exemption in property. That date is the date on which the debtor assigns their property for the general benefit of their creditors or the date on which a court grants a receiving order ("Date of Bankruptcy"). In ***Holthuysen Estate v Holthhuysen***, 1986 ABCA 226, 49 Alta LR (2d) 25. Justice Kerans for the court held that the date of the debtor's assignment was the date on which the bankruptcy trustee had to determine whether the debtor had a property interest in certain lands and whether those lands were the debtor's actual residence. He said:

> We ... declare that the property in question was property of the bankrupt within the meaning of the *Exemptions Act* on the day upon which he made his assignment into bankruptcy. That date is determinative of the debtor exemption which is $8,000.
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> ***Holthuysen*** at 28.

[17] Justice Kerans did not say that the value of the *property* is fixed on the Date of Bankruptcy. He said that that bankrupt may claim property as exempt and the bankrupt's exemption in that property is $8,000. What was at issue in that case was whether the bankrupt had an interest in the property and actually resided in a house on that property. The second issue was whether the bankrupt was entitled to the $8,000 exemption or a $40,000 exemption that resulted from amendments to the *Exemptions Act*, as it then was.

[18] The second basic principle on which Alberta courts agree is that there are two distinct stages to a bankruptcy proceeding, being the property-passing stage and the estate-administration stage. In ***Royal Bank of Canada v North American Life Assurance Co***, [1996] 1 SCR 325, which has been referred to in cases and materials as ***Ramgotra***, who was the bankrupt respondent in that case, Justice Gonthier, for the court, described these stages. ***Ramgotra*** was primarily a case that dealt with the effect of a settlement in which Dr. Ramgotra transferred non-exempt registered retirement savings plan funds into an exempt registered retirement income fund life annuity.

[19] During the property-passing stage, the bankrupt's property passes to and vests in the bankruptcy trustee: *BIA* s 71; ***Ramgotra*** at para 44. The bankruptcy trustee must then administer the bankrupt's estate, which is the estate administration stage. The estate administration stage includes the distribution of the bankrupt's estate among creditors: ***Ramgotra*** at para 45. Justice Gonthier goes on to say that while property exempt from execution or seizure under provincial legislation pursuant to *BIA* s 67(1)(b) "becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67": ***Ramgotra*** at para 48.

[20] The Trustee in the case a bar points to ***Toronto Dominion Bank v Amex Bank of Canada***, 1997 ABCA 139 at para 5, 196 AR 307, 50 Alta LR (3d) 310, where the Alberta Court of Appeal said, "s. 67(1)(b) says that exempt property forms no part of the assets which the trustee can take and distribute." This was a case decided post-***Ramgotra***. With respect, this is not what ***Ramgotra*** says. It says that the bankruptcy trustee "takes" the bankrupt's property, including exempt property, during the property-passing stage. It goes on to say that the bankruptcy trustee cannot "distribute" exempt property at the estate-administration stage.

[21] ***Ramgotra*** says nothing about what happens to the exempt property while it is in the hands of the trustee during the estate administration stage. Is the value of the exemption fixed as at the Date of Bankruptcy or does the value oscillate until the bankruptcy trustee elects to do something with it?

[22] To decide the case before her, the Bankruptcy Registrar in ***Perry*** provided a survey of the cases that support the "divergent" views of how Alberta courts have handled the issue of what happens when the value of the property changes during the administration of the bankrupt's estate. She describes these divergent views as the "One Step, Two Estates" approach and the "Two Step, One Estate" approach, which she describes in the following manner:

> One line of cases says because exemptions are determined at the date of bankruptcy, provincial exemption legislation cannot operate during the bankruptcy. The determination of entitlement to the principal residence exemption is a one step process. At the date of bankruptcy, the bankrupt's estate consists of two estates, being the exempt assets that always remain with the bankrupt and the

> non-exempt assets that are assigned to the trustee. This has been referred to as the "One Step, Two Estates" approach.
>
> The other line of cases says although exemptions are initially determined at the date of bankruptcy, provincial exemption legislation continues to operate during the bankruptcy. The determination of entitlement to the principal residence exemption is a two-step process. At the date of bankruptcy, the bankrupt's estate consists of only one estate, being made up of both exempt assets and non-exempt assets, all of which are assigned to the trustee. This is the first step. At some point during the bankruptcy, the bankrupt may become disentitled to the exemption by operation of the provincial legislation so at the time of distribution, the asset is no longer an exempt asset. This is the second step. This has been referred to as the "Two Step, One Estate" approach.
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> ***Perry*** at paras 3-4.

[23] The Bankruptcy Registrar finds that the "One Step, Two Estates" approach is supported by cases such as ***Gruber, Re*** (1993), 11 Alta LR (3d) 342, 143 AR 301 (QB); ***Hill, Re*** (1998), 6 CBR (4th) 38 (Alta QB); ***Messner, Re*** (2000), 16 CBR (4th) 106, (***sub nom. Messner (Bankrupt), Re***), 2000 ABQB 65, 258 AR 349).

[24] She finds that the "Two Step, One Estate" approach is supported by cases such as ***Dunbar, Re***, 1998 ABQB 413, 222 AR 102; ***Thorne, Re***, 2004 ABQB 83, 1 CBR (5th) 101; ***ICI Paints v Gazelle***, 2001 ABQB 233, 24 CBR (4th) 54, 343 AR 1; ***MacKay, Re***, 2002 ABQB 598, 318 AR 315, 4 Alta LR (4th) 181.

[25] With respect, there is a danger in attempting to find that a particular case or set of circumstances falls within one "camp" or another, as no case is that clear. Bankruptcy, of its nature, is dependent on the facts of each case and the danger of creating classifications, absent legislation, could result in uncertainty, unfairness, and inefficiencies. The Trustee in the case at bar, as well as the Intervenor Alberta Association of Insolvency and Restructuring Professionals provided this Court with a list of their practical concerns in moving forward in the face of ***Perry***. This is the reason why the case at bar appeared before this Court; to provide clarification in the face of such uncertainty.

[26] This Court intends on providing a principled approach to the issue it is facing, in the light of the legislation, *viz*, the *BIA*, the *CEA*, the *CERegs*, and the case authorities that are binding on it, such as ***Ramgotra*** and ***Holthuysen***. This approach is in keeping with the exhortation in ***Rizzo & Rizzo Shoes Ltd., Re***, [1998] 1 SCR 27 at para 21, 221 NR 241, 33 CCEL (2d) 173, where Justice Iacobucci, for the court, said:

> ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [Emphasis added].

[27] Justice Gonthier set out the two fundamental purposes of the *BIA* as, "the first such purpose it to ensure the equitable distribution of a bankrupt debtor's assets among the estate's creditors, while the second is to provide for the financial rehabilitation of insolvent persons": ***Ramgotra*** at para 15. Of course, those two fundamental purposes often collide, as they did in ***Ramgotra*** itself. Earlier, in ***Vachon v Canada Employment and Immigration Commission***, [1985] 2 SCR 417 at 430, 57 CBR (NS) 113, 63 NR 81, Justice Beetz, for the court said:

> The rehabilitation of the bankrupt is not the result only of his discharge. It begins when he is put into bankruptcy with measures designed to give him the minimum needed for subsistence. These measures are contained in s. 47 [now, *BIA* s 67(1)(b)] of the *Bankruptcy Act* concerning, *inter alia*, the exemption from execution of certain property, and in s. 48 [now, *BIA* s 68], regarding the wages of the bankrupt, which applies notwithstanding s. 47 ...

[28] Justice Gonthier confirmed this when he said, "[o]ne might well characterize exempt property collectively as the 'bare minimum' which a bankrupt is entitled to maintain in order to facilitate his or her rehabilitation following bankruptcy": ***Ramgotra*** at para 17.

[29] The *BIA* s 67(1)(b) recognizes that a bankrupt's exempt property is not divisible among their creditors. ***Holthuysen*** says that the *nature of the property* as exempt or non-exempt is determined as at the Date of Bankruptcy. As well, it holds that that date is "determinative" of the *value* of the exemption. This is in keeping with one of the fundamental purposes of the *BIA*, which is the financial rehabilitation of insolvent persons. To reduce the exempt value of the property would not follow this purpose, as it would reduce the minimum available to a bankrupt for their subsistence and would not facilitate the bankrupt's financial rehabilitation following bankruptcy: ***Ramgotra*** at para 17.

[30] If the value of the bankrupt's interest in their principal residence on the Date of Bankruptcy is less than the exemption amount, and the bankruptcy trustee is satisfied with that valuation, the bankruptcy trustee *may* divest its right, title and interest in the principal residence to the bankrupt. The bankruptcy trustee would do this pursuant to *BIA* s 20(1), which provides:

> 20(1) The trustee may, with the permission of the inspectors, divest all or any part of the trustee's right, title or interest in any real property or immovable of the bankrupt by a notice of quit claim or renunciation by the trustee, and the official in charge of the land titles or registry office, as the case may be, where title to the real property or immovable is registered shall accept and register in the land register the notice when tendered for registration.

[31] What if the bankruptcy trustee is satisfied with the valuation on the Date of Bankruptcy but it is of the view that the value may increase during the pendency of the bankrupt's bankruptcy? The bankruptcy trustee need not divest its right, title and interest in release the bankrupt's principal residence, but may re-evaluate the valuation during the pendency of the bankruptcy or as the bankrupt's discharge nears. This is the situation with which Justice Burrows was dealing in ***ICI Paints, A Business Unit of ICI Canada Inc v Gazelle (Bankrupt)***, 2001 ABQB 233, 24 CBR (4th) 54, 343 AR 1. Justice Burrows found that the increase in the value of the principal residence was available for distribution among the bankrupt's creditors. He said:

> The Government of Alberta has determined that the level of exemption in respect of accommodation owned by the debtor required to serve this purpose is $40,000.

> Parliament has determined that the same exemption should be used in Alberta bankruptcies (*BIA* s. 67(1)(b)). Reasoning that would result in the debtor preserving more than that value from his owned accommodation and depriving his creditors of the benefit of excess value greater than $40,000 violates the intention of the Alberta Legislature and Parliament.
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> ***ICI Paints*** at para 18.

[32] This Court agrees with that finding. Although Justice Burrows did not refer specifically to the *BIA* section that supports this result, it is *BIA* s 67(1)(c), which says that property of the bankrupt divisible among their creditors includes property that may "devolve on the bankrupt before their discharge." With respect, this finding does not go far enough. If the increase in the value of the principal residence was through the accretion of time, then his finding would be sound. However, to account fully for the increased value, the trustee, in whom the principal residence vests pending discharge, must pay the costs to maintain the principal residence, including any mortgage payments, real property taxes, and, possibly, the costs that the bankruptcy trustee might have incurred had it sold the principal residence to a third party. See ***Rassell, Re***, 1999 ABCA 232 at paras 26-27, 237 Alta LR (3d) 85, 237 AR 136. If the bankrupt continued to reside in their principal residence during this time, the bankrupt will likely have to pay occupation rent which may be equal to, less than, or greater than the maintenance costs. In other words, there must be an accounting, and negotiation, to determine the exact value of the "excess" to which Justice Burrows refers. The bankrupt must get credit for those amounts from the Date of Bankruptcy until discharge, divestiture pursuant to *BIA* s 20(1), or sale, whichever first occurs.

[33] If neither the bankruptcy trustee nor a creditor challenges the value of the bankrupt's principal residence, and the bankrupt obtains an automatic or court-ordered discharge, no one may thereafter challenge such value, even if the discharged bankrupt sells the principal residence which nets the bankrupt an amount greater than the exempt amount. This Court agrees with Registrar Funduk, when he said, "The message to trustees and creditors is - advance claims for surplus equity in limited exemptions property by no later than the bankrupt's application for discharge, or forget it": ***MacKay, Re***, 2002 ABQB 598 para 110, 318 AR 315, 4 Alta LR (4th) 181 (Registrar).

[34] What if the value of the principal residence on the Date of Bankruptcy exceeds the amount of the bankrupt's exemption? In those cases, the bankruptcy trustee might inquire of the bankrupt whether the bankrupt is able to pay the surplus over the exemption. If the bankrupt can pay the surplus or convince a third party to lend them sufficient funds to cover the surplus, the bankruptcy trustee will divest the estate of the principal residence pursuant to *BIA* s 20(1).

[35] But what if the bankrupt does not have the financial wherewithal to pay that surplus? Depending on the amount of the surplus, the bankruptcy trustee might sell the principal residence, much like it did in the case at bar. In that case, according to ***Holthuysen***, the bankruptcy trustee must pay the bankrupt the amount of the exemption. It will distribute the surplus among the bankrupt's creditors. Must the bankrupt limit their use of the exempt sale proceeds that the bankruptcy trustee pays to them? There are two ways of looking at this issue. The first deals with the wording of *CEARegs* s 37(2). The question is whether the Bankrupt risks losing the exempt sale proceeds if they fail to comply strictly with *CEARegs* s 37(2). The wording of the regulation is vague, as it does not say what happens after the end of the 60-day

period. Said differently, if the debtor asserts their exemption claim, and the exempt proceeds of sale or "stated value" are set aside and not intermingled, then what happens. Does the bankrupt receive the funds to do with the funds what they want, or must they invest the funds into another exempt asset. This vagueness is illustrated in ***Bank of Montreal v Hobbs***, 2014 ABQB 545, 596 AR 365, 6 Alta LR (6th) 51, when Justice Sullivan says:

> ... In a voluntary sale, the debtor is in control of the process and has the opportunity to determine how, by what means, and when their designation of exempt property is to be dealt with. The legislature determined that the debtor must do so within 60 days.
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> ***Hobbs*** at para 22.

[36] Do what? Similarly, in ***Alberta Treasury Branches v Samso Holdings Ltd***, 2003 ABQB 963, 25 Alta LR (4th) 83, 347 AR 359, Justice LoVecchio was dealing with how to determine when the 60-day period begins but does not address what happens after the 60-day period expires. He simply finds, based on the facts before him, that the bankrupt was entitled to claim the exemption.

[37] Some courts have found that, despite the vagueness in the wording of the regulation, the debtor has 60-days within which to use the proceeds of sale to purchase other exempt property. In ***Dunbar (Re)*** (1997), 47 CBR (3d) 195 at para 23, 205 AR 139 (Registrar), Registrar Funduk said:

> ... [T]he exemption ceases to exist at the end of 60 days unless the bankrupt has in the meantime used the sale proceeds to buy other exempt property. Although the bankrupt can claim the exemption at the date of bankruptcy he might later lose the exemption if (a) he does not use the sale proceeds in 60 days to buy other property which he can claim as exempt or (b) he comingles the sale proceeds.

[38] Similarly, in ***Thorne (Re)***, 2004 ABQB 83 at para 12, 1 CBR (5th) 101 (Registrar), Registrar Laycock said:

> ... The legislature must have intended the debtor have 60 days from the receipt of the sale proceeds to decide what to do with the funds and initiate the purchase of a replacement asset.

[39] Again, the regulation itself does not say this. However, this finding is in keeping with comments that the Alberta Law Reform Institute made before passage of the *CEA*, when it said:

> We think that, in the case of the exempt portion of <u>enforcement sale proceeds</u> and in the case of a voluntary sale of exempt property, <u>the cash to which the exempt property has been converted should be exempt for a period long enough to permit the debtor to convert the cash back into exempt property</u> … If the proceeds are mixed with another fund, the exemption should be lost.
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> Alberta, Alberta Law Reform Institute, *Enforcement of Money Judgments Vol 1: Report No. 61* (Edmonton: March 1991) [ALRI Report] at 319. [Emphasis added].

[40] Despite the recommendation, the *CEARegs* s 37(2) does not refer to enforcement sale proceeds. It refers only to a situation "where an enforcement debtor sells ... exempt property." Accordingly, it appears, if the exempt proceeds are derived from an enforcement sale, the

enforcement debtor need not convert the exempt portion of the sale proceeds to other exempt property. However, if the debtor voluntarily sells the property *CEARegs* s 37(2) applies.

[41] Does *CEARegs* s 37(2) apply to situations in which the property is sold other than through an enforcement sale or the voluntary sale by the enforcement debtor. There are conflicting authorities on this issue. In ***Hobbs***, after reviewing the objects of the exemption provisions and the jurisprudence that considered the impugned sections, Justice Sullivan found that *CEARegs* s 37(2) did not apply when the sale was a court-ordered sale in a foreclosure action. Thus, the enforcement debtor was not constrained by the limitations set forth in that regulation.

[42] In ***Cziborr v Hamilton***, 2009 ABQB 694, 484 AR 60, 61 CBR (5^{th}) 293, Justice Belzil reached a different conclusion. In that case, the debtor's principal residence, as found by a Master, was sold pursuant to writ enforcement proceedings. The order confirming the sale declared that $40,000 from the proceeds be paid into court. The learned Master found that the debtor (who by then had becomes a bankrupt) did not make her claim to those funds within the 60-day period, so she lost her exemption. On appeal, Justice Belzil dismissed the appeal. Although he did not specifically rule on it, implicitly, Justice Belzil found that *CEARegs* s 37(2) applies to a forced sale, or an enforcement sale situation. Perhaps that argument was not raised before him, because he dealt specifically with the date on which the 60-day period begins.

[43] Based on a plain reading of the *CEARegs* s 37(2), and the objectives of the exemption provisions, this Court agrees with the decision that Justice Sullivan reached in ***Hobbs***. *CEARegs* s 37(2) only applies to situations in which the enforcement debtor voluntarily sells the exempt property. *CEARegs* s 37(2) says, "where an enforcement debtor sells." This Court agrees with the comments that Registrar Funduk made in ***McAteer, Re*** (1981), 32 AR 248 at paras 52-53, 38 CBR (NS) 217, when he said:

> ... A "voluntary sale" as used in the cases is used in contradiction to a "forced sale". A forced sale is, in my view, a sale of the property as the result of the actions of a third party, such as a mortgagee, a builders' lien claimant, an execution creditor (subject to the $8,000 guarantee), a co-owner through partition or sale, or a trustee in bankruptcy. A forced sale is one where the property is, as it were, sold out from under the debtor.
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> A voluntary sale is, on the other hand, a sale by the debtor himself.
>
> [Emphasis added].

[44] As well, there is nothing in the *CEA* or the *CEARegs* that says that the enforcement debtor (or bankrupt) must make a *claim* to an exemption within a 60-day period, or any period, for that matter. The exemption exists without such a claim. It is only if the "enforcement debtor sells" the exempt property that the 60-day period arises under *CEARegs* s 37(2). The impropriety of the requirement the debtor (or bankrupt) must make a claim to an exemption is illustrated in ***Direct Rental Centre (West) Ltd v Norkus Estates (Trustee of)***, 2001 ABCA 233 at paras 42-44, 299 AR 39, 97 Alta LR (3d) 213 where Justice McFadyen for the majority said:

> ... [T]he legislative history, the scheme and provisions of the *CEA* and the intention of the *CEA* support the conclusion that an exemption is not a privilege but a right. The express provisions in the *BIA* excluding exempt property, and imposing a duty on the trustee not to distribute exempt property affirms the right.

> ...
>
> In conclusion, I find that the exemption was a right which did not need to be claimed by the bankrupt debtor.

[45] This brings us back to the original question. What if the exempt property is sold by a bankruptcy trustee to access the surplus value of the exempt property. This is, in essence, a forced sale that the bankruptcy trustee is conducting. The bankrupt is not voluntarily selling exempt property. As a result, this Court holds that *CEARegs* s 37(2) does not apply to such a sale and the trustee must pay the exempt amount to the bankrupt, and the bankrupt need not apply those proceeds to other exempt property, and may commingle those funds, as they see fit. This is in keeping with ***Ramgotra*** at para 17.

[46] The second way of looking at this issue deals with timing of when the bankrupt/debtor sells the exempt property. ***Holythusen*** says that a bankruptcy trustee must determine whether any of the bankrupt's property is exempt on the Date of Bankruptcy. If the property's value is such that it is worth less that the exemption amount, the bankruptcy trustee may divest itself of the property pursuant to *BIA* s 20(1). In such a case, the bankruptcy trustee should obtain either inspector approval to the divestiture, or, at least, the approval of the bankrupt's major creditors. If the bankruptcy trustee cannot obtain that approval, it should seek the court's direction. The concern, of course, is that without such concurrence, the bankrupt and bankruptcy trustee risk facing an application by a creditor pursuant to *BIA* s 38 to set aside the trustee's divestiture of the property, which is what happened in ***ICI Paints***. As mentioned, the bankruptcy trustee must establish the value of the property taking account of the bankrupt's exemption *and* the amount it will cost the bankrupt's estate to maintain and dispose of the property pending discharge. Only then will the trustee, and the bankrupt's creditors, be able to place a true value on the quantum of the surplus value of the property.

[47] If the bankruptcy trustee divests itself of the exempt property to the bankrupt, this Court finds that thereafter, the bankrupt is free to do what it likes with that property, as the trustee has found the property will not comprise property that is divisible among the bankrupt's creditors.

[48] What if the debtor sells the exempt property before the Date of Bankrutpcy? The starting point for this portion of this discussion is ***Regal Distributors Ltd v Freele***, [1931] 1 WWR 299, [1931] 1 DLR 943, 25 Alta LR 279 (Alta SC-App Div), which held that the proceeds from the voluntary sale of an exempt home by a debtor are not exempt under the *Exemptions Act*, RSA 1922, c 95. This principle was upheld in ***Alberta Treasury Branches v Wilson*** (1996), 178 AR 237, 37 Alta LR (3d) 260 (CA). In ***Wilson***, the court noted:

> Several cases have affirmed the rule that the proceeds of the voluntary sale of an exempt homestead are not themselves exempt. ... In other cases the rule has been departed from, though in each instance the judge seems not to have been aware of the decision in *Regal* and for this reason should not be followed. ...
>
> There will be a declaration that the proceeds of sale of the house are not exempt.
>
> ***Wilson*** at para 15-16.

[49] The court in ***Wilson*** made no mention of the *CEA* or the *CEARegs*, which is not surprising, given that the decision in ***Wilson*** was rendered on January 12, 1996, and the newly-minted *CEA* came into force on January 1, 1996. It appears that neither the *CEA* nor the *CEARegs* was argued in ***Wilson***.

[50] The *ratio decidendi* of ***Regal*** and ***Wilson*** has been supplanted by *CEARegs* s 37(2). See also ALRI Report at 319-20.

[51] In ***Dunbar, Re***, 1998 ABQB 413, 222 AR 102, 5 CBR (4th) 48 (Registrar), a husband and wife jointly owned a house in which they lived. In January 1996 they listed the house for sale. Soon after, the husband and wife separated. The wife went to live with her mother, and she never returned to the residence. The husband remained in the house until possession of it was given to the purchasers.

[52] On June 7, 1996, the husband and wife entered a sale contract for the house, with a closing date of July 15, 1996. On July 10, 1996, the husband assigned himself into bankruptcy and the wife assigned herself into bankruptcy the following day. The transfer was registered at Land Titles on July 17, 1996. The husband gave up possession at the end of July.

[53] The husband and wife's solicitor received the purchase price on August 9, 1996, and the solicitor forwarded the net proceeds of $39,150 to the bankruptcy trustee the same day. The bankruptcy trustee considered the sale proceeds to be exempt, so he gave it to the bankrupts by a cheque dated August 15, 1996. The husband deposited the cheque in the bankrupts' joint bank account. At that time there was a $201.14 credit in the account.

[54] On September 24, 1996, the bankrupts entered a contract to buy a one-third interest in the wife's mother's house for $40,000, with a closing date of October 1, 1996. From the date the husband deposited the funds in the joint bank account to September 26, 1996, there were debits to the account. Because there were insufficient funds to cover the $40,000 purchase price, the husband obtained money from his father to top-up the joint account. They closed the sale with the wife's mother.

[55] Registrar Funduk held that because the sale proceeds were intermingled with other funds in the joint bank account, they lost their exempt character pursuant to *CEARegs* s 37(2). What is the reason for the requirement that the exempt funds be kept separate from other funds? The Alberta Law Reform Institute said:

> The creditors should not be delayed and the court's time should not be wasted by applications to determine which part of a mixed fund is the remaining proceeds of the sale of exempt property, especially when it would have been simple for the debtor to have kept the fund separate when it was created. If the proceeds are mixed with another fund, the exemption should be lost.
>
> ALRI Report at 319.

[56] In ***Thorne (Re)***, 2004 ABQB 83, 1 CBR (5^{th}) 101 (Registrar), the bankrupt's leased motor vehicle was written off because of an accident about one month before she assigned her property for the general benefit of her creditors. The bankrupt received the residual insurance proceeds, the balance of which she provided to her bankruptcy trustee. The bankruptcy trustee applied to have the court determine the bankrupt's exemption to those funds. Registrar Laycock held, "The legislature must have intended the debtor to have 60 days from the receipt of the sale proceeds to decide what to do with the funds and initiate the purchase of a replacement asset": ***Thorne*** at para 12 [emphasis added]. Like Registrar Funduk in ***Dunbar***, Registrar Laycock found that *CEARegs* s 37(2) continued to apply and the bankrupt had to comply strictly with it, but the 60-day clock does not begin to run until the bankrupt receives the sale proceeds. See also ***Knight, Re***, 2012 ABQB 759 at paras 39-44, 554 AR 407, 75 Alta LR (5^{th}) 48 (Registrar).

[57] Thus, it appears from the wording of *CEARegs* s 37(2) and ***Thorne*** that exempt funds that a bankrupt receives from a voluntary pre-bankruptcy sale either from the bankruptcy trustee or from the purchaser must be "invested" in a further exempt asset. Registrar Hanebury did not place such a requirement on the bankrupt in ***Knight***.

[58] The Alberta Law Reform Institute in the ALRI Report discussed the "Shelter" exemption and observed:

> In most cases, the renter debtor and the owner debtor will be in approximately the same situation where the monthly cost of shelter is concerned. If the debtor who owns his or her home is carrying a mortgage, which is likely to be the case where the debtor is in such financial difficulty that exemptions are relevant, the mortgage payments, which must be met for the debtor's shelter to be maintained, will be a draw on the owner debtor's exempt wages roughly equivalent to the shelter costs of the non-owner debtor. Typically, only an insignificant portion of the monthly mortgage payment builds the mortgagor's equity.
>
> ALRI Report at 267-68.

[59] It went on to say:

> If the equity is below $40,000, it is protected in the form of equity in the house. If the total equity is above $40,000, and the house is sold, $40,000 should continue to be exempt for a period long enough to allow the debtor a reasonable opportunity to use it to secure alternative accommodation.
>
> ALRI Report at 271.

[60] The monetary limit of the principal residence exemption was raised from $8,000 to $40,000 in 1984: ***Holthuysen*** at para 5. Before the Alberta Legislature raised this exemption amount, there was debate that the monetary limit was too low; even in 1984. See ALRI Report at 272-73. Although the Alberta Law Reform Institute made no recommendations concerning the monetary limit, it said, "this is one of the provisions that we suggest be subject to the periodic adjustment process that we recommend for all monetary limits": ALRI Report at 273.

[61] In ***Re Piraux (Bankrupt)***, 2006 ABQB 409 at paras 50-51, 398 AR 66, 61 Alta LR (4th) 128, Justice LoVecchio observed:

> I am also sensitive to the apparent inadequacy in the current housing market of a $40,000 exemption for the purpose of replacing a home and I note from an excerpt of the *Holthuysen (Trustee of) v. Holthuysen*, 1986 CarswellAlta 446 (Alta. C.A.) decision, quoted in *MacKay, Re*, that the $40,000.00 exemption came into force in 1984.
>
> A generation later, the $40,000 maximum might well be past its best before date. However, that is a matter for the Legislature not the Courts.

[62] It is interesting to note that in 1984, the average home price in Calgary was $86,724, whereas in May of 2022, the average home price in Calgary was $546,000: Alberta Real Estate Association, City of Calgary Monthly Statistics (online: < https://configio.blob.core.windows.net/media/em_AlbertaRE/Attachments/Stats/Public%20Files/City%20of%20Calgary%20-%200046%20-%20Public.pdf> accessed June 15, 2022.

[63] Is it realistic to expect a bankrupt to invest their $40,000 into an exempt principal residence and qualify for a mortgage to finance the rest? Or is that alternate accommodation more likely to be a rental property? In either case, in the words of the Alberta Law Reform Institute, the renter bankrupt and the owner bankrupt will be in approximately the same situation where the monthly cost of shelter is concerned. The unfairness of this situation is exhibited in ***Dunbar*** where the bankrupts lost their shelter in the form of a one-third interest in a $120,000 residence because they did not strictly abide by *CEARegs* s 37(2).

[64] In ***Davis, Re***, 1991 ABCA 106, 116 AR 17, 80 Alta LR (2d) 100, Justice Stratton for the court said, "the primary intent of the legislation is to protect the debtor from undue economic hardship, or perhaps more accurately economic disaster, given that the debtor's home is at stake": ***Davis*** at para 38. He went to say:

> Support of my view of the legislative intent is found in the 1978 Working Paper, "Exemption From Execution and Wage Garnishment," Alberta Institute of Law Research and Reform (pp. 13 and 14).
>
> > The paramount purpose of the present Alberta legislation in this area appears to be to preserve for the debtor and his family the means to survive and earn a livelihood. A humane system of law cannot allow a debtor to be completely stripped of his assets and thrown out on to the street.
> >
> > In addition, the legislation promotes the following policy consequences which were probably not foreseen by the legislature at the time of the enactment. (1) Exemptions may obviate the need for welfare and other public programmes to support the debtor. (2) Exemptions may prevent the debtor going bankrupt ... (3) Exemptions minimize the debtor's losses through forced execution sales.
>
> ***Davis*** at para 39.

[65] If that is the purpose of exemptions legislation, is that purpose served by requiring a bankrupt to take their $40,000 exemption and try to find a principal residence for $40,000 or using it as a downpayment on a principal residence that costs many times more than the $40,000, failing which, the $40,000 is surrendered-back to the bankruptcy trustee for distribution among the bankrupt's creditors? Or is it more humane to allow the bankrupt to rent modest premises and use the $40,000 to cover their living expenses while they rehabilitate financially?

[66] Arguably, the Alberta Court of Appeal partially answered these questions in ***Royal Bank v Laughlin***, 2001 ABCA 78, 277 AR 201. In that case, the debtor lived on and farmed exempt lands. She gave a charging order to her two solicitors to secure their fees. She also gave a charging order to her daughter for amounts her daughter apparently provided to her. The daughter foreclosed on the lands and the balance, after paying priority charges, was held in trust. The Royal Bank, which held general security as against the debtor, commenced proceedings to determine entitlement to those funds. The bank alleged that the claims of the two solicitors and daughter were fraudulent preferences or conveyances. The court held that the debtor's disposition of her exempt property is not unlawful or fraudulent as it did not defeat, hinder, or delay her creditors and she "was free to dispose of her exempt equity as she saw fit": ***Laughlin*** at para 33.

It repeated a quotation contained in ***Abba, Re***, 1998 ABQB 730 at para 11, 230 AR 185, 66 Alta LR (3d) 277, which said:

> Exempt property is not available to creditors since they have not been injured, delayed, prejudiced or postponed by reason of dealings with exempt property which they had no right to in any event. No creditor is prejudiced by exempt property being given away. A settlement of exempt property cannot affect creditors' rights.

[67] Similarly, in ***Minister of National Revenue v. Anthony*** (1995), 32 CBR (3d) 109 at para 18, 402 APR 91 (Nfld SC – CA), Justice Marshall, for the court, said:

> [The *BIA*] clearly does not extend the right of creditors to assets which would not have been amenable to satisfy the debtor's obligations before bankruptcy. Indeed, s. 67(1)(b) may be viewed as expressing an intent not to exact such extended liability from the bankrupt as one of the conditions of discharge.

[68] In a bankruptcy, no creditor is prejudiced by the bankrupt using their exempt property for living expenses or for any other expenses, for that matter. In fact, a bankrupt may want to save the $40,000 in the hopes that someday, they may be able to purchase some form of modest shelter. As Justice LoVecchio said in ***Mutter, Re***, 2010 ABQB 312 at para 21, 26 Alta LR (5th) 71, 485 AR 175

> The purpose of the exemption is to permit a bankrupt to retain some small portion of their assets in order to give them a minimal financial stake in life when they emerge from the bankruptcy process. Hopefully, this minimal financial stake permits the bankrupt to attempt to rebuild their life, relying on their own resources.

[69] These are the underlying reasons for having exemptions laws. How can the courts meet these objectives in the face of *CEARegs* s 37(2), which says that the debtor (or bankrupt) must replace the exempt proceeds with exempt property? The answer lies in the wording of *BIA* s 72(1), which says that the *BIA* does not abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are "not in conflict with" the *BIA*.

[70] Circling back to ***Ramgotra***, Justice Gonthier characterized exempt property as "the 'bare minimum' which a bankrupt is entitled to maintain in order to facilitate his or her rehabilitation following bankruptcy": ***Ramgotra*** at para 17. He repeated the importance of exemptions when he said, "one must not lose sight of the fact that the result of the transaction is the acquisition of an asset which is so essential to the bankrupt and his or her dependents that it has been rendered exempt from execution or seizure by provincial legislation incorporated into the *Act* by s 67(1(b)": ***Ramgotra*** at para 28. Finally, at the estate-administration stage, he said:

> ... [W]hile an asset which is exempt under provincial law passes into the possession of the trustee at the time of bankruptcy, the exemption itself bars the trustee from dividing the asset among creditors where s. 67(1)(b) is operative.
>
> ***Ramgotra*** at para 49.

[71] If exemptions are established on the Date of Bankruptcy in accordance with ***Holthuysen***, and if the proceeds resulting from the sale of exempt property are exempt, such that the exemption bars the trustee from dividing the sale proceeds among the bankrupt's creditors, then

why must the bankrupt use those proceeds to purchase further exempt property? The bankrupt's creditors are not being injured, delayed, prejudiced or postponed by allowing the bankrupt to use the sale proceeds to live, as the creditors had no right to the sale proceeds in the first place. And given the current economic climate, in all likelihood, the bankrupt would not be able to acquire replacement exempt property with the $40,000. This makes *BIA* s 67(1)(b) ineffective, as the bankrupt would have to surrender the sale proceeds to the bankruptcy trustee for distribution among their creditors.

[72] As the Supreme Court of Canada said in ***Rizzo***, "statutory interpretation cannot be founded on the wording of the legislation alone." Rather, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

[73] This Court finds that in the case of a bankrupt, *CEARegs* s 37(2) conflicts with *BIA* s 67(1)(b), as it has the potential of making *BIA* s 67(1)(b) ineffective. As well, it flies in the face of the objects of the *BIA*, as set forth in ***Ramgotra*** and other cases. As a result, this Court finds that the sale proceeds remain exempt whether they are commingled with the bankrupt's other funds or not used within 60 days to purchase further exempt property. Such a finding does not interfere with the equitable distribution of a bankrupt's assets among the estate's creditors, as those creditors have not been injured, delayed, prejudiced, or postponed by not having access to property in which they had no interest. As well, if the bankruptcy trustee divests itself of the bankrupt's property pursuant to *BIA* s 20(1), the bankrupt may use that property as part of the "bare minimum" to facilitate their financial rehabilitation following bankruptcy. To require the bankrupt to use that property, or the exempt portion of it, towards further exempt property similarly flies in the face of the purpose of the exemption provisions contained in the *BIA*. Besides, the bankrupt did not come into possession of the exempt property through their voluntary sale of it. They came into possession of it through the bankruptcy trustee's sale or divestiture of it.

[74] What if the bankrupt sells their principal residence during the pendency of their bankruptcy? Are the proceeds of sale exempt? This was the situation in ***Gruber***. Justice Forsyth created the idea of "One Step, Two Estates" notion to which the Bankruptcy Registrar referred in ***Perry***. Justice Forsyth said:

> As previously noted, case authority is clear that the effective date for determination of the status of the exemption occurs on the date of bankruptcy. At that date the Bankrupt's property was severed into two estates: one estate that vests with the Trustee and is divisible amongst the Bankrupt's creditors, and one that remains with the Bankrupt because it is exempt under the provincial law.

[75] As we now know, this is incorrect, as ***Ramgotra*** says that on the Date of Bankruptcy, all the bankrupt's property vests in the bankruptcy trustee. See *BIA* s 71; ***Ramgotra*** at para 44. We must remember that Justice Forsyth decided this case before ***Ramgotra***. The effect of his finding, however, is illustrated when Justice Forsyth says, "I am satisfied that an asset which is validly exempt at the date of bankruptcy remains exempt, notwithstanding the nature of any subsequent dealing with that asset": ***Gruber*** at para 23. This has resulted in other courts interpreting ***Gruber*** as standing for the principle "once exempt, always exempt." This is not what Justice Forsyth held in that case. He said:

> ... I find that the Bankrupt was entitled to the exemption of his interest in his home at the date of the bankruptcy as he was in actual occupation, and the equity was less than $40,000. The fact that he subsequently sold that property prior to his discharge, does not affect his entitlement to one-half of the net proceeds of that sale as exempt property. Therefore, the Bankrupt's interest in the net sale proceeds from his home which was claimed exempt at the date of his Assignment but subsequently sold by him is property exempt and does not comprise an asset of his bankrupt estate.
>
> ***Gruber*** at para 24.

[76] In ***ICI Paints***, Justice Burrows correctly describes Justice Forsyth's finding in ***Gruber***, when he said:

> *Gruber* stands for the proposition that a portion of the bankrupt's equity in his home is exempt from division amongst his creditors and nothing that happens after the assignment, including the liquidation of the property interest, can cause the bankrupt to lose the benefit of that exemption. The case does not stand for the proposition that an increase in the value of the property after the assignment results in an increase in the exemption.
>
> ***ICI Paints*** at para 13.

[77] In fairness to Justice Forsyth, ***Gruber*** was decided before the *CEA* was passed, so there was no regulation like *CEARegs* s 37(2). However, that regulation existed when he rendered his decision in ***Hill, Re*** (1998), 6 CBR (4th) 38 (Alta QB), in which a bankrupt and his wife sold their home during the bankrupt's bankruptcy "to reduce their living expenses." The question before Justice Forsyth was whether the bankrupt maintained his exemption or whether the proceeds should be paid to the bankruptcy trustee for distribution among the bankrupt's creditors. He held that the bankrupt maintained his exemption. He referred to the fact that the *CEA* and the *CEARegs* address a "sale forced on by judicial proceedings, in which creditors would be able to attach to the proceeds, but it is not a sale under the *Bankruptcy Act* where there has been a stay of proceedings against all creditors": ***Hill*** at para 6. He went on to say:

> ... It would be passing strange to read into that section a provision from a provincial exemption Act which relates to enforcement proceedings under a writ and has a provision in for another purpose entirely.
>
> ***Hill*** at para 8.

[78] This Court need not decide whether Justice Forsyth's manner of distinguishing the purposes of the *BIA* and *CEA* is correct. Rather, it applies the same rationale as it did when dealing with the proceeds arising from a sale pre-Date of Bankruptcy, *supra*. The exempt portion of the proceeds of sale that a bankrupt realizes on a sale that occurs during the pendency of their bankruptcy remains exempt no matter the use to which the bankrupt makes of those exempt proceeds. The bankrupt must pay any surplus over the exempt portion to the bankruptcy trustee for distribution among the bankrupt's creditors.

[79] It might be worthwhile to summarize this Court's findings.

(a) On the Date of Bankruptcy, all the bankrupt's property vests in the bankruptcy trustee; the property-passing stage: *BIA* s 71, ***Ramgotra*** at para 44;

(b) The bankruptcy trustee must determine, as at the Date of Bankruptcy, the bankrupt's exemptions: ***Holthuysen*** at para 9;

(c) The bankruptcy trustee administers the bankrupt's estate; the estate administration stage: ***Ramgotra*** at para 45;

(d) The bankrupt's maximum exemption in their principal residence is their proportionate share of $40,000, depending on their ownership interest: *CEA* s 88(g); *CEARegs* s 37(1);

(e) If the value of the bankrupt's interest in their principal residence is less than the bankrupt's exemption amount, the bankruptcy trustee *may* divest itself of its right, title, or interest in that principal residence: *BIA* s 20(1). In that case, the bankrupt is free to do what they like with that property as the bankruptcy trustee has determined that the property will not comprise property that is divisible among the bankrupt's creditors.

(f) If the bankruptcy trustee is satisfied with the value of the bankrupt's interest in their principal residence on the Date of Bankruptcy but it is of the view that the property value may increase during the pendency of the bankrupt's bankruptcy, the bankruptcy trustee need not release the principal residence to the bankrupt pursuant to *BIA* s 20(1), but will re-evaluate the property value during the pendency of the bankruptcy or as the bankrupt's discharge nears.

    1) If the property value remains the same the bankruptcy trustee may divest itself of its right, title, or interest in that principal residence pursuant to BIA s 20(1), the effect of which is set forth in sub-paragraph (e), above;

    2) If the property value increases, the bankruptcy trustee must evaluate the property value taking account of the costs to maintain the property and the costs to sell the property, against any occupation rent that the bankrupt must pay in the interim. It will give the bankrupt an opportunity to pay the net surplus value, in which case the bankruptcy trustee will divest itself of its right, title, or interest in that principal residence pursuant to BIA s 20(1). If the bankrupt cannot pay the net surplus, the bankruptcy will sell the bankrupt's principal residence and provide the bankrupt with the bankrupt's exemption amount and distribute the balance among the bankrupt's creditors: ICI Paints. The bankrupt will be free to do what they like with its exempt amount.

(g) If the bankruptcy trustee determines that the value of the property is greater than the bankrupt's exemption, the provisions of sub-paragraph (f)(2) apply.

(h) If the bankrupt sells their principal residence before the Date of Bankruptcy but does not receive the sale proceeds until after the Date of Bankruptcy, the bankrupt may retain their exempt portion of the sale proceeds and need not acquire replacement exempt property and may commingle the exempt portion with their other monetary assets. The surplus over the exempt amount must be surrendered to the bankruptcy trustee for distribution among the bankrupt's creditors.

(i) If the bankrupt sells their principal residence before the Date of Bankruptcy and receives the sale proceeds before the Date of Bankruptcy, the provisions of *CEA* s 88(g) and *CEARegs* s 37(2) apply, and the bankrupt retains their exemption but cannot commingle the sale proceeds and must purchase exempt property within 60 days after they receive the sale proceeds. ***Holthuysen*** says that exemptions are determined at the Date of Bankruptcy and on that date, the Bankrupt had only the proceeds of sale of the exempt property and not the property itself. If the bankrupt fails to comply with *CEA* s 88(g) and *CEARegs* s 37(2), they lose their exemption and must surrender it to the bankruptcy trustee for distribution among the bankrupt's creditors.

(j) If the bankrupt sells their principal residence during the pendency of their bankruptcy, the bankrupt may retain their exempt portion of the sale proceeds and need not acquire replacement exempt property and may commingle the exempt portion with their other monetary assets. The surplus over the exempt amount must be surrendered to the bankruptcy trustee for distribution among the bankrupt's creditors.

VI. Application of Principles to the Case at Bar

[80] Mr. Chan's situation falls squarely within subparagraph (f)(2), above. The Trustee must pay Mr. Chan his exempt portion and Mr. Chan is free to do with that portion whatever he wishes. Given his personal and financial situations Mr. Chan likely cannot afford to purchase replacement exempt property within 60 days after receiving the exempt portion of the sale proceeds. He has no need for such an exempt asset and he will not be able to afford to purchase such an asset.

[81] This humane result is intended to protect him from undue economic hardship and will hopefully allow Mr. Chan to retain his dignity without being "completely stripped of his assets and thrown out on to the street."

VII. Comments on *Perry*

[82] The foregoing concludes the issues before this Court. However, it is worthwhile for this Court to provide a brief comment on the Bankruptcy Registrar's conclusion in ***Perry***. As mentioned earlier in these reasons, she provides us with a survey of the various cases that deal with the apparent tension between the "One Step, Two Estates" approach and the "Two Step, One Estate" approach. As discussed, this Court does not agree that cases fall clearly into one approach or the other.

[83] Importantly, she finds that the *CEA* and *CEARegs* remain "operational throughout the administration of the bankrupt's estate to determine the property that is distributed to the

creditors and the property that the bankrupt is entitled to retain or get back": ***Perry*** at para 113. While this Court agrees that those pieces of legislation remain in operation for some purposes, based on this Court's application of the principles of statutory interpretation that Justice Iacobucci articulated in ***Rizzo***, they cannot apply in other situations, as discussed above.

[84] The Bankruptcy Registrar relied on *CEA* s 92(1), to disentitle the deceased bankrupt's estate from retaining his principal residence exemption. That section provides:

> 92(1) Where a debtor is deceased, the property of that debtor that would be exempt if the debtor were alive remains exempt from writ proceedings against the debtor's estate for the period of time that the property is required for the maintenance and support of the deceased debtor's dependants.

[85] This policy is sound, based on this Court's discussion of the underlying policy reasons for having exemptions laws in the first place. An exemption is personal to the debtor and would be lost on the debtor's death, as one of the purposes of the exemption, *viz*, the financial rehabilitation of the debtor is not sound if the debtor is dead. It also recognizes the policy of not placing the debtor's dependents in an impecunious state once the debtor dies. The ALRI Report said:

> The enforcement processes should not destroy the debtor as a viable economic and social entity. The law, in the interests of all participants, must protect debtors from forfeiting so much of their property and potential as would render it impossible or unreasonably difficult for them to maintain themselves and their dependants at a reasonable standard and with reasonable security that they can continue to do so.
>
> ...
>
> It seems to us that the purpose of exemptions legislation is to protect debtors' present ability to maintain themselves and their families, to protect a measure of security that their ability to do so will continue in the future, and to foster restoration of their personal economy.
>
> ALRI Report at 254-55 [emphasis added].

[86] Exemptions policy only goes so far. It cannot protect the deceased debtor's exempt assets from non-dependent beneficiaries. To this extent, this Court agrees with the Bankruptcy Registrar's application of *CEA* s 92(1).

Heard on the 11th day of April, 2022.
Dated at the City of Calgary, Alberta this 21st day of June, 2022.

K.D. Yamauchi
J.C.Q.B.A.

Appearances:

Sean T. FitzGerald
Miles Davison LLP
for the Applicant

Kristen Clarke
Alberta Justice
For the Respondent Office of the Public Trustee for Alberta

Mandi Deren-Dube / Dana M. Nowak
MLT Aikins LLP
for the Intervenor