

INSOLVENCY UPDATE

August, 2008

Insolvency Legislation Amendments Come into Force (Only Some and Finally!)

The Government of Canada has finally amended certain portions of the *Bankruptcy and Insolvency Act* (the "BIA") as well as introducing the *Wage Earner Protection Program Act* (the "WEPP") and has made other amendments to legislation relating to Student Loans and RRSPs etc. The *General Rules* relevant to the BIA amendments that were brought into force have also been amended.

CHANGES AFFECTING PERSONAL INSOLVENCIES

RRSP Change

Money in a RRSP, RIF or a deferred profit sharing plan will no longer be available for distribution among a bankrupt's creditors. Any contributions made in the 12 months before the date of the bankruptcy are subject to a claw back. Where provincial legislation exempts RRSPs from execution, the provincial legislation will apply.

Student Loan Debt

The amendments reduce the period of time from ten to seven years that a student must wait after ceasing to be a full or part-time student before a discharge order will release a student loan debt or obligation.

The "hardship provision" which allows for an application to have student loans discharged can now be made after 5 years.

Non-dischargeable Debt

Amendment to provide that an order of discharge does not release the bankrupt from any debt or liability for obtaining property and services by false pretences or fraudulent misrepresentation other than a debt or liability that arises from an equity claim is now in force.

Stay of Proceedings

Amendment to the BIA to clarify that the stay of proceedings in respect of a bankrupt ceases to apply on the date that the bankruptcy trustee is discharged where the bankrupt remains undischarged.

CHANGES AFFECTING CORPORATE INSOLVENCIES

Wage Earner Protection Program Act

The WEPP will apply in respect of wages owing up to \$3,000 to an individual by an employer who becomes bankrupt or any employer whose property comes under the possession or control of a receiver. This is a significant change to the current landscape.

Employee Remuneration Charge and Priority

Amendments to the BIA so that wages for services rendered during the six months immediately preceding a bankruptcy or receivership are secured against current assets to the extent of \$2,000 and such security will rank above every other claim or security against the bankrupt's current assets except unpaid supplier rights, farmer and fisherman rights and statutory deemed trusts claims that survive bankruptcy such as source deductions.

Pension Charge

The BIA now creates a priority charge for registered pension plan contributions consisting of both employee contributions and current employer obligations. The charge will apply in respect of any pension plan regulated by an Act of Parliament or the Legislature of a Province and security for the pension amounts rank above every other claim or security against the bankrupt's assets except unpaid supplier rights, farmer and fisherman rights, the new employee remuneration charge and statutory deemed trust claims that survive bankruptcy such as source deductions.

Initial Bankruptcy Event in respect of Commencement of CCAA Proceedings

The definition of "initial bankruptcy event" in the BIA has been changed to add the commencement of proceeding under the CCAA to the list of initial bankruptcy events. As a result, it will no longer be necessary to file an Application for a Bankruptcy Order so as to preserve an early effective date to

challenge fraudulent preferences and the like when a CCAA proceeding has been commenced.

Equity Claim

The definition section of the BIA has been changed to add the definitions of "equity claim", "equity interest" and "shareholder".

The 2005 amendments stipulated that certain equity claims would be subordinated to creditor claims in a restructuring, and that these claims would not have voting rights. The description of "equity claims" was also expanded to include a claim for a dividend or similar payment, a return of capital, a redemption or retraction obligation, a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission (or in Quebec, the annulment) of a purchase or sale of an equity interest, or for contribution or indemnity in respect of any such claim. The amendments also clarify that a CCAA plan or BIA proposal can become effective without requiring a vote of the holders of equity claims.

Although the definition section has been changed, the amendments to the BIA in respect to which these definitions would be applicable, are not yet in force.

Agreements

Amendment to restrict the termination or amendment of security agreements with a debtor who has filed a notice of intention to make a proposal or a proposal.

Aircraft Equipment

Amendments to the BIA creates an international registry for security in relation to aircraft and related equipment. The equivalent provisions to amend the *Companies Creditors Arrangements Act* under which most airline insolvencies are likely to occur, are not yet in force.

Disclaimer

This letter is designed to inform readers of various matters relating to insolvency. The comments provided are, of necessity, brief and should not be relied upon as legal advice. We encourage you to contact your lawyer for advice in the context of a particular situation.

Should you have any questions relating to this topic or any other insolvency matter that you may have, please contact Stephen Boale or David Wood at:

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