



BDO Dunwoody Limited
Financial Recovery Services

BDO News Bulletin

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For further inquiries, or to discuss how these changes may affect your clients, please contact your local BDO professional.

New Insolvency Legislation Coming into Force on September 18, 2009

BACKGROUND

We are advised by the Office of the Superintendent of Bankruptcy that the remaining sections of Bill C-55, “*An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act and to make consequential amendments to other Acts,*” which have not yet been proclaimed, will come into effect on September 18, 2009.

Here is a summary of the amendments, as well as brief comments on the implications as they are now determinable. We have not editorialized widely on these amendments. This bulletin is not designed to provide legal advice as it does not replace the advice of a lawyer or BDO Financial Recovery Services professional.

UNPAID SUPPLIERS

The existing law allows unpaid suppliers to obtain access to, and repossess goods that meet, specific criteria within a given timeframe. Historically, many suppliers did not benefit from these provisions as they did not fully understand the timeframes and other criteria related to the claims process.

The amendments simplify the timeframes in which the claims can be made. Now, an unpaid supplier may make a claim for goods delivered within 30 days before the date of bankruptcy or receivership, but must make such a claim in writing to the trustee or receiver within 15 days of the appointment. The existing requirements regarding identification, condition and status of the inventory remain.

ALIGNMENT OF CCAA AND BIA

Numerous changes to the CCAA and BIA harmonize the two pieces of federal legislation to provide more consistency, regardless of the legislation under which a debtor may attempt to reorganize. The more significant changes include the following:

Executory Contracts

In a proposal or a CCAA plan of arrangement, on notice to the other party and subject to appeal, contracts can be disclaimed if it is necessary for the success of the proposal or plan of arrangement. The other party then has an unsecured claim for its losses. This is an expansion and codification of current practice. Certain types of contracts are excluded.

These are:

- Collective agreements
- Eligible financial contracts (e.g. derivative and futures contracts)
- Financing agreements if the debtor is the borrower
- Leases if the debtor is the lessor
- Intellectual property licenses where the debtor is the licensor (subject to conditions)

The court may also make an order assigning a contract without the consent of the other party to the contract. The court must be satisfied that, among other things, assignment of the contract is necessary to the success of the proposal and that the debtor is not in default of the agreement.

These assignment rights do not apply to:

- Collective agreements
- Eligible financial contracts
- Leases for land and premises (in these cases, landlord consent is required)
- Rights and obligations that are not assignable “by reason of their nature”

Amendments also codify current CCAA practice that, in a proposal or plan of arrangement, contracts cannot be terminated or amended by reason of commencement of an insolvency proceeding. These clauses are known as “ipso facto” clauses.

Collective Agreements

The amendments specifically provide that collective agreements will remain in force unless agreed otherwise. If, in a proposal or plan of arrangement, the debtor company has made good faith efforts to renegotiate without success, it can apply to the court for authorization to serve a notice to bargain on the union. If the collective agreement is revised, the union can make an unsecured claim in the proceeding for the value of any concessions granted.



The notice to bargain is a court direction to management and the bargaining unit that they must attempt to renegotiate the contract. While a notice to bargain opens up the collective agreement for negotiation, there is no certainty of changes since both sides must agree. Therefore, it would appear unlikely that this amendment will substantially change the current environment surrounding reorganizations and collective agreements.

This is a significant difference from the provisions of Chapter 11 of the United States Bankruptcy Code, which does allow modification to collective agreements by the court in the course of a restructuring, if a negotiated settlement cannot be reached.

Interim Financing

The amendments provide that the debtor company may be able to obtain interim financing during either a CCAA proceeding or a BIA proposal. In such cases, the court may issue an order providing a charge to the interim lender which ranks in priority to the claims of existing secured creditors or any previous court-ordered charge. This type of financing is commonly referred to as debtor in possession (DIP) financing.

Rules are set out that provide guidance to the court in granting interim financing, essentially codifying the practice that the courts followed prior to the amendments in CCAA proceedings and now provides for financing in BIA filings. In addition, there are provisions for an administrative charge that will secure the costs of the proceedings and ensure that debtors have access to qualified professional help.

Equity Claims

Claims of shareholders for damages arising from the purchase or sale of shares of the bankrupt are subordinated to the claims of creditors.

Critical Supplier

The concept of a “critical supplier” is now to be formally available for restructurings under CCAA. Where critical to the continued operation of a reorganizing company, the Court can declare a supplier to be a “critical supplier,” requiring they continue supplying the critical goods and/or services. The Court can grant security or charge in favour of the critical supplier, which may rank in priority to existing security.

Governance of the Process

The amendments have introduced substantial changes to the processes by which insolvency and restructuring files are administered.



In a complex restructuring, the involvement of a competent and committed Board of Directors is essential to the success of the proceeding. The BIA and the CCAA have now been amended to codify practice for the creation of priority charges to indemnify directors and officers from statutory liabilities that may arise post filing. This is designed to ensure that directors do not “abandon ship” once a company in difficulty initiates plans to restructure.

At the same time that directors are recognized as essential to a restructuring, it is also recognized that they can be a barrier to the restructuring’s success. There are provisions that allow for the removal of directors if they appear to impair the process, or appear likely to impair it, or act inappropriately.

Monitors and Receivers

The amendments clarify issues relating to the appointment of professionals in insolvency and restructuring files. In a CCAA filing, the monitor appointed to oversee the process must be a licensed Trustee in Bankruptcy. In addition, the auditor of a debtor company can no longer be appointed monitor under the CCAA.

Furthermore, for private appointment receiverships and the new BIA provisions for court appointed receiverships, a receiver must be a licensed trustee. No qualifications are set out for the appointment of a receiver under a provincial Courts of Justice Act (or equivalent) appointment. We don’t know if this is deliberate, or because it anticipates that provincial appointments will become obsolete.

Interim Receiverships, National Receiverships

Up until now, the interim receivership provisions of the BIA have answered the need for a “national” receiver. The new provisions eliminate the need to stretch the definition of “interim”, and add provisions that ensure that an interim appointment is of fixed length. Courts are also authorized to appoint a “national” receiver if it is “just or convenient to do so.” Such an appointment eliminates the need to obtain separate appointments in every province or territory where the debtor has assets.

UNCITRAL

The amendments to the BIA and CCAA, which are based upon the United Nations Commission on International Trade Law Model Law, are intended to promote cooperation in international insolvency proceedings. The revisions authorize courts to coordinate and cooperate with each other, restrict the scope of Canadian insolvency proceedings when foreign proceedings were previously commenced, and grant relief to representatives of foreign proceedings. The United States has also adopted similar revisions to their insolvency legislation.



TECHNICAL

Transfers at Undervalue

The amendments eliminate the current provisions dealing with settlements and reviewable transactions and introduce provisions that deal with “transfers at undervalue.” Where such a transaction is identified, the trustee is able to apply to court and obtain judgment for the difference between the consideration paid and fair market value. These changes are designed to cast a much wider net than the previous provisions, and also contain provisions to deal with related parties.

Asset Sales

Rules have been introduced that require that a sale of assets during a proposal or restructuring, out of the ordinary course of business, must be approved by the Court. The Court is given guidance on matters to consider prior to approving any such sale. In a bankruptcy, the Court must also approve sales of assets to related persons.

CONSUMER ISSUES

Income Tax Debt

A bankrupt who has \$200,000 or more of personal income tax debt representing 75% or more of the bankrupt’s total unsecured proven claims will not be eligible for an automatic discharge. A court hearing regarding the discharge application would be held after 9 months (if the bankrupt has no surplus income) or 21 months (if the bankrupt has surplus income) from the date of bankruptcy.

Consumer Proposals

Several changes have been made to encourage debtors to make proposals to their creditors as opposed to filing an assignment in bankruptcy. Some of the more significant changes are:

- The definition of a consumer debtor has been changed to increase the maximum filing threshold from \$75,000 to \$250,000, excluding any debts secured by the individual's principal residence.
- Defaulted consumer proposals can now be revived. Administrators may send notices to the creditors informing them that the proposal will be automatically revived after 45 days unless one of them files a notice of objection. If a notice of objection is filed, the proposal will not be revived. Alternatively, the administrator may apply to court at any time to make an order reviving the proposal on any terms the Court considers appropriate.
- No meeting of creditors will be required when an amended consumer proposal has been filed by a debtor.
- Unless the proposal explicitly provides for the compromise of non-dischargeable debts, and the creditor votes in favour of the proposal, debts listed in Section 178 of the BIA will not be discharged.



Technical Amendments

- The definition of income has been amended to include any amounts for wrongful dismissal, pay equity settlements or workers' compensation, but not to include amounts received as a gift, inheritance or other windfall. Inheritances or other windfalls are considered to be property and are realizable by the trustee.
- A first-time bankrupt who has surplus income will be required to pay surplus income to the estate for 21 months; a second-time bankrupt will be required to pay for 36 months.
- A second-time bankrupt with no surplus income will be eligible for an automatic discharge after 24 months.
- If a bankrupt remains undischarged after the discharge of the trustee, a creditor may resume collection proceedings against the bankrupt without leave of the court.
- Income tax refunds for both the pre- and post-bankruptcy period will form part of the estate of the bankrupt.
- If the bankrupt is not required to make any surplus income payments, the trustee can enter into and enforce an agreement with the bankrupt for the payment of the trustee's fees and disbursements provided the amount does not exceed a prescribed amount and the payments do not extend beyond 12 months following discharge.
- There will be no automatic discharge for a bankrupt who fails to attend mandatory credit counselling as prescribed, and there will not be a Certificate of Full Performance of a Proposal if the debtor fails to attend such counselling.

