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INSOLVENCY BULLETIN

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Industry Canada.

The objective of the Insolvency Bulletin is to promote communication and strengthen ties between the Office of the Superintendent of Bankruptcy and insolvency professionals. The Bulletin is aimed particularly at trustees, jurists, registrars, accountants, credit managers and to those with a general interest in bankruptcy and insolvency.

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From the Desk of the Superintendent

This issue is chiefly devoted to legislative matters.

On November 24, 1995, the Honourable John Manley, Minister of Industry, introduced in the House of Commons Bill C-109 to amend the *Bankruptcy and Insolvency Act,* the *Companies' Creditors Arrangement Act* and the *Income Tax Act.*

You will recall that the 1992 legislative reforms constituted the first phase of amendments on bankruptcy and insolvency. These amendments included a three-year review clause. In order to prepare for phase II of the amendments, the Minister established the Bankruptcy and Insolvency Advisory Committee (BIAC).

BIAC was made up of a steering committee, eight working groups, and several subcommittees. It mainly consisted of private sector representatives, consumer groups, lawyers, bankruptcy trustees and others: public sector, federal and provincial representatives also took part in the process. In fact, more than 100 people representing some 50 organizations and interest groups participated in the process.

Bill C-109 is the final product of the three-year review process. The amendments that are included in this Bill are based on BIAC recommendations. In this issue of the Insolvency Bulletin, we have reproduced the press release and the accompanying backgrounder, as well as a more detailed summary of the amendments.

On November 28, 1995, the House began the second reading debate of this Bill which is required before it is referred to a parliamentary committee for a clause-by-clause study. This debate has since been adjourned to a later date. The House has now adjourned for the holiday recess and will reconvene in February 1996.

The Office plans to organize information sessions on the Bill with interested parties in the spring.

This issue also reproduces the Code of Ethics for bankruptcy trustees and the accompanying summary of the impact analysis. The Governor-in-Council approved this Code on September 26, 1995 as an amendment to the Bankruptcy and Insolvency Rules. The Code sets out the standards of ethics for trustees. I have asked that a framework mechanism be established for the implementation of this Code and the processing of complaints relative to it.

I take this opportunity to wish all readers of the Insolvency Bulletin a Happy New Year.

Bill C-109 — News Release and Backgrounder

Federal Bankruptcy Proposals Promote Fairness and Jobs

OTTAWA, November 24, 1995 — Industry Minister John Manley today introduced in the House of Commons a bill to amend the *Bankruptcy and Insolvency Act*, and the *Companies' Creditors Arrangement Act.*

"These amendments are a key part of my department's efforts to establish an economic framework that supports jobs, innovation and competitiveness in the Canadian marketplace," said Mr. Manley. "Although bankruptcy is an issue that few Canadians want to contemplate, businesses and consumers need the assurance that Canada's bankruptcy laws support both risk-taking and the fair resolution of insolvency situations."

Designed to complement the three-year review of the last round of bankruptcy reforms, the proposed amendments — over 70 in all — reflect the government's ongoing commitment to update and monitor bankruptcy legislation. The vast majority of the amendments are based upon the recommendations of the federal Bankruptcy and Insolvency Advisory Committee (BIAC) established in 1993, which conducted extensive consultations over the last two years.

Canada's business community — particularly small- and medium-sized enterprises — need bankruptcy laws that offer flexibility during financial duress. By strengthening the reorganization provisions in the existing legislation, the amendments will help businesses recover from insolvency, and ultimately support innovation, growth and the protection of jobs. Other features of particular interest to the business community include (1) unprecedented support for the preservation of the environment by giving claims for environmental clean-up costs first-ranking priority over certain assets; and (2) reform of the *Companies' Creditors Arrangement Act* to provide for more disclosure, and rules and guidelines for the Courts.

Although business bankruptcies have remained relatively stable over the past two years, consumer bankruptcies are on the rise. In recognition of this trend, the proposed amendments seek to strike a fair balance between rehabilitation and obligation. Highlights of proposals that aim to enhance the responsibility of consumer debtors include: (1) the payment of debts with *surplus* income, or income that exceeds a minimum cost of living; (2) the requirement that debtors meet financial responsibilities arising from spousal and child support, as well as from civil court fines for physical or sexual assault; and (3) making student loan debts non-dischargeable for two years after termination of studies, recognizing the existence of a variety of re-payment options during this period, including no re-payment in situations of hardship.

"To be competitive, Canada needs forward-looking economic framework laws," added Mr. Manley. "These amendments attempt to minimize the social and economic cost of insolvencies, while fostering an innovative and prosperous economy."

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Fairness in Canada's Bankruptcy Laws

Striking the Balance between Rehabilitation and Obligation

On the sidelines of bankruptcy or insolvency situations are the human costs of debt and financial strife. Low-income families, spouses of the bankrupt and individuals trying to re-build their financial and personal lives all struggle with the human side effects of a bankruptcy.

The proposed amendments respond to an extensive consultative process involving direct and constructive input from the business sector and consumers, as well as from practitioners involved in bankruptcies and insolvencies. A federal Bankruptcy and Insolvency Advisory Committee (BIAC), chaired by the Deputy Minister of Industry Canada, met for two years to monitor the 1992 changes to the legislation and proposed further refinements in keeping with current economic realities and needs.

The proposed amendments to the *Bankruptcy and Insolvency Act* (BIA) seek to assert the need for responsible action by debtors, while offering realistic and human solutions that allow families and individuals to get back on their feet.

As well, the amendments are intended to preserve the jobs individuals and families need to meet their financial obligations and enjoy an adequate standard of living.

Like the last changes to the BIA (1992), these amendments place an emphasis on re-organization techniques and arrangements that help businesses return to solvency and meet their obligations as employers. Their aim is to preserve jobs and the businesses that create them.

Specifically, the amendments provide for:

- maintenance of income-support benefits such as GST tax refunds, that allow families and individuals to meet their essential needs. Under the proposed legislation, these benefits are exempt from seizures intended to re-imburse creditors.

- priority status for provable claims by divorced or separated spouses for spousal or child support payments. Previously, spouses were not considered creditors.

- debtors to meet their obligations where a sexual or physical assault charge resulted in penalties. Amendments make these judgments non-dischargeable and allow support for assault victims to continue.

- tighter control of premature student bankruptcies intended to discharge responsibility from student loans. In recent years, the federal government has lost over $60 million per year in loan defaults as a result of early student claims of bankruptcy. The proposed changes will make student loan debts non-dischargeable for 24 months following termination of studies. Recognizing that some students experience real economic difficulties, the amendments complement a variety of re-payment options during that 24-month period, including no re-payment in situations of hardship.

- individuals to make recompense from a portion of "surplus income" deemed to exceed a minimum cost of living. This provision provides for a regularized re-payment schedule and encourages bankrupt individuals to make their best effort to re-imburse their creditors. Under directives from the Superintendent of Bankruptcy, trustees will have powers to establish rates and the terms of a conditional discharge, saving court costs and allowing for a personalized arrangement between a bankrupt and his or her creditors.

- spouses to make a joint consumer proposal where their financial relationship requires a co-ordinated re-payment effort. These new provisions streamline proceedings and save costs.

- more time for creditors to review debtor proposals, and a quicker response from the courts to those proposals. The old waiting period for creditors would be extended from 30 days to 45 days and courts would have 15 days to indicate whether the proposal has been accepted, as opposed to the current response period of 30 days. Otherwise, the proposal would be deemed accepted.
- counselling for persons related to the debtor.

Promoting Growth and Preserving Jobs

Bankruptcy Laws that Encourage Re-organization vs. Liquidation

The proposed changes advance the 1992 amendments to the *Bankruptcy and Insolvency Act* (BIA) that were intended to keep businesses alive and productive in the Canadian marketplace. The amendments are designed to encourage insolvent businesses to re-organize their affairs, take responsibility for debt, negotiate with their creditors and continue to employ Canadians.

The proposed amendments respond to an extensive consultative process involving direct and constructive input from the business sector and consumers, as well as from practitioners involved in bankruptcies and insolvencies. A federal Bankruptcy and Insolvency Advisory Committee (BIAC), chaired by the Deputy Minister of Industry Canada, met for two years to monitor the 1992 changes to the legislation and proposed further refinements in keeping with current economic realities and needs.

Government participation was characterized by an insistence that risk-taking and competition should be encouraged if jobs and growth are to be secured in the Canadian marketplace. Highlights of the amendments include:

- a new emphasis on ensuring that the environment is protected and cleaned up after a bankruptcy, and that insolvency practitioners' personal liability is fair and well understood. These changes ascribe top priority to environmental clean-up costs, as affected assets are liquidated and/or the business is re-organized. For the first time, these costs will have primacy over all other claims, including those of secured creditors. The liability protection for trustees and receivers allows them the time and security required to oversee the clean-up, and the constructive re-alignment of the company's structure, assets and holdings.
- the provision of new liability protection for company directors. Previously, where directors were vulnerable to personal claims they were unlikely to commit to the re-building of an insolvent company. If businesses are to re-organize rather than liquidate, directors need to be encouraged to continue their involvement in the stewardship of the company. This bill endeavours to secure the competence and expertise of a company's directors for the duration of the re-organization period.
- limits on the use of the *Companies' Creditors Arrangement Act (CCAA)* as an alternative regime for re-organizing insolvent enterprises. Amendments make this legislation more of a companion to the BIA, and harmonize its disclosure and monitoring requirements. In the future, only companies with liabilities in excess of $10 million will have access to the provisions of the CCAA, preserving the flexibility and special features of the CCAA for larger companies seeking to re-organize their affairs. Changes will also ensure that creditors are better informed as the process unfolds.
- protection for farmers and fishermen "primarily" engaged in farming or fishing from bankruptcy petitions, even where they earn income extraneous to their primary occupations. Previously, these businesspeople risked petitions when they stepped outside of their traditional roles to supplement their incomes during their off-season. The bill ensures that they won't be forced into bankruptcy when they are technically insolvent.
- changes that harmonize Canadian bankruptcy and insolvency practices with those of our international trading partners. These legislative adjustments will facilitate co-operation between jurisdictions in multinational re-organizations and insolvencies, and assert that Canadian rules apply to the distribution of assets, creditor preference and reviewable transactions.

- a continued emphasis on re-organization versus the liquidation of assets when a business fails. These proposed changes are intended to put the tools for re-building a company into the hands of its proprietors, directors and insolvency practitioners, and importantly, its creditors. The latter group will more consistently be involved in the determination of the "salvageability" of a company and market forces will more frequently shape the futures of insolventcompanies.

Bill C-109 — Summary of Proposed Amendments

This document is a summary of the major proposed amendments in Bill C-109, an Act to amend the *Bankruptcy and Insolvency Act* (BIA), the *Companies' Creditors Arrangement Act* (CCAA) and the *Income Tax Act*, which was tabled by the Honourable John Manley, the Minister of Industry, on November 24, 1995.

I. Consumer Bankruptcies

1. Exempt property

1.1 Exempt property under federal and provincial statutes

The exemption provisions in bankruptcy matters are amended to include any property that is declared exempt under a federal statute as well as property declared exempt under a provincial statute (s. 67(1)(b) BIA).

1.2 GST credits and other essential needs

Such goods and services tax (GST) credits and prescribed payments relating to the essential needs of debtors as are made in prescribed circumstances are exempt (s. 67(1)(b.1) BIA).

2. Surplus income

2.1 Superintendent's standards

The amount of surplus income that a bankrupt must pay to the estate shall be determined according to the standards established by the Superintendent. These standards may vary from one region to another (s. 68(1) BIA).

2.2 Duty of the bankrupt

The bankrupt has a duty to pay to the estate the amount of his or her surplus income (s. 68(3) BIA). The bankrupt shall inform the trustee of any material change in his or her personal financial situation (s. 158(n.1) BIA).

2.3 Trustee must ensure bankrupt's compliance with the duty

The trustee is responsible for ensuring that the bankrupt complies with his or her duty to pay surplus income to the estate (s. 68(3) BIA). The trustee shall review the bankrupt's budget and determine how much is to be paid, having regard to the Superintendent's standards and the personal situation of the bankrupt.

2.4 Recommendation of the official receiver

If the amount that the bankrupt must pay to the bankruptcy estate differs substantially from the Superintendent's standards, the official receiver shall recommend to the trustee and the bankrupt an amount to be paid to the estate by the bankrupt (s. 68(5) BIA).

2.5 Information to creditors

The trustee shall inform the creditors, in the notice of bankruptcy, of the amount of the excess income that the bankrupt must contribute to the estate (s. 102(3) BIA). If there is any change in the amount to be paid, the creditors shall be notified (s. 68(4) BIA).

2.6 Mediation by the official receiver

If there is no agreement between the bankrupt and the trustee concerning the amount of surplus income to be paid, the trustee shall send a request for mediation to the official receiver. A creditor may also request mediation by the official receiver with respect to the amount to be paid to the estate (s. 68(6) and (7) BIA).

2.7 Maintenance of judicial remedy — as a last resort

The new mediation process does not remove recourse to the courts. However, the court shall intervene only as a last resort, i.e. where the bankrupt disagrees with the recommendation of the official receiver, where the mediation fails, or where the bankrupt fails to comply with his or her obligation (s. 68(10) BIA).

3. Opposition to discharge

3.1 Two new grounds for opposition

Bill C-109 introduces two new grounds for opposition to discharge:

- non-compliance with the requirement to pay the surplus income under section 68 (s. 173(1)(m) BIA);
- the fact that the bankrupt chose bankruptcy rather than a proposal to creditors as the means to resolve his or her financial difficulties (s. 173(1)(n) BIA).

3.2 Recommendation of conditional discharge by the trustee

When the bankrupt applies for discharge, the trustee may recommend that his or her discharge be subject to conditions. The trustee shall consider whether the bankrupt has complied with his or her obligation to pay some part of the surplus income to the estate; the total amount paid to the estate, having regard to the bankrupt's financial resources; and the fact that the bankrupt chose to proceed to bankruptcy rather than to make a proposal as the means to resolve his or her indebtedness. If the trustee elects to make such a recommendation, it shall be included in the "report on the bankrupt's application for discharge" that is prepared under section 170. A recommendation that the bankrupt be discharged subject to conditions is deemed to be an opposition to the discharge of the bankrupt (s. 170.1(1) to (3) BIA).

3.3 Copy of the trustee's report to creditors who request it

The trustee's report on the bankrupt's application for discharge, prepared according to section 170, shall be forwarded to each creditor who requested a copy in a proof of claim (s. 168.1(1)(a) and s. 170(2) BIA).

3.4 Mediation of the official receiver

Where the bankrupt does not agree with the recommendation of the trustee regarding the bankrupt's application for discharge, he or she may request the mediation of the official receiver. Similarly, where a creditor or the trustee files an opposition based on the new paragraphs 173(m) and (n), the trustee shall send an application for mediation to the official receiver (s. 170.1(4) and (5) BIA).

3.5 Court order of discharge

Where the mediation regarding the bankrupt's application for discharge fails or where the bankrupt has failed to comply with conditions that were established by the trustee, or as a result of the mediation, the trustee shall apply to the court for an appointment for hearing the discharge application of the bankrupt (s. 170.1(7) BIA).

3.6 Costs where discharge opposed

The court may award costs to the opposing creditor out of the estate in an amount not exceeding the amount realized by the estate under the conditional order (s. 197(6.1) BIA).

4. Meeting of creditors and information to creditors

In summary administration estates, the meeting of the creditors is no longer mandatory. A meeting shall be called if it is requested by the creditors or the official receiver (s. 155(d.1) BIA).

The notice of bankruptcy that is sent to the creditors shall indicate the amount of the surplus income that the bankrupt is to pay to the estate under section 68 and other information on the financial situation of the bankrupt (s. 102(3) BIA).

The bankrupt is required to inform the trustee of any material change in his or her financial situation so that the latter can amend the amount of the excess income that is to be paid to the estate (s. 158(n.1) and 68(4) BIA). The creditors shall be informed of any material change in the financial situation of the bankrupt and of any amendment to the amount he or she must pay to the estate (s. 102(4)(b) BIA).

5. Claim for support

A claim for spousal or child support is a provable claim. The claim is provable for amounts accrued in the year preceding the bankruptcy and for any lump sum amount payable before that date (s. 121(4) BIA). The claim is a preferred claim in the order of distribution of the estate assets (s. 136(1)(d.1) BIA).

Furthermore, in respect of such a claim for support, an individual's bankruptcy does not stay the proceedings by the spouse or children in relation to any property of the bankrupt that has not devolved to the trustee (s. 69.41).

6. Claims for student loans

Student loans made under any federal or provincial statute are undischargeable debts when the bankruptcy occurs while the debtor is still a student or within two years following the termination of studies (s. 178(1)(g) BIA).

However, the court may order that the bankrupt is discharged from such debt if it is satisfied that the bankrupt has acted in good faith and that he or she will continue to experience financial difficulty to such an extent that he or she will be unable to pay the liabilities under the loan (s. 178(1.1) BIA).

7. Claims for assaults

A bankrupt is not discharged from payment of damages awarded by a court in civil proceedings in respect of an assault (s. 178(1)(a.1) BIA).

8. Counselling service

The counselling service is expanded to encompass a person who, as specified in directives of the Superintendent, is financially associated with the bankrupt (s. 157.1(1)(b) BIA).

II. Consumer Proposals

1. *Joint consumer proposal*

Two or more consumer proposals may, in such circumstances as are specified in directives of the Superintendent, be joined where they could reasonably be dealt with together because of the financial relationship of the consumer debtors involved (s. 66.12(1.1) BIA).

2. Distribution of dividends

It is no longer necessary to distribute consumer proposal dividends every three months. The manner of distribution must be indicated in the proposal (s. 66.12(6) and 66.26 BIA).

3. Changes in limitation periods

The time allowed for creditors to respond to the proposal is increased from 30 days to 45 days. The time for the court's approval of the proposal is reduced from 30 days to 15 days (s. 66.15 to 66.22 BIA).

4. Proposal by a bankrupt

A bankrupt may file a consumer proposal if the proposal is approved by the inspectors, where applicable; in such case, the debtor shall retain the services of a trustee in bankruptcy. (ss. 66.11 and 66.4(2) BIA). Where a consumer proposal made by a bankrupt is annulled by the court, the debtor is deemed to have made an assignment on the date of the order (s. 66.3(5) BIA).

III. Reorganizations and Commercial Bankruptcies

1. Liability of trustees, receivers and interim receivers

1.1 General liability

Trustees, receivers and interim receivers who carry on the business of the debtor or continue the employment of the debtor's employees are not personally liable in respect of any claim against the debtor where the claim arose before or upon their appointment (ss. 14.06(1.1) and (1.2) BIA).

1.2 Environmental liability

Trustees, receivers and interim receivers are not personally liable in those respective positions for any environmental condition that arose or environmental damage that occurred before or after their appointment, unless the condition arose or the damage occurred as a result of their gross negligence or wilful misconduct (s. 14.06(1.1) and (2) BIA).

These persons are not, however, exempted from their duty to report or provide the necessary information under the applicable environmental statutes (s. 14.06(3) BIA).

Where a court or agency issues an order to remedy any environmental condition or damage, the trustee has four options. The trustee may: (1) comply with the order; (2) contest it; (3) request a stay of the order to assess the economic viability of complying with it, or; (4) abandon any real property affected by the condition or damage. The trustee has immunity for at least ten days following the order (s. 14.06(4) and (5) BIA).

Claims resulting from orders to remedy are secured by a charge on the real property affected and on any real property contiguous thereto that is related to the activity that caused the damage (s. 14.06(7) BIA).

2. Disclaimer of commercial leases

In the context of a commercial reorganization, a debtor who wishes to disclaim a commercial lease (formerly, *repudiate* a commercial lease) has three options:

- the debtor may offer the landlord compensation corresponding to the actual losses resulting from the disclaimer, in which case the offer made to the landlord must include the same conditions as those offered to ordinary creditors. (s. 65.2(4) BIA).
- The debtor may also make an offer to the landlord based on a pre-determined formula for assessing damages. Under this formula, the landlord's claim amounts to one hundred percent of the rent provided for in the lease in the first year of the lease after the disclaimer plus fifteen per cent of the rent for the remainder of the term of the lease after that year, the total amount not to exceed three years rent. In this case the landlord is in a particular category of ordinary creditors and votes in this category (s. 65.2(5) BIA).
- The debtor may not make a separate offer to the landlord. In such case, the landlord has a claim based on the pre-determined formula referred to above and the landlord votes as an ordinary creditor within the most general class of such claims for all purposes in connection with the proposal (s. 65.2(6) BIA).

3. Liability of directors

Directors sued for repayment of a dividend paid at the time when the corporation was insolvent may assert in their defence that they had reasonable grounds to believe that the corporation was not insolvent. By "reasonable grounds" the court shall consider whether the directors relied on financial statements or reports relating to the corporation's affairs prepared by credible professional persons (s. 101(2), (2.1) and (5) BIA).

In the context of a commercial reorganization, proceedings against the directors in their capacity as directors on statutory claims for which they may be liable are stayed (s. 69.31 BIA). A proposal may include an offer to compromise such claims. The offer of compromise may not include claims that are based on a contract or on allegations of misrepresentation or of wrongful conduct by the directors. The affected creditors shall vote by classes (s. 50(13) to (17) BIA).

4. Deemed refusal of a proposal

The court may, at any time before the meeting of creditors, declare that the proposal is deemed to have been refused by the creditors if the court is satisfied that

the debtor is not acting in good faith or that the proposal will not likely be accepted by the creditors (s. 50(12) BIA).

5. Claims by a workers' compensation body

Claims by a workers' compensation body are dealt with on the same footing as claims by the Crown.

Generally speaking, these claims rank as ordinary claims. The securities created by statute for amounts owing to the body shall be recognized only if they are registered. In such cases they rank according to the date of registration and in respect of the amounts owing at the time of registration (s. 86 and 87).

6. International insolvencies

In accordance with the new trends observed among our major trading partners, the new Part XIII is intended to codify and clarify the domestic rules in order to promote greater cooperation and coordination in international insolvencies.

The court may "recognize" a foreign representative. A "foreign representative" is a person who is assigned, under the laws of the jurisdiction outside Canada, functions that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the court (s. 267).

A foreign representative or any interested person may ask the court to limit the property to which the authority of the trustee in bankruptcy extends to the property of the debtor situated in Canada (s. 268(2) BIA).

Foreign orders to stay proceedings in regard to property situated in Canada are not automatically recognized; however, a foreign representative may ask the court to stay proceedings in Canada (s. 269).

A foreign representative may commence proceedings in Canada in accordance with Canadian laws, as if he or she were a creditor, trustee, receiver or debtor. Proceedings include the filing of a petition for a receiving order, the filing of a notice of intention or a proposal with respect to an insolvent person and the request for the appointment for an interim receiver (s. 270).

The court is empowered to issue orders to facilitate and coordinate international proposals and arrangements (s. 268(3) BIA).

Under section 271, the court may seek the aid and assistance of a court or other authority in a foreign proceeding. It may also, at the request of the foreign representative:

- grant a stay of proceedings against a debtor in Canada who has filed a notice of intention or a proposal or who has become bankrupt;
- appoint an interim receiver of the property of the debtor situated in Canada;
- authorize the examination under oath of the debtor or some other interested person.

The exchange rate applicable to claims is the rate in effect as of the date of the bankruptcy; in the case of a proposal in respect of an insolvent person, the rate is the one referred to in the proposal, or, if not provided, the one in effect as of the day the notice of intention or proposal was filed (s. 275).

IV. Companies' Creditors Arrangement Act

Bill C-109 amends the *Companies' Creditors Arrangement Act* (CCAA) and borrows certain provisions from the *Bankruptcy and Insolvency Act* with a view to establishing greater uniformity and certainty in the process, while maintaining the necessary flexibility to deal with complex reorganizations involving several million dollars or more.

1. Threshold of eligibility

The Act applies only if the total of creditor claims exceeds ten million dollars (s. 3 CCAA).

2. Initial stay and further orders

The court may, without prior notice, grant an initial stay of any proceeding for a period not exceeding 30 days (s. 11(3) CCAA). It may also, upon prior notice of at least ten days, grant further stays for such period as it may impose (s. 11(4) and (5) CCAA).

3. Financial disclosure

An initial application for a stay shall be accompanied by a statement indicating the projected cash flow of the company and copies of the most recent financial statements (s. 11(2) CCAA).

4. Appointment of a monitor

A court that grants a stay of proceedings shall appoint a monitor to supervise the business and financial affairs of the debtor company. This monitor shall file with the court, prior to the meeting of the creditors or forthwith after ascertaining any material adverse change in the company's financial circumstances, a report on the business and financial affairs of the company. The company's auditor may be appointed as the monitor (s. 11.7 CCAA).

5. Extension of credit and supply of goods

The court may not stay proceedings against third parties under a letter of credit or guarantee in relation to the debtor company (s. 11.2 CCAA). Nor shall it prohibit a person from requiring immediate payment for goods or services provided after the order to stay is made or requiring the further advance of money or credit (s. 11.3 CCAA).

6. Liability of the monitor

The liability of the monitor is similar to that of the trustee in bankruptcy or the receiver. (See above, Section III)

7. Claims by the Crown

The court may order the stay of proceedings by the federal or provincial Crown on claims for deductions at source made by the debtor company but not remitted to the government. The stay shall end once the company defaults on its obligations for current deductions at source, i.e. those that must be remitted after the order to stay is made (s. 11.4 CCAA).

Furthermore, the court shall not sanction any arrangement that does not provide for the payment in full to the federal or provincial Crown, within six months after court sanction of the arrangement, of the amounts that are subject to a claim for deductions at source; nor shall it sanction an arrangement if the current deductions at source have not been remitted to the government (s. 18.2 CCAA).

The statutory trusts are not recognized, with the exception of those trusts the amount of which corresponds to the federal or provincial deductions at source, unemployment insurance premiums and contributions to a federal or provincial pension plan (s. 18.3 CCAA).

Generally speaking, the statutory claims of the federal or provincial Crown rank as ordinary claims (s. 18.4 CCAA).

A statutory security provided for amounts owing to the federal or provincial Crown is valid only if it is registered before the date of the initial application. In such case it shall rank according to the date of registration and for amounts owing at the time of that registration (s. 18.5 CCAA).

8. Liability of directors

An order to stay proceedings may provide for a stay of proceedings against the directors in their capacity as directors for statutory claims for which they may be liable (s. 11.5 CCAA). The proposed arrangement may include an offer to compromise such claims. The offer of compromise shall not include claims based on a

contract or on allegations of misrepresentations or of wrongful conduct by directors (s. 5.1 CCAA).

9. Vote of creditors

The majority required to approve an arrangement is decreased from three-fourths in value of the creditors to two-thirds (s. 6 CCAA).

10. Standardization of forms

The Governor in Council may prescribe the information to be given in any form to be used under the Act (s. 22 CCAA). It is anticipated that the forms used for the *Bankruptcy and Insolvency Act* will be adopted, in order to standardize the disclosure of information.

11. International context

Section 18.6 of the CCAA is intended to codify and clarify the domestic rules so as to promote greater international cooperation and coordination.

The court may "recognize" a foreign representative. A "foreign representative" is a person who is assigned, under the laws of the jurisdiction outside Canada, functions that are similar to those performed by a trustee, liquidator or administrator appointed by the court.

The court is empowered to issue orders to facilitate and coordinate international arrangements.

The court may seek the aid and assistance of a court or other authority in a foreign proceeding.

The exchange rate applicable to claims is the rate referred to in the arrangement, or, if not provided, the one in effect as of the day of the initial request.

12. Continuance of proceedings from one Act to another

A reorganization proceeding commenced under Part III may not be continued under the *Companies' Creditors Arrangement Act*, and vice versa (s. 11.6 CCAA and s. 66(2) BIA).

V. Securities Firms Bankruptcies

The new Part XII of the BIA provides a framework for the more effective administration of insolvencies of securities firms bankruptcies.

A petition for a receiving order may be files against a securities firm by a securities commission, a securities exchange, a customer compensation body (for example, the Canadian Investor Protection Fund) or a person appointed under a federal or provincial enactment relating to securities. To this effect, the scope of the "acts of bankruptcy" is enlarged to include the failure to meet capital adequacy requirements (s. 256).

This part creates three categories of property:

1. customer name securities: these are securities registered in the name of a customer that are not in negotiable form (s. 253 BIA);

2. the customer pool fund: it is composed of securities other than customer name securities, cash in customers' accounts and income obtained from securities in the customer pool fund (s. 261(2)(a) BIA); and

3. the general fund: it includes all of the remaining vested property (s. 261(2)(b) BIA).

The estate property is distributed as follows:

1. the customer name securities shall be delivered to the customer unless the customer is indebted to the securities firm (s. 263 BIA);

2. the assets of the customer pool fund shall be distributed to the customers in proportion to their net equity (s. 262(1) BIA); any shortfall may be compensated by a customer compensation body;

3. the assets of the general fund shall first be distributed to the non-customer creditors, in accordance with the order of distribution set out in s. 136 BIA and, rateably (s. 262(3) BIA):

   - to customers, for the remainder of their claims after distribution of the assets of the customer pool fund;

   - to any customer compensation body;

   - to the ordinary creditors.

Upon the application by the trustee or a customer compensation body, the court may order that a customer be treated as a "deferred customer" (s. 258 BIA). In such case the deferred customer shall not be entitled to share in the assets of the customer pool fund; the deferred customer will participate, with the lowest ranking, in the assets of the general fund (s. 262(3)(d) BIA).

VI. Miscellaneous Administrative Amendments

Some amendments of an administrative nature are made throughout the *Bankruptcy and Insolvency Act.* These include the following.

1. Standardization of limitation periods

To facilitate the day-to-day administration of files, time limits are standardized. Limitation periods of more than five and up to thirty days are calculated in multiples of five: see, for example, section 50(11), which increases the period to 15 from 13 days. Unless otherwise provided (for example, 45 days), limitation periods of more than 30 days are calculated in months: see, for example, section 35(3), which changes the period from 90 days to three months.

2. Definitions — s. 2

The definitions of "corporation" and "insolvent person" are extended to include a person having property in Canada.

3. Date of the initial bankruptcy event and time or date of bankruptcy — ss. 2 and 2.1

"Date of the initial bankruptcy event" is defined as the earliest of the date of filing or of making an assignment by or in respect of the person, a notice of intention or a proposal, or a petition for a receiving order. Furthermore, section 2.1 states that the bankruptcy or putting into bankruptcy of a person is deemed to occur at the time or date of the granting of a receiving order, the filing of an assignment or the event that causes an assignment by the person to be deemed.

A number of correlative amendments are made to specify the time at which the rights and obligations set out in the Act commence — in which case it is necessary to refer either to the definition of "date of the initial bankruptcy event" or to the rule of construction in section 2.1. See, for example, section 95(1).

4. Forms for Superintendent's directives — ss. 2 and 5(4)(e)

The Superintendent is authorized to prescribe by directives the form of the documents and the information to be given therein. The definition of "prescribed" is amended accordingly.

5. Notifications to the Superintendent — s. 2.2

Notifications and documents that are given to the Superintendent are given at the division office as specified by directives.

6. Trustee licences — ss. 5(4)(d) to 15.1

The Superintendent is authorized to issue directives governing the criteria in relation to the issuance of licences (s. 5(4)(d) BIA). The superintendent may issue a licence after investigating the conduct of the applicant and verifying his or her qualifications; a licence may be denied to a candidate who is insolvent or who has been convicted of an indictable offence (s. 13(2) and (3) BIA).

Other provisions affecting the Superintendent's actions in relation to the trustee's licence include:

- On an *ex parte* application by the Superintendent, the court may order a financial institution to freeze a deposit account of a trustee (s. 6(4) BIA).
- A licence ceases to be valid if the trustee becomes bankrupt. The Superintendent may, however, on written representations made by the trustee, reinstate the licence (s. 13.2(3) and (4) BIA).
- A licence may be cancelled or suspended if the trustee is convicted of an indictable offence or if he or she has failed to comply with the conditions or limitations to which the licence is subject. In such case, the Superintendent shall send the trustee a notice setting out the reasons therefor ten days before the decision to suspend or cancel the licence takes effect. The formal disciplinary process does not apply to such cases (s. 13.2(5) to (7) BIA). This new disciplinary power may be delegated by the Superintendent (s. 14.01(2) BIA).
- A trustee shall not engage the services of a person whose trustee licence has been cancelled (s. 13.6).
- Under section 14.01(1), the range of potential breaches of duty by the trustee, and potential penalties therefor, is expanded: it now includes, for example, the trustee's duty to take an examn or to make restitution of money to the estate.
- Unless the Superintendent decides otherwise in the interest of third parties or the public interest, the

disciplinary hearing is public. A disciplinary decision is always public (s. 14.02(3) and (4) BIA).

- Under section 14.03(1), the scope of conservatory measures is clarified: for example, the Superintendent may direct a person to continue the administration of the estate and the costs of this person shall be paid in priority (s. 136(1)(b)(i) BIA); the superintendent may also direct the official receiver not to appoint the trustee in respect of any new estates.
- The circumstances in which the Superintendent may take conservatory measures are extended to the insolvency of the trustee and the trustee's conviction on an indictable offence (s. 14.03(2) BIA).
- Section 15.1 states that a trustee is deemed to be a "trustee" within the meaning of section 2 of the *Criminal Code*.

7. Trustee acting for a secured creditor — s. 13.4

A trustee, even before the first meeting of creditors, may not act for or assist a secured creditor, unless that trustee has obtained an independent legal opinion as to the validity of the security and has notified the superintendent and the creditors of that fact.

8. Transfer of funds other than by cheques — s. 25(2)

The Superintendent is authorized to issue directives governing the manner in which payments may be made by a trustee.

9. Assignment of wages and assignment of debts — s. 68.1

An assignment of existing or future amounts receivable as wages, commission or professional fees is of no effect in respect of the amounts earned or generated after the bankruptcy.

10. Margin deposits — s. 95(2.1) and (3)

A "margin deposit" made by a clearing member with a clearing house is explicitly excluded from the presumption of fraudulent intent in the context of a request to cancel a preferential payment. "Margin deposit" is defined as a payment to assure the performance of the obligations of a clearing member in connection with security transactions.

11. Proof of claim for unpaid wages — s. 126(2)

Proofs of claims for unpaid wages may be made by a representative of a federal or provincial ministry or by a union representing the employees.

12. Petition for a receiving order against fishermen and farmers — s. 48

The protection against being petitioned into bankruptcy for individuals engaged solely in fishing and farming is expanded to include an individual whose principal occupation and means of livelihood is fishing or farming.

13. Contingent or unliquidated claims — ss. 121(2), 135(1.1), (3) and (4)

The trustee shall determine whether a contingent or unliquidated proof of claim is a provable claim and, if it is a provable claim, shall value it. The trustee shall notify the creditor thereof, who has thirty days in which to appeal the trustee's decision to the court.

14. Examination by the official receiver — s. 161

The statutory examination by the official receiver may be held at any time prior to the bankrupt's discharge. If it is held after the first meeting of the creditors, the notes shall be made available only to those creditors who request them.

Transitional and Coming into Force Provisions

Transitionals — *Bankruptcy and Insolvency Act* (BIA)

Clause 15(2): s. 14.06 BIA	Applies to Part III proceedings (e.g., notices of intention or proposals), bankruptcies or receiverships commenced after they come into force.
Clause 119: Part III or s. 50(1.1) to 66.4 BIA	Applies to proceedings commended after they come into force.
Clause 59(3): s. 67(1)b) and (b.1) BIA	Applies to bankruptcies commenced after they come into force.
Clause 60(2): s. 68 and 68.1 BIA	Applies to bankruptcies commenced after they come into force.
Clause 62(2): s. 69(2)(b) and (c) BIA	Applies to proposals and bankruptcies commenced after they come into force.
Clause 65(2): s. 69.41 BIA	Applies to proposals and bankruptcies commenced after they come into force.
Clause 73(2): s. 86 BIA	Applies to bankruptcies and proposals commenced after they come into force.
Clause 74(3): s. 87 BIA	Applies to bankruptcies and proposals commenced after they come into force.
Clause 78(3): s. 95(2.1) and (3) BIA	Applies to bankruptcies commenced after they come into force.
Clause 82(3): s. 101 BIA	Applies to bankruptcies commenced after they come into force.
Clause 84(3): s. 102 BIA	Applies to bankruptcies commenced after they come into force.
Clause 87(3): s. 121 BIA	Applies to proposals and bankruptcies commenced after they come into force.
Clause 89(3): s. 135 BIA	Applies to proposals and bankruptcies commenced after they come into force.
Clause 90(5): s. 136 (1)(b)(i) and (d.1) BIA	Applies to proposals and bankruptcies commenced after they come into force.
Clause 92(3): s. 155 (d.1) BIA	Applies to bankruptcies commenced after they come into force.
Clause 101(2): s. 170.1 BIA	Applies to bankruptcies commenced after they come into force.
Clause 103(2): s. 173(1)(m) and (n) BIA	Applies to bankruptcies commenced after they come into force.
Clause 105(4): s. 178(1)(a.1), (g) and (1.1) BIA	Applies to proposals and bankruptcies commenced after they come into force.
Clause 118(2): Part XII — Securities Firm Bankruptcies	Applies to bankruptcies commenced after they come into force.

Transitionals — *Companies creditors' Arrangement Act*)CCAA)

Clause 127

The new CCAA provisions apply to proceedings commenced after they come into force.

Coming into force — BIA and CCAA

Clause 129

Provides that, subject to the bill, the bill, or any part of it, or any provision of the BIA or CCAA as enacted by the bill shall come into force on a day or days to be fixed by order in council. However new section 216 BIA and section 23 CCAA (review after 7 years) come into force on the day the Bill is assented.

Code of Ethics for Trustees in Bankruptcy[†]

JUS-95-339-01
(SOR/DORS)

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Industry, pursuant to section 13.5* and subsection 209(1) of the Bankruptcy and Insolvency Act**, is pleased hereby to alter the Bankruptcy and Insolvency Rules***, C.R.C., c. 368, in accordance with the schedule hereto.

Schedule

1. The *Bankruptcy and Insolvency Rules* are amended by adding the following after section 54.2:

Code of ethics for trustees

54.3 Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.

54.31 For the purposes of sections 54.35 to 54.48, "professional engagement" means any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the Act.

54.32 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.

54.33 Trustees shall cooperate fully with representatives of the Superintendent in all matters arising out of the Act, these Rules and any directive issued pursuant to subsection 5(4) of the Act.

54.34 Trustees shall not assist, advise or encourage any person to engage in any conduct that the trustees know, or ought to know, is illegal or dishonest, in respect of the bankruptcy and insolvency process.

54.35 Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act with respect to the professional engagements of the trustees.

54.36 Trustees shall not disclose confidential information to the public concerning any professional engagement, unless the disclosure is

(*a*) required by law; or

(*b*) authorized by the person to whom the confidential information relates.

54.37 Trustees shall not use any confidential information that is gathered in a professional capacity for their personal benefit or for the benefit of a third party.

54.38 Trustees shall not purchase, directly or indirectly,

(*a*) property of any debtor for whom they are acting with respect to a professional engagement; or

(*b*) property of any estates in respect of which the Act applies, for which they are not acting, unless the property is purchased

(i) at the same time as it is offered to the public,

(ii) at the same price as is offered to the public, and

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† This amendment to the *Bankruptcy and Insolvency Rules*, bearing number SOR/95-463, came into force on September 26, 1995. It was published in Part II of the Canada Gazette on October 18, 1995, at page 2761.

* S.C. 1992, c. 27, s. 9(1)

** S.C. 1992, c. 27, s. 2

*** SOR/92-579, 1992 *Canada Gazette* Part II, p. 3977

(iii) during the normal course of business of the bankrupt or debtor.

54.39 (1) Subject to subsection (2), where trustees have a responsibility to sell property in connection with a proposal or bankruptcy, they shall not sell the property, directly or indirectly,

(*a*) to their employees or agents, or persons not dealing at arms' length with the trustees;

(*b*) to other trustees or, knowingly, to employees of other trustees; or

(*c*) to related persons of the trustees or, knowingly, to related persons of the persons referred to in paragraph (*a*) or (*b*).

(2) Where trustees have a responsibility to act in accordance with subsection (1), they may sell property in connection with a proposal or bankruptcy to the persons set out in paragraphs (1)(*a*), (*b*) or (*c*), if the property is offered for sale

(*a*) at the same time as it is offered to the public;

(*b*) at the same price as it is offered to the public; and

(*c*) during the normal course of business of the bankrupt or debtor.

54.4 Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment.

54.41 Trustees shall not sign any document, including a letter, report, statement, representation or financial statement, or associate themselves with any such document, that they know, or reasonably ought to know, is false or misleading, and any disclaimer of responsibility set out therein has no effect.

54.42 Trustees may transmit information that they have not verified, respecting the financial affairs of a bankrupt or debtor, if

(*a*) the information is subject to a disclaimer of responsibility or an explanation of the origin of the information; and

(*b*) the transmission of the information is not contrary to the Act, these Rules or any directive issued pursuant to subsection 5(4) of the Act.

54.43 Trustees shall not engage in any business or occupation that would compromise their ability to perform any professional engagement or that would jeopardize their integrity, independence or competence.

54.44 Trustees who hold money or other property in trust shall

(*a*) hold the money or property in accordance with the laws, regulations and terms applicable to the trust; and

(*b*) administer the money or property with due care, subject to the laws, regulations and terms applicable to the trust.

54.45 Trustees shall not, directly or indirectly, pay to a third party a commission, compensation or other benefit in order to obtain a professional engagement or accept, directly or indirectly from a third party, a commission, compensation or other benefit for referring work relating to a professional engagement.

54.46 Trustees shall not obtain, solicit or conduct any professional engagement that would discredit their profession or jeopardize the integrity of the bankruptcy and insolvency process.

54.47 Trustees shall not, directly or indirectly, advertise in a manner that

(*a*) they know, or should know, is false, misleading, materially incomplete or likely to induce error; or

(*b*) unfavourably reflects on the reputation or competence of another trustee or on the integrity of the bankruptcy and insolvency process.

54.48 Trustees, in the course of their professional engagements, shall apply due care to ensure that the actions carried out by their agents or employees or any persons hired by the trustees on a contract basis are carried out in accordance with the same professional standards that those trustees themselves are required to follow in relation to that professional engagement.

54.49 Any complaint that relates to a contravention of any of sections 54.32 to 54.48 shall be sent to the office of the Superintendent in writing.

Regulatory Impact Analysis Statement

(*This statement is not part of the Rules.*)

Description

The Superintendent of Bankruptcy is responsible for overseeing the administration of estates and other matters governed by the *Bankruptcy and Insolvency Act.* Within the scope of this mandate, the Superintendent regulates the procedure for licensing persons who will act as trustees in bankruptcy. These trustees administer bankruptcies and proposals of debtors in Canada. Chapter 27 of the *Statutes of Canada,* 1992, consists of amendments to the *Bankruptcy and Insolvency Act* and stipulates that trustees shall comply with such codes of ethics as may be prescribed.

Up to now, trustees have not been subject to uniform standards of professional ethics in the provision of their services. The Canadian Insolvency Practitioners Association has its own code of ethics; however, membership in the Association is not a prerequisite for obtaining a trustee licence. Not all trustees are members of the Association. In addition, the Association may suspend membership but it cannot suspend a licence. Other professional associations of which trustees may be members, such as those for chartered accountants, certified general accountants and certified management accountants, also have ethical standards that govern the responsibilities of their members; however, these vary from one association to another.

The bankruptcy and insolvency community (practitioners, creditors and consumers) has been seeking the creation of a uniform, complete and compulsory code of ethics.

The code of ethics addresses the competence and integrity that licensed trustees must demonstrate in the administration of insolvency appointments. It covers the scope and quality of the information that trustees must provide to creditors, the administration of funds that are entrusted to trustees, conflicts of interest and the sale and purchase of property of a bankrupt. It also contains standards relating to advertising by trustees and, generally, the maintenance of the good reputation of the trustee community.

Alternatives

The maintenance of the *status quo* is not an acceptable solution. The absence of standards of professional ethics applicable to all trustees renders uncertain the adoption of uniform and fair solutions to practical problems that arise in the administration of debtors estates. The adoption of the code of ethics would reinforce the confidence of creditors, debtors and the general public in the bankruptcy and insolvency system.

Prescribing the use of an existing code, such as the code of the Canadian Insolvency Practitioners Association, was also considered. This prescribed code includes the standards of conduct of the Association as well as additional standards that stipulate the level of quality of insolvency services that the public is entitled to expect from trustees. Given the nature of the government's statutory responsibilities and public policy requirements, it is considered necessary for the government to establish and issue comprehensive and uniform standards, by regulation, which reflect a broad-based consensus and with which all licensed trustees will have to comply.

Costs and Benefits

The establishment of high standards of conduct will maintain public confidence in the administration of the *Bankruptcy and Insolvency Act.*

The code of ethics establishes a minimum and uniform standard in the quality of insolvency services provided by trustees in bankruptcy. It is designed to strengthen and enhance the existing standards of professional practice.

The code will enable trustees to better understand the scope of the rights and duties that govern their professional conduct. From this point of view, they can use it as a reference in providing their professional services.

The code will also enhance the predictability of the rules of administration of bankruptcies. It will give interested persons, namely creditors, some means of control over the quality of trustee services, and thereby help to

maintain the public's confidence in the bankruptcy and insolvency system.

There are no costs to trustees, creditors and debtors associated with the code.

Consultation

Notice was given in the *Federal Regulatory Plan* for 1993, under the number CACC-25.

During the drafting of the code of ethics, the Superintendent consulted closely with, and obtained the cooperation of, representatives from stakeholders, particularly the Canadian Insolvency Practitioners Association. In addition, a draft of the code was circulated to all trustees in bankruptcy, the main groups of creditors and consumer associations, as well as other stakeholders, for example court officers and lawyers.

This RIAS was prepublished in the *Canada Gazette*, Part I on August 27, 1994. It was also discussed by the 630 participants at the Superintendent's Annual Insolvency Information Seminars, which were held in eight major centers across Canada in November and December 1994.

After reviewing the comments received, section 54.39 was redrafted. It now states that trustees shall not sell property to persons mentioned therein, including their agents or persons not dealing at arms length and, knowingly, to employees of other trustees. However, trustees are allowed to sell the property if it is offered for sale at the same time and for the same price as it is offered to the public, and during the normal course of business. This section was also changed to make sure that, where it relates to property in a proposal, the section applies only if the trustee (and not the debtor) has the responsibility of selling the property.

The former section 54.41 was divided into two distinct sections: new section 54.41 states that trustees must not sign documents that they know or reasonably ought to know are false or misleading; new section 54.42 reproduces old subsection 54.41(2): it authorizes trustees, in some circumstances, to transmit information that they have not verified.

Changes were made to section 54.48 (formerly section 54.47) to clarify its objective which is to ensure that trustees retain competent persons in the course of a professional engagement. The purpose is not to refer to the trustees' civil liability but rather their ethical accountability. The section was therefore redrafted to state that trustees shall apply due care to ensure that the actions carried out by their employees are carried out in accordance with the same professional standards that trustees themselves are required to follow.

A new section was added (section 54.49) to indicate that a complaint relating to a contravention of this code must be sent to the Office of the Superintendent of Bankruptcy in writing.

Other technical changes were also made to clarify and facilitate the interpretation of other sections.

Compliance and Enforcement

The code of ethics will be part of the *Bankruptcy and Insolvency Rules*, and trustees will be required to abide by them. The Superintendent can rely on several means to ensure compliance: licensing and disciplining of trustees; supervising and auditing of estate administration; and inquiry and investigation. The Superintendent may also issue directives with respect to particular aspects of the administration of estates.

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