



Innovation, Science and Economic Development Canada

[Home](#) □ [Bankruptcy](#) □ [Office of the Superintendent of Bankruptcy Canada](#) □ [Legislation](#)

Office of the Superintendent of Bankruptcy Canada

Summary of Legislative Changes

Summary of Key Legislative Changes in Chapter 47 of the *Statutes of Canada, 2005*, and Chapter 36 of the *Statutes of Canada, 2007*

Both the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) are amended by Chapter 47 of the *Statutes of Canada, 2005*, and Chapter 36 of the *Statutes of Canada, 2007* (c.47 and c.36 respectively). The legislative amendments are broad ranging and significant, and are intended to achieve the following main goals:

1. To encourage restructuring of viable businesses as an alternative to bankruptcy. In this regard, the CCAA has been significantly modified to provide increased predictability and consistency while preserving its flexibility.
2. To improve protection for workers in bankruptcy. The amendments also create the legislative framework for the Wage Earner Protection Program (WEPP), which ensures that workers whose employers are bankrupt or subject to a receivership receive compensation for their claims in a timely manner.
3. To make the insolvency system fairer and to reduce the potential for abuse. Inequities in the treatment of personal bankruptcies are addressed and the scope for abuse is curbed, while respecting the fundamental objective of providing a fresh start to the honest, but unfortunate, debtor.

On July 7, 2008, the *Wage Earner Protection Program Act*, along with a few amendments to the *Bankruptcy and Insolvency Act*, came into force. These amendments to the BIA include, but are not limited, to the following: (1) the creation of super-priorities (enhanced or higher ranking priorities) for wages and unremitted pension contributions; (2) changes to the definition of "date of the initial bankruptcy event"; (3) a reduction in the student loan debt discharge period; (4) protection of Registered Retirement Savings Plans (RRSPs); (5) the treatment of pre- and post-bankruptcy income tax refunds as part of the property of the estate; (6) the ability for creditors to realize against the property of the bankrupt without leave of the court once the Licensed Insolvency Trustee (LIT) is

discharged; and (7) the treatment of leased aircraft objects consistent with the *Convention on International Interests in Mobile Equipment* (Aircraft Equipment).

The balance of the legislative changes in c. 47 and c. 36 came into force on September 18, 2009.

A. Summary of Key Legislative Changes in Force as of July 7, 2008

Wage Earner Protection Program Act

The *Wage Earner Protection Program Act* (WEPPA) creates the Wage Earner Protection Program (WEPP), a program run by the Department of Human Resources and Skills Development Canada. The WEPP provides for payment of outstanding wages (up to the greater of \$3000 or four times the maximum weekly insurable earnings under the *Employment Insurance Act*) to individuals whose employment is terminated as a result of the bankruptcy or placement into receivership of their employer. The term "wages" is defined to include salary, commissions, compensation for service rendered and vacation pay. The definition of "wages" under the WEPPA was expanded effective January 26, 2009, to include severance pay and termination pay. Employee claims are reduced by any amount paid to them by the receiver or the LIT.

LITs and receivers are required to perform numerous duties to support the operation of the program. WEPPA provisions allow the program to cover insolvency professionals' fees in certain cases and under certain conditions where there are insufficient assets to cover the costs of carrying out those duties related to the operation of the WEPP. A due diligence defence is available to LITs and receivers.

Wage Claims

In bankruptcies and receiverships, the claims of workers are secured against current assets (cash, accounts receivable and inventory) to the extent of \$2000 per employee under the BIA. This limited super-priority secures unpaid wages, salaries, commissions and compensation for services rendered during the period of six months before the date of the initial bankruptcy event to the date of bankruptcy or during the six months before the receivership. Compensation includes vacation pay, but not severance pay or termination pay.

The limited super-priority over current assets ranks above secured creditors but below the rights of unpaid suppliers to repossess goods (s. 81.1 of the BIA) and the claims of farmers, fishermen and aquaculturists in respect of unpaid products supplied to the bankrupt or insolvent employer (s. 81.2 of the BIA). The limited super-priority also ranks behind unremitted income tax, Employment Insurance and Canada Pension Plan deductions deemed to be held in trust.

Under the WEPPA, the Government of Canada is, to the extent of the amount paid, subrogated to the rights the individual has in respect of unpaid wages. The limited super-priority of \$2000 applies against current assets. Where current assets are insufficient to cover the amount owing up to \$2000, the creditor has a preferred claim for the outstanding amount under section 136(1)(d) of the BIA.

Officers and directors are precluded from having a secured claim for wages. They will, however, continue to have a preferred claim under section 136(1)(d).

New provisions also preclude persons who were not dealing at arm's length with the bankrupt from having a secured claim for wages unless the LIT/receiver determines it is appropriate in the circumstances.

BIA s. 2, s. 4(5), s. 81.3 and s. 81.4 and Form 31

Pension Protection

Provisions have been added to provide a priority over all assets of the debtor for the payment of normal pre-filing pension contributions, not including any unfunded pension liabilities, in bankruptcies and receiverships. Normal pre-filing contributions are amounts deducted from employees' remuneration for contribution to the pension plan and all unpaid employer's contributions. This priority does not apply to special payments ordered by a pension regulator to liquidate an unfunded liability and to claims related to such unfunded liability.

The limited super-priority ranks below the rights of unpaid suppliers to repossess goods (s. 81.1 of the BIA) and the claims of farmers, fishermen and aquaculturists in respect of unpaid products supplied to the bankrupt or insolvent employer (s. 81.2 of the BIA), deemed trusts for source deductions and the wage claim priority.

BIA s. 81.5 and s. 81.6 and Bankruptcy and Insolvency General Rules s. 59.1 and Form 31

Date of the Initial Bankruptcy Event

The definition of "date of the initial bankruptcy event" has been amended to include the commencement of proceedings under the CCAA.

BIA s. 2

Student Loans

The waiting period before which a student loan under the *Canada Student Loans Act*, the *Student Financial Assistance Act* and provincial enactments that provide for student loans may be discharged is reduced from 10 years to 7 years after the bankrupt ceases to be a full- or part-time student. The period before which an application may be made to the court to request a discharge on the basis of hardship is reduced from 10 years to 5 years.

The new time frame of seven years applies to all those who filed for bankruptcy on or after July 7, 2008, and to undischarged bankrupts on that date, i.e., student-loan borrowers who were bankrupt but not yet discharged as of that date.

Relief under section 178(1.1) ("the hardship provision") is available to all bankrupts, including those who were discharged prior to July 7, 2008.

BIA s. 178

RRSP Exemptions

Amounts held in RRSPs are exempt from seizure in bankruptcy, subject to a possible clawback for contributions made in the 12 months preceding bankruptcy. Where provincial legislation exempts RRSPs from execution, the provincial legislation applies. Where provincial legislation does not provide for the exemption of RRSPs, the exemption in the BIA applies, subject to the possible clawback referred to above.

BIA s. 67(1)(b.3) and Bankruptcy and Insolvency General Rules s. 59.2

Income Tax Refunds

Income tax refunds for both the pre- and post-bankruptcy period form part of the estate of the bankrupt. Where the bankrupt is a judgment debtor under the *Family Orders and Agreement Enforcement Assistance Act*, a carve out exists for the portion of the income tax refund that is garnishable money under a summons for child and/or spousal support.

BIA s. 67(1)(c)

Action against Undischarged Bankrupts

Creditors may realize on the property of the bankrupt without leave of the court once the LIT has been discharged — even if the bankrupt remains undischarged.

BIA s. 69.3(1.1)

Aircraft Objects

Provisions have been added regarding the treatment of aircraft objects in Division I proposals and CCAA cases.

BIA s. 65.1(4), s. 69(2)(d), s. 69.1(2)(d) and s. 69.3(3); CCAA s. 11.07 and s. 34

B. Summary of Key Legislative Amendments in Force as of September 18, 2009

Commercial issues

Wage Claims

Division I proposals under the BIA and plans of compromise or arrangement under the CCAA must provide for payment immediately after court approval/sanction of the proposal/plan to employees (and former employees) of at least what they would be qualified to receive if the employer had become bankrupt.

BIA s. 60(1.3); CCAA s. 6(5)

Pension Protection

Division I proposals and CCAA plans that do not provide for the payments of unpaid pension contributions are not to be approved by the court unless the parties to the pension plan have entered into an agreement approved by the relevant pension regulator respecting payment of those amounts.

BIAs. 60(1.5), s. 60(1.6); CCAA s. 6 and *Companies' Creditors Arrangement Regulations* s. 3

Collective Agreements

Any collective agreement between an employer and a union shall remain in force on its terms unless the agreement is amended by agreement of the parties. Upon application by an insolvent person, the court may make an order authorizing the insolvent person to serve a notice to bargain on the union pursuant to the labour legislation of the relevant jurisdiction. If the court-ordered bargaining fails, there is no provision for the court to disclaim, terminate or revise the collective agreement. If the collective agreement is amended by agreement of the parties, the union has a claim as an unsecured creditor for the value of concessions granted.

BIA s. 65.12; CCAA s. 33

Liability of Licensed Insolvency Trustees

LITs, interim receivers, receivers and monitors who carry on the business of the debtor will not be personally liable for claims that existed or are calculated by reference to a period before their appointment, explicitly including liability as a "successor employer."

BIA s. 14.06(1.2) and s. 14.06(1.3); CCAA s. 11.8

Monitors

Monitors under the CCAA must be an LIT and the company's auditor may not be the monitor except with permission of the court.

CCAA s. 11.7

Interim Receivers

Time limits regarding the duration of interim receiverships have been established and restrictions have been introduced relating to the powers that may be granted to interim receivers.

The powers that may be granted to the interim receiver are as follows:

- a. to take possession of all or part of the debtor's property mentioned in the appointment;
- b. to exercise such control over that property, and over the debtor's business, as the court considers advisable;
- c. to take conservatory measures;
- d. to summarily dispose of property that is perishable or likely to depreciate rapidly in value.

Interim receivers appointed under section 47.1 of the BIA may be granted the same powers listed above with the addition of the power to carry out the duties set out in subsections 50(10) or 50.4(7) of the BIA, in substitution for the LIT referred to in those subsections.

The application for the appointment of an interim receiver is to be filed in the "locality of the debtor."

The interim receiver's appointment ends on the earliest of the following:

- a. the taking possession by a receiver under section 243(2) of the BIA of the property over which the interim receiver was appointed;
- b. the taking possession by an LIT of the property over which the interim receiver was appointed;
- c. the expiry of 30 days after the day on which the interim receiver was appointed, or of any period specified by the court (in the case of an appointment under section 47 of the BIA); or the date of court approval of the proposal (in the case of an appointment under section 47.1 of the BIA).

BIA s. 46(4), s. 47(1), s. 47(4) and s. 47.1(4)

National Receivers

Judges exercising their powers under the BIA may, on application of a secured creditor, appoint a "national" receiver under section 243 of the BIA if it is "just or convenient to do so". A receiver appointed under section 243 of the BIA will have the authority to act throughout Canada. Such an appointment eliminates the need to obtain separate appointments in every province/territory where the debtor has assets.

Receivers so appointed must be LITs, and they have the same protections as LITs against personal liability for pre-appointment environmental damage and other claims. The application for the appointment of a receiver is to be filed in the "locality of the debtor".

If a notice to enforce security is to be sent under section 244(1) of the BIA, the court may not appoint a receiver until the 10-day notice period has expired unless the debtor consents to an earlier enforcement or the court considers it appropriate to appoint a receiver before then.

The court may also grant a charge over the debtor's assets to secure the fees and disbursements of a receiver appointed under section 243 of the BIA and such charge may rank in priority to secured creditors. Secured creditors must be given notice and the opportunity to make representations before the court makes such an order.

BIA s. 243

Stay of Proceedings — Regulatory Body

The new provisions define what is to be considered a "regulatory body." Essentially, any body charged with enforcing or administering an Act of Parliament or the legislation of a province is considered to be such a body. In addition, there is the ability to prescribe by regulation other bodies that can obtain the same benefits provided by the section. For example, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada are

prescribed regulatory bodies.

Under the new provisions, the automatic stay of proceedings initiated on filing a proposal or notice of intention does not affect regulatory bodies that are acting strictly in their role as regulators. A regulatory body is entitled to continue to investigate or prosecute a debtor company for failings under the relevant regulations. A regulatory body is, however, stayed (precluded) from attempting to enforce a debt or monetary obligation owing to it in its capacity as a creditor, for example, in respect of a fine previously imposed.

BIA s. 69.6 and Bankruptcy and Insolvency General Rules s. 103.1; CCAA s. 11.1 and Companies' Creditors Arrangement Regulations s. 5

Interim Financing

The court has the power to order that all or part of the debtor's property is subject to a security or charge in favour of a person lending money to the debtor. Notice is required to be given to secured creditors who are likely to be affected by the order.

The court may grant the lender a priority over existing security, but the order may not secure pre-existing debts.

The provisions specify the factors for the court to consider on an application for interim financing.

BIA s. 50.6; CCAA s. 11.2

Disclaimer and Assignment of Agreements

Disclaimers

Agreements (commonly referred to as "executory contracts"), other than certain specified agreements, may be disclaimed in a Division I proposal or under a CCAA filing. If the LIT or monitor does not approve the proposed disclaimer, the reorganizing debtor must apply to the court in order to disclaim the agreement.

The co-party to the agreement may seek a declaration that the agreement not be disclaimed. In deciding whether to make an order disclaiming the agreement, the court must consider a list of factors. If the disclaimer is not opposed or is approved by the court, the co-party may file a proof of claim in the reorganization as an unsecured creditor for any damages suffered.

Where the agreement relates to intellectual property, the disclaimer does not affect the co-party's right to use the intellectual property, nor the right to enforce an exclusive right to use the intellectual property, as long as the co-party continues to perform its obligations under the agreement.

The disclaimer provisions do not apply to eligible financial contracts, collective agreements, financing agreements if the company is the borrower, and leases of real property where the debtor is the lessor. Disclaimers of real property leases where the debtor is the lessee are already dealt with in section 65.2 of the BIA.

Assignments

A debtor may apply to court for an order assigning rights and obligations under an agreement to another person.

Agreements may be assigned, subject to the proposed assignee meeting certain requirements and provided any financial defaults under the agreement are remedied. Factors for the court to consider in determining whether to make an order assigning an agreement are specified and include whether the LIT/monitor approved the proposed assignment.

The following is a list of the types of agreements that cannot be assigned: commercial leases, eligible financial contracts, collective agreements and agreements that are not assignable by reason of their nature (e.g., personal service contract).

BIA s. 65.11, s. 66(1.1), s. 84.1 and s. 146 and Bankruptcy and Insolvency General Rules s. 94.1 and s. 95 and Form 44.1; CCAA s. 11.3 and s. 32 and Companies' Creditors Arrangement Regulations s. 13 and Form 4

Asset Sales

Summary and Ordinary Administration Bankruptcy

The sale of assets in an ordinary administration bankruptcy to "related parties" requires court approval. The court must consider factors set out in the legislation before granting an order to sell the property.

In summary administration bankruptcies, court authorization of the sale of assets to a "related party" is only required if the creditors request it.

Proposals and the CCAA

In Division I proposals and CCAA cases, assets may not be sold outside of the ordinary course of business unless the sale is approved by the court on notice to all secured creditors likely to be affected by the sale. Factors for the court to consider are specified. Where the proposed sale is to a "related party," the court must be satisfied that additional conditions are met.

BIA s. 30(4), s. 65.13 and s. 155(k); CCAA s. 36

IpsO Facto Clauses

The protection afforded to debtors under consumer proposals and Division I proposals against the impact of "ipso facto" clauses (clauses purporting to entitle a party to terminate an agreement on the basis of another party filing a proposal even if the other party is not otherwise in default of the terms of the agreement) is extended to bankruptcies and CCAA filings.

Eligible financial contracts are excluded from the application of these provisions.

BIA s. 65.1 and s. 84.2; CCAA s. 34

Transfers at Undervalue and Preferences

Transfers at Undervalue

Settlements and reviewable transactions have been replaced with a single cause of action — "transfer at undervalue" or "TUV." It is a question of fact for the court to determine (1) whether the transfer was at undervalue, and (2) whether the parties were or were not dealing with each other at arm's length. Persons who are related to each other are deemed not to deal at arm's length unless there is evidence to the contrary.

TUV to Non-Arm's Length Party

If the court finds that the transaction was a transfer at undervalue and that the other party was not at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if (1) the transfer took place within one year before the date of the initial bankruptcy event or (2) the transfer took place within one to five years before the date of the initial bankruptcy event and the debtor was insolvent at the time of the transfer or intended to defeat the interests of creditors.

TUV to Arm's Length Party

If the court finds that the transaction was a transfer at undervalue and that the parties were dealing with each other at arm's length, the court may grant judgment for the difference between the actual consideration and the fair market value if the transfer took place within one year before the date of the initial bankruptcy event and the debtor was insolvent at the time of the transfer and the debtor intended to defeat the interests of creditors.

Preferences

Preference to Non-Arm's Length Creditor

If the preference was made to a non-arm's length creditor within one year, no intention test is required. The LIT only needs to show the transaction had the effect of preferring the creditor.

Preference to Arm's Length Creditor

If the preference was made to an arm's length creditor within three months, the LIT must establish that there was an intention to prefer that creditor over another. Where the transaction had the effect of preferring the arm's length creditor, a rebuttable presumption arises of an intention to prefer.

The BIA's transfer at undervalue and preference provisions are incorporated into the CCAA by reference. LITs and monitors will now have to report on the reasonableness of a decision to exclude the application of the TUV and preference provisions from a proposal or a compromise or arrangement (i.e., not to go after the preference or the TUV transaction).

BIA s. 2, s. 4(5), s. 50(10)(b), s. 95, s. 96 and s. 101.1; CCAA s. 23(1)(d.1) and s. 36.1

Directors

The court may order that the director or person acting in such capacity be removed if the court is satisfied that the director may unreasonably impair the insolvent person's ability to complete a viable

proposal/plan. The court is also authorized to fill any vacancy that is created. The court may grant a priority charge against the assets of the insolvent person in favour of the directors for an amount reasonably necessary to indemnify them against obligations and liabilities they may incur following the date of the filing and ending at the completion of the proceeding. The charge may be given priority over existing security. Notice is required to be given to secured creditors who are likely to be affected by the order granting the charge.

BIA s. 64 and s. 64.1; CCAA s. 11.5 and s. 11.51

Payment of Professional Costs

In Division I proposals and CCAA cases, the court may make an order providing that the property of the debtor is subject to a charge to pay the expenses of professional advisers of any interested party if the court is satisfied that the order is necessary for the effective participation of the interested party. The charge may be given priority over existing security. Notice is required to be given to secured creditors who are likely to be affected by the order.

BIA s. 64.2; CCAA s. 11.52

Critical Suppliers

In CCAA filings only, the court may make an order declaring a person to be a critical supplier and may make an order requiring continued supply on terms and conditions consistent with the supply relationship or on any basis the court considers appropriate. Critical suppliers must be given security by the court over the property of the debtor and such security may be given priority over any existing security. Notice is required to be given to secured creditors who are likely to be affected by the order.

CCAA s. 11.4

Unpaid Suppliers' Rights

Unpaid suppliers have 15 days after the date of bankruptcy or the appointment of a receiver to submit a written demand for goods delivered to the purchaser or the purchaser's agent (e.g., third-party warehouse) within 30 days before the bankruptcy or appointment of the receiver.

BIA s. 81.1

Shareholder Approval

The court may authorize, as part of a proposal or a compromise or arrangement, a change to the debtor's constating documents (e.g., articles of incorporation for a corporation or trust documents for an income trust) that would otherwise require approval of the shareholders or unitholders, as the case may be.

The court may also order the sale of assets outside of the ordinary course of business even if shareholder approval was not obtained.

BIA s. 59(4) and s. 65.13(1); CCAA s. 6(2) and s. 36(1)

Plan Approval

The court may fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement.

CCAA s. 12

Treatment of Equity Claims

Claims arising from the purchase or sale of equity of the bankrupt or debtor company are subordinated to all other claims. The class of creditors having equity claims may not vote at any meeting unless the court orders otherwise. Creditors with equity claims are not entitled to a dividend until all other claims are satisfied. No proposal or compromise or arrangement that provides for payment of an equity claim is to be approved/sanctioned by the court unless all other claims are to be paid in full.

BIA s. 2, s. 54(2)(d), s. 54.1, s. 60(1.7) and s. 140.1; CCAA s. 2, s. 6(1), s. 6(8) and s. 22.1

Income Trusts

Provisions have been added to deal with the insolvency of an income trust.

BIA s. 2 and Bankruptcy and Insolvency General Rules s. 1.1 and s. 103.1; CCAA s. 2 and Companies' Creditors Arrangement Regulations s. 2 and s. 5

Eligible Financial Contracts

The following changes were effected by the *Budget Implementation Act, 2007* (S.C. 2007, c.29): (a) the definition of "EFC" (EFC) was updated and moved to regulations to provide greater flexibility with respect to future updates; (b) the carve out for EFCs from the application of the stay provisions was clarified; and (c) the ability of parties to terminate EFCs post-insolvency filing (i.e., impact of the ipso facto provision) does not apply to EFCs.

BIA s. 65.1 and s. 84.2; CCAA s. 11.05(1); Budget Implementation Act, 2007 (S.C. 2007, c. 29) Part 9.

UNCITRAL

The principles of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency have been adopted.

BIA s. 267–284 and Bankruptcy and Insolvency General Rules s. 138; CCAA s. 44-61 and Companies' Creditors Arrangement Regulations s. 14

CCAA Oversight

The Office of the Superintendent of Bankruptcy will maintain a public registry of CCAA filings, will receive and keep a record of all complaints regarding the conduct of monitors, and will have supervisory powers in relation to the conduct of monitors under the CCAA.

CCAA s. 26–31 and Companies' Creditors Arrangement Regulations s. 11–12

CCAA Process

Provisions have been introduced with a view to making the process under the CCAA more transparent (e.g., notice provisions, cash-flow statements on a weekly basis, etc.).

CCAA s. 23 and Companies' Creditors Arrangement Regulations s. 6–10 and Forms 1, 2 and 3

Consumer Issues

Bankrupts with High Income Tax Debt

Bankrupts with personal income tax debt in an amount exceeding \$200,000, representing 75 percent or more of their total unsecured proven claims, are not eligible for an automatic discharge.

"Personal income tax debt" includes interest, penalties or fines imposed under the *Income Tax Act* or equivalent provincial legislation, but does not include an amount payable by the individual in their capacity as a director of a corporation.

BIA s. 172.1

Surplus Income

First-time bankrupts who have surplus income are required to contribute a portion of the surplus to their estate for the benefit of their creditors for 21 months, and second-time bankrupts are required to contribute for 36 months, subject in both cases to a change in circumstances that impacts on the obligation to pay surplus income.

BIA s. 168.1 and Forms 65, 82 and 84 and Directive No. 11R2

Definition of Income

The definition of "total income" has been amended to include amounts received by the bankrupt between the date of bankruptcy and the date of discharge, including amounts for wrongful dismissal, pay-equity settlements or workers' compensation, but not including amounts received during the same time period as a gift, inheritance or other windfall.

A requirement to pay surplus income is enforceable against income that would otherwise be exempt, and income earned but not yet received is included in the definition of "total income."

BIA s. 68

Post-Discharge Payment Agreements

Agreements regarding the payment of LIT's fees and expenses are permissible and enforceable after the bankrupt's discharge, provided (1) the bankrupt's income is below the level where a surplus income obligation would arise, (2) the amount to be paid under the terms of the agreement does not exceed a prescribed amount (currently set at \$1,800), and (3) the payments do not extend beyond

12 months following discharge.

BIA s. 156.1 and Bankruptcy and Insolvency General Rules s. 58.1

Definition of Consumer Debtor

A consumer proposal may be filed by someone with up to \$250,000 in debts, excluding debts secured by their principal residence.

BIA s. 66.11

Discharge of Second-Time Bankrupts

Second-time bankrupts without surplus income are eligible for an automatic discharge after 24 months.

Second-time bankrupts with surplus income are eligible for an automatic discharge after 36 months.

BIA s. 168.1(b)

Consumer Proposal Default

Administrators of consumer proposals have discretion to "revive" a consumer proposal that would otherwise be deemed annulled. Creditors retain the right to object to the revival of the consumer proposal. Courts have the power to make an order reviving the consumer proposal on any terms the court considers appropriate. An application to court for an order reviving a consumer proposal that has been deemed annulled may be made at any time.

BIA s. 66.31 and Forms 54.2, 55.1, 56 and 93–96

Avoiding the Inadvertent Discharge of Otherwise Undischargeable Debts

Debts set out in section 178 of the BIA or section 18(2) of the CCAA are not discharged in a proposal or in a plan of compromise or arrangement except if the proposal/plan explicitly provides for the compromise of those claims and the creditors vote in favour of the proposal/plan.

BIA s. 62(2.1); CCAA s. 19(2)

Debts Not Released by Order of Discharge

Debts for services obtained through false pretenses or fraudulent misrepresentations, together with debts for property obtained in such circumstances, are included as undischargeable debts.

BIA s. 178(1)(e); CCAA s. 19(2)(d)

Mandatory Counselling

Debtors making a consumer proposal must undergo mandatory counselling in order to receive a certificate of full performance. Bankrupts who have refused to attend mandatory counselling are not eligible for an automatic discharge.

BIA s. 66.38(2) and s. 157.1(3)

Statement of Affairs in Proposals

A statement of affairs is required to be completed in all proposals.

BIA s. 50(2) and s. 62(1) and Forms 78 and 79

Section 170 Report

The amendment to subsection 170(1) of the BIA limits the circumstances in which a report ("section 170 report") must be prepared. The section 170 report is required where the bankrupt has surplus income, when an opposition to the bankrupt's discharge has been filed, when the bankrupt has been bankrupt on a previous occasion, or when there is any reason that would require a court hearing of the discharge. Rule 121.1 also sets out the timelines regarding the preparation of the section 170 report.

BIA s. 170(1) and Bankruptcy and Insolvency General Rules s. 121.1 and Form 82

Asset Limit for Summary Administration Bankruptcy

The asset limit for summary administration bankruptcy estates has been raised from \$10,000 to \$15,000.

BIA s. 49(6) and s. 49(8) and Bankruptcy and Insolvency General Rules s. 130

Costs and Taxation

The cap on the amount that LITs may pay for legal services without first having to be taxed is increased from \$1,000 to \$2,500.

Bankruptcy and Insolvency General Rules s. 18(2)

Undischarged Bankrupt — Credit

Undischarged bankrupts must disclose their status when they obtain credit of \$1,000 or more from any person. The threshold amount is increased from \$500 to \$1,000.

BIA s. 199(2)

Disposal of Unrealizable Assets

Any property of a bankrupt that is listed in the statement of affairs or otherwise disclosed to the LIT before the bankrupt's discharge and that is found incapable of realization must be returned to the bankrupt before the LIT's application for discharge. If inspectors have been appointed, the LIT may do so only with their permission.

BIA s. 40(1)

Other Issues

Voting Issues / Non-Arm's Length Voting Rights

If the outcome of a vote at a meeting of creditors is determined by the vote of one or more persons who did not deal with the debtor at arm's length within the one-year period before bankruptcy, the chair re-determines the outcome not taking the vote of those creditors into account. This then becomes the outcome of the vote unless an application is made to court within 10 days and the court determines another outcome. In an application to revoke or vary a decision regarding the outcome of a vote, the court may suspend the effect of the vote.

[BIA s. 109\(6\) and s. 115.1](#)

Professional Conduct Provisions

Amendments were made to the professional conduct provisions that add clarity to issues that have arisen in various court proceedings.

[BIA s. 14.01](#)

Legal Opinion

In order for an LIT of an estate to act for a secured creditor in realizing on its security, the LIT must obtain a written opinion from independent legal counsel that the security is valid and enforceable against the estate.

[BIA s. 13.4](#)

Orderly Payment of Debts

Provinces that have chosen to "opt in" to the Orderly Payment of Debts (OPD) provisions may also "opt out." This amendment ensures that the legislation provides explicit authority for provinces to "opt out" of operating the OPD program.

[BIA s. 242](#)



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