The Law Society of Manitoba

INCORPORATED 1877 | INCORPORÉ EN 1877

CORPORATE COMMERCIAL

Chapter 6

Bankruptcy and Receivership

February 24, 2020

TABLE OF CONTENTS

A. INTRODUCTION

1. The Legal Status of Bankruptcy

Bankruptcy means the state of being bankrupt or the fact of becoming bankrupt. The term "bankrupt" applies to a very specific legal status.

The layperson often describes someone as being bankrupt when that person is in precarious financial circumstances and unable to pay the bills. Such a person may be hopelessly insolvent but not a bankrupt within the meaning of the *Bankruptcy and Insolvency BIA, R.S.C., 1985, c. B-3* ("BIA").

Unless a person meets the definition of a bankrupt, the provisions of the BIA do not apply.

Bankrupt is defined in *section 2 of the BIA* as:

> *a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person.*

Another important concept that is critical to bankruptcy law is that of insolvency.

Insolvent person is defined in *section 2 of the BIA* as:

a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this BIA amount to one thousand dollars, and

> *(a) who is for any reason unable to meet his obligations as they generally become due,*
>
> *(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or*
>
> *(c) the aggregate of whose property is not, at a fair valuation, sufficient or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.*

The definition of an insolvent person is particularly important in two main areas of the *BIA.*

One: only an insolvent person may make an assignment in bankruptcy.

Two: when a transaction is being attacked as being a preference under section 95 of the BIA, there must be proof that the person making the preference was insolvent.

2. How to become Bankrupt

A person becomes bankrupt by making:

(a) a voluntary assignment; or

(b) an application for a bankruptcy order; or

(c) a deemed assignment.

a) Voluntary Assignment - *Section 49 of the BIA*

Section 49 of the *BIA* provides that **"**An insolvent person … may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors."

To make a voluntary assignment, the debtor must first hire a Licensed Insolvency Trustee. Licensed Insolvency Trustees (LITs) are federally regulated professionals who provide advice and services to individuals and businesses with debt problems. The LIT assists the debtor to complete the voluntary assignment in the prescribed form under seal.

An assignment is a simple contract by which all of the debtor's property, (the term debtor as defined in the *BIA*, includes an insolvent person) is assigned by the debtor to a named trustee for the benefit of the creditors. The assignment is accompanied by a sworn statement in prescribed form showing the property of the debtor divisible among the creditors, the names and addresses of all creditors, the amounts of their claims and the nature of each whether secured, preferred or unsecured. The debtor also provides certain information regarding income and expenses.

The LIT will then file the assignment with the *Office of the Superintendent of Bankruptcy* (OSB) in the District office of the locality of the debtor. The OSB carries out regulatory, administrative, and supervisory duties. It licenses and regulates the insolvency profession and maintains public records and statistics. In Manitoba, the OSB District office is located on the 4th Floor, 400 St. Mary Avenue, Winnipeg, Manitoba, R3C 4K5 (telephone: 1-877-376-9902).

The Superintendent appoints the trustee and may have regard to the wishes of the creditors where those wishes can be ascertained. Typically, however, the Superintendent will follow the wishes of the debtor and appoint the trustee selected by the debtor on the form. The Superintendent issues a certificate of appointment which becomes the trustee's authority to act.

A voluntary assignment is an act of the debtor which does not require the approval or consent of creditors or the court.

Very often persons in severe financial circumstances contact lawyers for legal advice. The decision to "go bankrupt" should never be taken lightly.

One of the first questions you should ask is whether the client has gone bankrupt before, and what event(s) are driving the client to consider bankruptcy now. You must make a detailed inquiry into the client's property, debts, employment status, and family status.

You must understand the basics of the *BIA* to advise the client about the details of the *BIA* relating to preferences, transfers at undervalue, and surplus income requirements, as well as the impact of bankruptcy upon the ability to obtain credit in the future, and the possibility that the client's discharge from bankruptcy might be opposed.

The client should also understand clearly the obligations imposed by the *BIA* and which property will vest immediately in the trustee (as well as that property which will be exempt from seizure). The client should also be made aware of the fact that all debts are not discharged by bankruptcy. These debts are described in section178 of the BIA and include:

- any fine, penalty, restitution order or other order similar in nature imposed by a court in respect of an offence or any debt arising out of a recognizance or bail;
- any court award of damages in civil proceedings in respect of:
- bodily harm intentionally inflicted, or sexual assault, or
- wrongful death resulting therefrom;
- any debt or liability for alimony or alimentary pension;
- any debt or liability under a support, maintenance, or affiliation order or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner, or child living apart from the bankrupt;
- any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;

- any debt or liability resulting from property or services by false pretences or fraudulent misrepresentation;
- liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove the claim;
- a student loan, an apprentice loan, or a guarantee of such loans, where the date of bankruptcy occurs before the bankrupt ceases to be a full or part-time student or eligible apprentice or within seven years thereof (or after five years by court order if the court is satisfied that the bankrupt has acted in good faith and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt);
- any debt for interest owed on any of the above-described amounts.

b) Application for Bankruptcy Order - *the BIA Sections 43 - 45*

One or more creditors may file an application in court for a bankruptcy order against a debtor if the debt or debts owing to the creditor or creditors amount to one thousand dollars and the debtor has committed an act of bankruptcy within the six months preceding the filing of the application. The creditor must allege these facts in the application which is verified by an affidavit.

Section 42 of the BIA lists ten acts of bankruptcy. The more common acts of bankruptcy are:

- the debtor has made a fraudulent gift, delivery or transfer of property in Canada or elsewhere; (see section 42(1)(b)
- the debtor has transferred property or created a charge thereon which would be a preference under the BIA; (see section 42(1)(c))
- the debtor disposes of their property with the intent to defraud, defeat or delay creditors; (see section 42(1)(g))
- the debtor defaults in a proposal made under the BIA; (see section 42(1)(i))
- the debtor has ceased to meet liabilities generally as they become due. (see section 42(1)(j))

The court, on being satisfied of the facts alleged in the application, may issue a bankruptcy order declaring the debtor to be bankrupt and appointing a licensed insolvency trustee to take possession of the debtor's property and administer it for the benefit of creditors according to the provisions of the BIA.

The creditor will usually indicate a desired trustee to be appointed when applying to court and will be in a position to assure the court that the person named is qualified and willing to act.

If a creditor contacts you for advice about applying to bankrupt a debtor

If a creditor contacts you for advice about applying to bankrupt a debtor, review some of the practical issues before proceeding on those instructions.

The courts do not wish to be used as a collection agency for a single creditor who is trying to be paid in priority to other creditors. It has been held that the filing of an application to use the bankruptcy court as a collection agency is an abuse of process: *Re Aarvi Construction Co. (1978), 29 C.B.R. (N.S.) 265, [1978] O.J. No. 2623 (QL) (S.C.)*. The courts generally want the moving creditor to exhaust all normal collection remedies before resorting to bankruptcy unless there is another valid reason for an application.

The following are some of the reasons why a creditor may force a debtor into bankruptcy rather than simply pursue normal collection remedies:

- preferences made by the debtor may be reviewed and set aside;
- assets which have been sold or transferred at undervalue may be recovered (see *section 96(1) of the BIA*);
- if the debtor is continuing to lose money in a business operation, the bankruptcy will terminate the operation so that the creditor's ultimate position is not further eroded;
- assets of the debtor will be liquidated and the proceeds distributed equitably among all unsecured creditors;
- all legal actions whereby one creditor may obtain an advantage over another are stayed;
- an investigation may be made as to the bankrupt's affairs if the debtor has been acting improperly;
- creditor priorities may be reversed.

There are, of course, disadvantages to applying to bankrupt the debtor that the unsecured creditor should consider, some of which are:

- the legal costs of issuing an application may not be recoverable if there are insufficient unsecured assets and the moving creditor may be asked by the licensed insolvency trustee to underwrite the fees which, depending upon the complexity and size of the estate, could be sizeable;

- an application precludes further efforts to improve the debtor's financial position, assuming that is a realistic possibility.

c) Deemed Assignment

A deemed assignment in bankruptcy is made when a debtor makes a proposal under the BIA (except for a consumer proposal discussed below) which is not accepted or, if accepted, is not carried out by the debtor according to its terms.

3. Proposals - *Sections 50 - 66*

Generally speaking, there are two types of formal proposals: *Division I* or ordinary proposals, and *Division II* or consumer proposals.

4. Division I Proposals

A proposal may be filed by an insolvent person (which, in the case of *Division I* proposals, includes a corporation), a receiver within the meaning of *section 243(2)* of the BIA but "only in relation to an insolvent person", a liquidator of an insolvent person's property, a bankrupt and a trustee of the estate of a bankrupt.

A proposal must ensure that source deductions owing to the Canada Revenue Agency for employee remittances are paid in full and that all employees are paid at least the amount they are entitled to under the BIA. If leases are to be repudiated, the proposal must indicate that the landlord may file a proof of claim for its actual losses under the lease or an amount equal to the lesser of:

(a) rent under the lease for the first year after bankruptcy plus fifteen percent of the rent for the remainder of the term; or

(b) three years rent.

Tactically, the debtor will have to satisfy its creditors that:

- the debtor is able to carry out the proposal;

- the creditors will be better off if the proposal is accepted than if the debtor goes bankrupt.

The proposal may divide the creditors, both secured and unsecured, into classes depending upon the nature of their debt and the nature and priority of their security. The proposal will be deemed to be accepted if the majority in number and two/thirds in value of the unsecured creditors of each class approve the proposal.

If the secured creditors in each class do not approve the proposal, they will be entitled to take action under their security.

After the vote, the proposal must be approved by the court.

An insolvent debtor may file a notice of intention to file a proposal under *section 50.4* of the BIA or may file the proposal itself. The notice of intention must be filed with the official receiver stating:

- the insolvent person's intention to make a proposal;
- the name and address of the licensed insolvency trustee who has consented in writing to act as trustee under the proposal; and
- the names of all creditors with claims of $250 or more and the amount of their claims.

Within ten days after filing the notice of intention, the insolvent debtor shall file with the official receiver a statement indicating projected cash-flow of the insolvent debtor, reviewed as to its reasonableness by the trustee. The trustee will also be required to file a report on the insolvent debtor's business and financial affairs, to participate in the preparation of the proposal and to advise and assist the insolvent debtor in that regard.

If the insolvent debtor fails to file the cash flow statement as required or the trustee fails to file a proposal within thirty days after the filing of the notice of intention, or within any extension of that period granted by the court, the insolvent debtor shall be deemed to have made an assignment in bankruptcy on the date of the filing of the notice of intention to file a proposal.

The *BIA* allows the insolvent debtor the right to apply to the court for an extension of the initial thirty day period to file a proposal. The extensions must not exceed forty-five days and all extensions granted may not exceed in the aggregate five months after the expiration of the initial thirty day period. The court will have to be satisfied that the insolvent person is acting in good faith and with due diligence, that the insolvent person will likely be able to make a viable proposal if the extension is granted, and that no creditor would be materially prejudiced if the extension is granted.

On the other hand, the court may terminate the thirty day period or any extension if, on the application of a creditor, an interim receiver or the trustee, the court is satisfied that the insolvent person is not acting in good faith and with due diligence, that no viable proposal will likely be made or accepted by the creditors, or that the creditors as a whole would be materially prejudiced if the extended stay of proceedings were to continue.

A corporation may include in the proposal a term whereby the corporation's debts are compromised as well as the liabilities of the directors in their capacity as directors.

The *BIA* provides a certain breathing space for the debtor. A notice of intention or filing of a proposal will result in the following significant consequences during the period of the stay:

- no person will be able to terminate, amend or accelerate payments under any agreements with the insolvent person including leases of real property or license agreements;
- no public utility will be able to discontinue service to the insolvent person by reason only that the insolvent person is insolvent or has not paid for services rendered before the filing of the notice of intention;
- an insolvent person who is a commercial tenant under a lease of real property will be entitled to disclaim the lease on giving thirty days' notice to the landlord provided that under the proposal the landlord is allowed to file a proof of claim;
- no creditor will have any remedy against the insolvent person or its property or shall commence or continue any action, execution or other proceeding for the recovery of a claim provable in bankruptcy;
- no provision of any security agreement between the insolvent person and the secured creditor that provides that the insolvent person ceases to have any rights to use or deal with its assets upon its insolvency will have any force or effect; and
- the Crown will not be able to exercise certain garnishing rights under *section 224(1.2)* of the *Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.)* and the Crown in right of a province will not be able to exercise rights under substantially similar provincial legislation.

The trustee is charged with the obligation of investigating the accuracy of the statement of affairs and will report on the investigation at the first meeting of creditors.

It is in this manner that a formal proposal under the BIA provides the debtor with significantly more credibility than an informal proposal. Informal proposals often fail because the creditors simply do not believe the representations made by the debtor. As well, informal proposals are extremely difficult to carry out because the consent of one hundred percent of the creditors is required. If any creditor in an informal proposal does not accept the proposal made by the debtor, that creditor may commence an action, obtain a judgment and execute under it in the normal course or may also apply to force the debtor into bankruptcy. On the other hand, if a formal proposal under the BIA is approved by special resolution of creditors and by the court, all further actions against the debtor are stayed provided the debtor lives up to the terms of the proposal.

The result of a proposal being rejected by the creditors or by the court is that the debtor is deemed to have filed an assignment in bankruptcy on the date that the proposal was filed with the official receiver. It is for this reason that some debtors are reluctant to file formal proposals. They may wish to avoid bankruptcy and are simply not prepared to take the risk of being declared bankrupt by having their proposal rejected by the creditors or the court.

Under a proposal, the debtor retains title to and, generally, control of their property and business so long as the terms of the proposal are met.

From a practical point of view two major factors must exist before a proposal will be accepted:

- there must be a reasonable likelihood that the debtor will be able to carry out the terms of the proposal, and
- the creditors must be satisfied that they will be better off under the terms of the proposal than if the debtor were declared bankrupt.

5. Division II (Consumer) Proposals

a) Consumer Debtor

To file a consumer proposal, the debtor must meet the definition of a consumer debtor (*section 66.11)*, which means the debtor must:

- be an individual;
- be bankrupt or insolvent; and
- have aggregate debts not exceeding $250,000.00 (excluding any debts secured on the debtor's principal residence).

b) Administrator

The *BIA* contemplates that a consumer proposal will be administered by a licensed insolvency trustee, or a person appointed or designated by the Superintendent to administer consumer proposals.

c) Contents of Consumer Proposal

There are no restrictions to the content of a consumer proposal except that it must provide for:

- payment in priority to other claims of all claims directed to be so paid in the distribution of the property of the consumer debtor (*section 66.12(6)(a)*);

- payment of all fees and expenses of the administrator as well as any financial counsellor *(section 66.12(6)(b)*);
- the manner of distributing dividends (*section 66.12(6)(c)*); and
- performance of the consumer proposal to be completed within five years (*section 66.12(5)*).

d) Procedure and Administration of Consumer Proposal

The consumer debtor seeks the assistance of an administrator in preparing the proposal. The administrator will investigate the consumer debtor's property and financial affairs and will provide, personally or through another counsellor, counselling for the consumer debtor. The consumer proposal will then be prepared in the prescribed form and filed. Within ten days of the filing of the consumer proposal, the administrator must prepare and file with the official receiver a report setting out the results of the investigation, an opinion as to whether the consumer proposal is reasonable and fair to the consumer debtor and the creditors and whether the consumer debtor will be able to perform the proposal, and a list of the creditors whose claims exceed $250.00. (*section 66.14*)

e) Meetings of Creditors

To streamline the procedure, there will be no meeting of creditors unless there is sufficient demand for one. A meeting will only be held if requested by the official receiver or if creditors representing twenty-five percent of proven claims request one. (*section 66.15(2)*) Creditors have forty-five days following the filing of the consumer proposal to request a meeting and within that same forty-five day period the creditors may either accept or reject the consumer proposal. (*section 66.17)* The effect of a rejection is that it is deemed to be a request for a meeting of creditors. If no meeting is requested, the consumer proposal is deemed to be accepted by the creditors. (*section 66.18)*

At a meeting of creditors, all creditors vote by ordinary resolution as one class. (*section 66(19))* A majority of the total dollar value of the voting claims will be enough to approve the consumer proposal.

f) Court Approval

After the consumer proposal has been accepted or deemed to be accepted by the creditors, there is a fifteen-day period in which the creditors or the official receiver may require the administrator to apply to court to have the consumer proposal

reviewed. If no such request is made, the consumer proposal shall be deemed to be approved by the court. (*section 66.22*)

If the matter proceeds to court, the court will hear from all interested parties. If the court is of the opinion that the terms are not reasonable or are not fair to the consumer debtor or the creditors, the court shall refuse to approve the consumer proposal. (*section 66.24)*

g) Effect of an accepted/approved Consumer Proposal

All monies under the consumer proposal are paid to the administrator who, after deducting fees and expenses, will distribute the available monies to the creditors.

Once the consumer proposal is accepted and approved, it is binding on all unsecured creditors and those secured creditors who have filed proofs of claim. The consumer proposal does not release debts referenced in *section 178 of the BIA,* unless specifically provided for in the consumer proposal and consented to by the applicable creditor.

h) Annulment of a Consumer Proposal

If the consumer debtor is in default of the obligations undertaken in the consumer proposal, it may be annulled by court order or deemed annulled in certain cases.

The effect of an annulment of a consumer proposal is that the consumer debtor is deemed to have made an assignment in bankruptcy (see *section 66.3 (5); section 66.31(4)*) and, under *section 66.32* of the *BIA*, unless the court otherwise orders, the consumer debtor may not make another consumer proposal and is not entitled to any relief under *section 69* to *section 69.2* until all claims for which proofs of claim were filed and accepted are paid in full or extinguished by operation of *section 178(2).*

Where a consumer proposal is annulled or deemed annulled, the rights of the creditors are revived for the amount of their claims less any dividends received. (*section 66.32(2)*)

i) Consumer Debtor Protection

On the filing of a consumer proposal, the consumer debtor obtains a stay of proceedings against all creditors. Similar to the effect of regular proposals, no person may terminate, demand or claim any accelerated payment under any agreement because of the insolvency or the consumer proposal. Similarly, no public utility is allowed to discontinue service because of the insolvency or consumer proposal. As

well, no employer may dismiss, suspend, lay off or otherwise discipline a consumer debtor solely on the ground that a consumer proposal has been filed. (*section 66.34*)

1. Personal Bankruptcy Duties of the Bankrupt

The *BIA* emphasizes the rehabilitation of the debtor. A trustee may counsel a debtor who is not a bankrupt according to any *section 5(4)(b)* directives of the Superintendent. Under *section 157.1* the trustee must provide counselling for an individual bankrupt, and may provide counselling for a person who is financially associated with an individual bankrupt. The provision for automatic discharge under *section 168.1* does not apply to an individual bankrupt who has refused or neglected to receive counselling. The estate of the bankrupt pays for the cost of the counselling as part of the administration of the bankruptcy.

Section 158 sets out the duties of the bankrupt. Upon bankruptcy, all property of the bankrupt vests in the trustee, subject to the exemptions discussed below. Accordingly, the bankrupt must deliver all property that is in the bankrupt's possession and control to the trustee including all books, records, documents and other materials relating to the bankrupt's property or affairs. A bankrupt must deliver all credit cards to the trustee for cancellation. (*section 158(a.1)*).

The bankrupt must complete a sworn statement of affairs showing all assets and liabilities, the names and addresses of all creditors, the particulars of any security given to creditors and such other information as may be required. The bankrupt must also disclose to the trustee all property disposed of within one year preceding the bankruptcy including any property disposed of by transfer at undervalue within five years preceding the bankruptcy.

The bankrupt must attend before the official receiver for examination under oath as to the bankrupt's conduct, the causes of the bankruptcy and the disposition of property.

The bankrupt is required to attend at the first meeting of creditors and to submit to an examination at that meeting. The bankrupt may also be required to submit to other examinations under oath about the bankrupt's property and affairs.

The bankrupt is required to aid the trustee in the realization of the bankrupt's property and if asked, the bankrupt must examine the correctness of all proofs of claim filed.

2. Property of the Bankrupt - Section 67

Section 67 of the BIA describes the property of the bankrupt which is divisible among the creditors. Generally, it includes all property of the bankrupt wherever situated at the date of bankruptcy, or that may be acquired by or devolve upon the bankrupt before discharge. It specifically excludes any property held by the bankrupt in trust for any other person, any property that is exempt from execution or seizure under the laws of the province within which the property is situated and within which the bankrupt resides, GST refunds,

prescribed payments relating to the essential needs of an individual, and RSPs, RIFs and RDSPs (other than any contributions in the twelve months preceding bankruptcy).

In Manitoba, many statutes provide exemptions to a bankrupt, including *The Executions Act, RSM 1987, c. E160, The Judgments Act, RSM 1987, c. J10, The Insurance Act, RSM 1987, c. I40, The Pension Benefits Act, RSM 1987, c. P32* and *The Registered Retirement Savings Protection Act, SM 2006, c. 29*. They allow exemptions which include:

- the necessary and ordinary clothing of the bankrupt and the members of the bankrupt's family;
- furniture and household furnishings and appliances of the bankrupt to a value of $4,500;
- professional books, tools, implements and other necessities used by the bankrupt to earn a living to a value of $7,500. This may include a motor vehicle with a value not exceeding $3,000 if the motor vehicle is required by the bankrupt for the employment, trade, occupation, profession or business or the transportation to and from the bankrupt's place of employment or business;
- equity in a residence to a maximum of $2,500, or if the residence is held in joint tenancy or tenancy in common to a maximum of $1,500;
- proceeds of a life insurance policy where there is a designated beneficiary of a particular class;
- all rights, property and interests of a plan holder in a registered plan.

6. Claims Provable in Bankruptcy

The general rule is that all debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which the bankrupt may become subject before discharge because of any obligation incurred before the date of bankruptcy, shall be deemed to be provable claims in proceedings under the BIA.

If a proof of claim for contingent or unliquidated damages is filed with the trustee, the trustee shall determine whether it is a provable claim and value it. The trustee may also apply to the court for a determination as to whether the claim is provable and if so, to value the claim. If the trustee disallows the proof of claim, the creditor has a right to appeal the trustee's decision to court.

Every creditor who wishes to be entitled to any share of the estate of the bankrupt must file a proof of claim with the trustee. A copy of the prescribed form is found in the precedents.

The proof of claim shall contain or refer to the statement of account or other documents or evidence showing the particulars of the claim and any counter-claim or set-off that the

bankrupt may have to the knowledge of the creditor. The claim should also state whether the creditor is a secured or preferred creditor.

The proof of claim must be filed before the creditor may receive any share of the estate of the bankrupt. The trustee is simply not entitled to pay any dividend to a creditor who has not filed a proof of claim.

The proof of claim must be filed by the creditor before the meeting of creditors for that creditor to have a vote.

7. Preferences and Transfers at Undervalue

The operation of the BIA is intended to ensure that all ordinary creditors should rank equally. *Section 95* and *section 96* of the BIA create a framework for challenging transactions that may diminish the value of the bankrupt's estate, reducing the money available for distribution to the creditors.

These types of transactions are called:

(a) preferences - when an insolvent debtor pays one or more creditors at the expense of other creditors; or

(b) transfers at undervalue - a disposition of property or provision of services for which no consideration or less than fair market value consideration is given or received by the debtor who is insolvent at the time or rendered insolvent by the transfer.

a) Preferences

Under *section 95 of the BIA*, a transaction that gives one creditor a preference over other creditors is void against the trustee but the proof required depends upon whether the advantaged creditor is at arm's length (*requires the intention to give a preference- see* section 95(1)(a)*)* or not at arm's length (*requires only the effect of giving a preference- see* section 95(1)(b)*)* in the transaction with the insolvent person.

if an insolvent person makes a transfer of property or other listed transaction in favour of a creditor who is dealing at arm's length and the transaction was made during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of bankruptcy, then if the transaction has the effect of giving the arm's length creditor a preference over the other creditors it raises a presumption that the transaction was intended to give that arm's length creditor a preference over the other creditors. If the arm's length creditor with the preference cannot rebut that presumption, then that transaction is void as against the trustee. See section 95(2).

If an insolvent person makes a transfer of property or other listed transaction in favour of a creditor who is not dealing at arm's length and the transaction took place during the period beginning on the day that is twelve months before the date of the initial bankruptcy event and ending on the date of bankruptcy, then if the transaction has the effect of giving the creditor who is not dealing at arm's length a preference over the other creditors that transaction is void as against the trustee without more. See *section 95(1)(b).*

For *section 95* to apply, the following components must exist:

i. Transfer of Property

There must be a transfer of property made, provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered;

ii. By an Insolvent Person

Section 2 of the BIA defines insolvent person. The trustee must prove on a balance of probabilities that the debtor was insolvent at the date of the transfer, charge, payment, obligation or judicial proceeding. Proof is generally adduced by affidavit evidence from the trustee, including information respecting the financial status of the debtor at the time, financial statements, evidence from third parties or the bankrupt individual.

iii. In Favour of a Creditor

A creditor is defined in *section 2* of the BIA as a person having a claim provable as a claim under the BIA. A person must be a creditor at the time the impugned transaction was made. The transaction must have the effect of giving the creditor a preference over the other creditors.

iv. Occurs Within the time limits

The timing of the transaction is treated strictly.

The transaction will not be caught by *section 95* if the transaction with the arm's length creditor takes place outside of the three months of the initial bankruptcy event.

The transaction will not be caught by *section 95* if the transaction with the creditor who is not at arm's length takes place outside the twelve months of the initial bankruptcy event.

The date of the initial bankruptcy event is the assignment in bankruptcy of the debtor, or the filing of a proposal or notice of intention to file a proposal, or proceedings under the *Companies Creditors Arrangements Act, R.S.C., 1985, c. C-36*.

It is often because of apparent preferences that creditors decide to make an application for a bankruptcy order against the debtor, so that the trustee may attack the apparent preference for the advantage of all other creditors.

v. With a View to Giving an Arm's Length Creditor a Preference Over Other Creditors

If the other requirements of *section 95(1)* are proven and the transaction with the creditor who is not at arm's length has the effect of giving the creditor a preference over the other creditors, then the transaction is void as against the trustee.

However, *section 95(2)* provides if the transaction with an arm's length creditor has the effect of giving one creditor a preference over another, the trustee must still prove that the transaction was made "with a view to giving" the arm's length creditor a preference over the others. The trustee is helped in meeting this requirement because the effect of giving one creditor a preference over another raises a presumption that the transaction was made with a view to giving the preference. The arm's length creditor who received the preference must rebut the presumption by leading evidence to the contrary or else the transaction with the arm's length creditor will be void as against the trustee.

b) Transfers at Undervalue

In an undervalue transfer at arm's length, the trustee will have a remedy if:

(a) the transfer occurred during the period beginning one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy or date of commencement of proposal proceedings;

(b) the debtor was insolvent at the time of the transfer or was rendered insolvent by the transfer; and

(c) the debtor intended to defraud, defeat or delay a creditor. The trustee must prove or satisfy all three conditions.

In an undervalue transfer not at arm's length, the trustee will have a remedy if:

(a) the transfer occurred during the same one year period; or

(b) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day that is one year before the date of the initial bankruptcy event where

(i) the debtor was insolvent at the time of the transfer or was rendered insolvent by the transfer; or

(ii) the debtor intended to defraud, defeat or delay a creditor.

The trustee may recover against the other party privy to the transfer under value, a judgment for the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor.

8. Order of Priorities and Scheme of Distribution

Section 136 of the BIA deals with the order of priority of claims. Subject to the rights of secured creditors, the proceeds realized from the property of the bankrupt shall be applied in priority of payment as follows:

a) Preferred Claims

- funeral expenses if bankrupt deceased;
- costs of administration including trustee's fees and trustee's legal fees;
- superintendent's levy under *section 147;*
- wages, salaries, commissions, compensation or disbursements to a maximum of two thousand dollars per employee;
- unremitted pension plan contributions;
- a secured creditor has a preferred claim for the difference between the amount it would have received but for *sections 81.5 and 81.6* and the amount it actually received;
- certain debts referred to in *section 178(1)(b) and (c)*;

- municipal taxes (assessed or levied within 2 years preceding bankruptcy) other than realty taxes not exceeding the value of the interest of the bankrupt in the property;
- landlord's arrears for rent for three months next preceding the bankruptcy and accelerated rent of three months after the bankruptcy as entitled under the lease;
- fees and costs referred to in *section 70(2)* of the BIA;
- claim for injuries to employees of the bankrupt not covered by any *Workers Compensation Act*.

b) Wage Earner Protection Program Act

The *Wage Earner Protection Program Act, S.C. 2005, c. 47, section 1* establishes the "WEPP," the purpose of which is to make payments to individuals for wages owed to them by employers who are bankrupt or subject to a receivership. "Wages" includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation.

Payments are made by the federal government from the consolidated revenue fund. If payment is made under WEPP to an individual for eligible wages, the federal government is, up to the amount of the payment, subrogated to any rights the individual may have in respect of the eligible wages against **(a)** the bankrupt or insolvent employer; and **(b)** if the bankrupt or insolvent employer is a corporation, a director of the corporation.

The federal government may recover the payments from the employer's assets in the case of a bankrupt employer, based on a preferred claim under *section 136 of the BIA.* The government will then have an unsecured claim against the employer's estate for amounts paid for severance pay or termination pay.

c) Unsecured Claims

The preferred claims are paid in full in the order of priority listed. After preferred claims are paid in full any remaining balance is distributed *pari passu** among the unsecured creditors. (**pari passu – on equal footing – treat all creditors equally, so each receives the same fractional amount as other creditors at the same time.)*

9. Release of Debts on Discharge of a Bankrupt

An order of discharge releases the bankrupt from most of the obligations which existed at the date of bankruptcy (including contingent liabilities such as guarantees). The debts and obligations not released are set out in *section 178 of the BIA*.

An individual who has never been bankrupt before is entitled to an automatic discharge (see *section 168.1(1)(a) of the BIA*)

(i) 9 months after the date of assignment, unless an opposition (see *section 168.2 of the BIA*) to the discharge is filed or the bankrupt is required to make surplus income payments under *section 68 of the BIA*; or

(ii) 21 months after the date of assignment unless an opposition to the discharge is filed.

In the event of an automatic discharge, the bankrupt is not required to appear in court. Before the end of the prescribed automatic discharge date, the trustee prepares a report according to *section 170(1) of the BIA* and serves it upon the Superintendent of Bankruptcy, the bankrupt, and any creditor who has requested a copy of it, and in practice, the bankrupt provides an affidavit to the trustee. The trustee also provides notice to creditors of the impending discharge. Anyone wishing to oppose the discharge must give the trustee notice of opposition and the grounds for opposition before the time appointed for hearing of the application for discharge. The trustee or any creditor may attend in court and be heard in person or by counsel.

If there is opposition, the trustee applies to have the matter heard by the court.

B. RECEIVERSHIPS

1. Definition

Receivership may be broadly defined as a mechanism for the recovery of monies loaned, whereby following a default by the debtor the secured creditor may appoint a receiver to liquidate, or a receiver-manager to operate and/or liquidate, the assets pledged as security. A receiver takes control of the assets while a receiver-manager takes control of the assets and undertakings of the debtor. A receiver-manager can operate the business as a going concern, an option that is not available to a receiver.

2. Causes

Receiverships generally occur where a secured creditor has lost confidence in the debtor's ability to resolve its financial problems. It is common for the management of a corporation in this position to make every effort to prevent, or at least delay, the appointment of a receiver, for upon the receiver's appointment, management will lose effective control of the corporation's affairs.

3. Appointment

The receiver may be court appointed or may be privately appointed (under the provisions of a security agreement).

a) Court-Appointed Receiver

Section 55 of The Court of Queen's Bench Act, SM 1988-89, c. 4 the court may appoint a receiver where it appears to the judge to be just or convenient to do so. The receiver must be a licensed insolvency trustee.

Section 46 of the BIA allows the court, where necessary for the protection of the estate of a debtor, to appoint an interim receiver at any time after the filing of an application for a bankruptcy order and before a bankruptcy order is made. The interim receiver appointed may take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value and exercise such control over the business of the debtor as the court deems advisable, but the interim receiver shall not unduly interfere with the debtor in the carrying on of its business.

Section 47 of the BIA allows the court, before service of a notice of intention under *section 244(1) of the BIA*, to appoint an interim receiver of all or any part of the debtor's property. The power of the interim receiver may be to take possession of all or part of the debtor's property, exercise such control over the property and the debtor's business as the court considers advisable, take conservatory measures, and

summarily dispose of property that is perishable or likely to depreciate rapidly in value. The interim receiver's appointment expires on the earliest of

(i) the taking of possession of the debtor's property by a receiver or licensed insolvency trustee; and

(ii) the expiry of thirty days after the day on which the interim receiver was appointed, or any period specified by the court.

Under *section 243* of the BIA, on application by a secured creditor, the court may appoint a receiver where it considers it just or convenient to do so to

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of a debtor;

(b) exercise any control the court considers advisable over that property and the debtor's business; or

(c) take any other action that the court considers advisable.

The court may not appoint a receiver under *section 243* before the expiry of the ten-day notice period under *section 244* of the BIA unless the debtor consents to an earlier enforcement or the court considers it appropriate. The appointment of a receiver under *section 243* has the advantage of being national in scope, unlike an appointment under *section 55* of *The Court of Queen's Bench BIA*. It eliminates the need to obtain separate appointments in each province or territory where the debtor has assets.

There is a distinction in practice between cases where an appointment is sought where the secured party has an undisputed proprietary right, such as a charge under a debenture, and those cases where there is a substantive dispute over property and it is necessary to preserve the property from some apprehended danger pending the resolution of the dispute. In the case of a debenture holder seeking to realize on the security, the appointment of a receiver will be made almost as a matter of course, while in the latter case, the court must be satisfied, in a sense similar to the application for an injunction, that there truly is some danger from which the property in question must be preserved and that the circumstances warrant the court exercising its extraordinary jurisdiction.

b) Privately Appointed Receiver

The other common form of receiver is the privately appointed one. Debentures, general security agreements, and other types of security agreements commonly provide that upon default, one of the remedies available to the holder of the security will be the appointment of a receiver or a receiver-manager.

The mode of appointment of a private receiver is usually a very simply written direction by the secured creditor which takes effect as between the secured creditor and the receiver upon delivery to and acceptance by the debtor.

The receiver is appointed after the demand for payment of the loan and notice of intention to enforce security under *section 244* of the BIA has been made upon the debtor.

4. Notice Required to be Given by Secured Creditor

If a lender intends to enforce its security against all or substantially all of an insolvent debtor's accounts receivable, inventory or business assets, it must provide the debtor with at least ten days' notice of its intention to do so according to *section 244* of the BIA. The debtor is then able to take advantage of this time to make efforts to resolve the debt or to file a notice of intention to make a proposal to creditors.

5. Duties and Powers of the Receiver or Receiver-Manager

The duties and powers of the receiver flow from the terms of the security agreement under which the receiver is appointed or the order of the court. The more common duties and powers are:

- to take possession of the assets charged;
- to carry on and manage the operation of all or part of the business;
- to borrow money and grant a prior charge on the assets by way of receiver's certificates;
- to sell or otherwise dispose of the assets by private sale, public tender or by auction.

If the security agreement is ambiguous about the duties and powers of the receiver, the receiver will normally seek the direction of the court.

Historically, receivers were governed by common law. However, the various Corporations Acts of Canada and now the various Personal Property Security Acts impose certain duties on receivers. *The Corporations Act, RSM 1987, c. C225* of Manitoba requires the receiver to act honestly and in good faith and to deal with any property of the corporation in the receiver's possession or control in a commercially reasonable manner. Similarly, *The Personal Property Security Act, SM 1993, c. 14* requires secured parties and receivers to proceed in a commercially reasonable manner.

6. The Position of Directors of a Corporation in a Receivership

The powers of the directors of the corporation that the receiver-manager is authorized to exercise may not be exercised by the directors until the receiver-manager is discharged (*section 91 of The Corporations Act*).

The statutory obligations of the directors do remain in existence, however, such as the obligation to pay employees' wages both under *The Corporations Act* and *The Employment Standards Code*, SM 1998, c. 29. Also, the directors and officers maintain the right to take any actions not specifically granted to the receiver-manager. For example, the directors still have the authority to cause the corporation to sue the secured creditor, or the receiver-manager, or both if they feel they have a proper action against them for damages.

In many instances, the receiver requests assistance in performing their duties from the directors and officers, who are paid a reasonable remuneration for their efforts.

7. Environmental Issues

The *BIA* creates a special status for trustees and receivers regarding environmental matters. Notwithstanding any provision of any federal or provincial legislation about the protection of the environment, under *section 14.06(2)* neither a trustee nor a receiver is personally liable in respect of any environmental condition that arose or occurred before or after their appointment, except where the condition arose or the damage occurred as a result of the gross negligence or willful misconduct of the trustee or receiver.

As a consequence of that special legislated protection for trustees and receivers, many secured creditors who are concerned about potential environmental problems with any of the debtor's assets they may have under security may wish to make an application for a bankruptcy order or appoint a receiver over the debtor's assets and undertakings instead of taking possession directly as a secured creditor.

8. Differences Between Bankruptcy and Receivership

a) Nature of Distinction

The *BIA* is a federal statute which primarily concerns itself with the rights of unsecured creditors and provides a method whereby the estate of an insolvent person can be

liquidated, subject to the rights of secured creditors, and then distributed to the unsecured creditors in an orderly fashion.

Receivership, on the other hand, is a contractual remedy (assuming that there is a security agreement in place which provides for it), an equitable remedy, or a statutory remedy (in the case of an application under *The Corporations Act*) which is governed largely by an agreement between the parties, provincial law, and/or the common law. It is available for the most part only to creditors secured by a debenture, security agreement or similar instrument, or to other creditors who may have been able to obtain an order under the provisions of *The Court of Queen's Bench Act*.

Historically, where a creditor was secured by a debenture or security agreement, upon default under that instrument, the creditor would immediately appoint a receiver or receiver-manager to realize on the security. The creditor would very seldom consider petitioning the debtor into bankruptcy because this was a remedy usually used by unsecured creditors. There are many reasons, however, why a secured creditor may wish to petition the debtor into bankruptcy. When there are substantial unpaid debts to landlords and to many of the government authorities who now have statutory liens, it may be wise for the secured creditor to petition the debtor into bankruptcy to improve the creditor's priority position relative to these other creditors.

b) Advantages to a Secured Creditor of the Bankruptcy of a Debtor

i. Landlords

Where a debtor has been operating from leased premises, there is often a definite advantage to the secured creditor if the debtor is petitioned into bankruptcy. In a receivership, a landlord has the right to distrain for rent in arrears against the goods of the tenant even though those goods may be charged in favour of a secured creditor under a debenture or security agreement. *Section 37* of *The Landlord and Tenant Act, RSM 1987, c. L70* essentially gives the landlord's right of distress priority over the rights of a secured creditor whose claim to the goods is by a security agreement as defined in *The Personal Property Security Act*.

Also, the landlord may have rights under the lease to terminate the lease, and if the only person in control of the property and assets of the debtor is a receiver or receiver-manager, the landlord can ask the debtor to immediately vacate the premises while at the same time distraining for arrears of rent.

In a bankruptcy, the landlord has no right to levy distress or to evict the trustee. In fact, under *section 73(4) of the BIA,* where the landlord has levied distress and sold the assets to pay the rent, the money realized less the costs of the distress and sale shall be paid back to the trustee. Further, under *section 46 of The Landlord and Tenant Act,* the trustee has the right to elect to retain the whole, or part, of the unexpired term of the lease or to assign, surrender or disclaim the lease. A trustee who wishes to assign the lease must obtain the approval of the court by satisfying the court that the assignee of the lease is a fit and proper person.

Under *section 136 of the BIA,* a landlord is treated only as a preferred creditor, whose rights are subject to those of a secured creditor. Therefore, if there are substantial arrears of rent and the value of the assets is slight, the secured creditor may be well advised to petition the debtor into bankruptcy, thereby moving the landlord behind the secured creditor in priority.

ii. Deemed Trusts and Statutory Liens

Many statutes, both provincial and federal, purport to create priority positions in favour of certain creditors, usually government departments or agencies.

All three levels of government assert various priority claims under statutes, some of the more frequently encountered of which are:

- **municipal claims:**

  - *Section 347(1)* of *The Municipal Act, SM 1996, c. 58* provides for a lien and charge on real property and *section 347(2)* provides for a lien and charge on personal property for unpaid taxes;

  - *Section 353* of *The City of Winnipeg Charter, SM 2002, c. 39* provides for a special lien on real property for all unpaid taxes and a lien and charge on personal property for business tax;

- **provincial government:**

  - *Section 27(1)* of *The Manitoba Hydro Act, RSM 1987, c. H190* establishes in favour of Manitoba Hydro the same priority rights as a landlord would have in the collection of unpaid hydro bills;

  - *The Tax Administration and Miscellaneous Taxes Act, RSM 1987, c. R150 sections 64* and *66* provide for a lien and deemed trust in priority to secured creditors for unpaid RST and other tax liabilities.

- **federal government:**

  - The federal government claims priority over assets of an estate in receivership under several statutes including the *Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.)*, *Excise Tax Act, R.S.C., 1985, c. E-15* (for GST), the *Employment Insurance BIA, S.C. 1996, c. 23*, and the *Canada Pension Plan Act, R.S.C., 1985, c. C-8,* all of which essentially state that unpaid monies due to these federal departments are deemed to have been deducted or withheld in trust and to have been kept separate and apart from the other assets of the debtor and to form no part of the estate of the debtor, and/or provide for the creation of secured interests in favour of the Crown.

Accordingly, if a secured creditor appoints a receiver over the property and assets of a debtor who has substantial unpaid debts due to these various government departments and agencies who claim priority positions under these statutes, it may again be in that secured creditor's best interest to petition the debtor into bankruptcy. In that circumstance, certain government agencies and the landlord would only be preferred creditors who would rank behind the secured creditor in priority.

C. PRECEDENTS

1. Assignment under BIA

FORM 21

Assignment for the General Benefit of Creditors

(Section 49 of the Act)

(*Title Form 1*)

This indenture made this _____ ____, 2_____,

between

_____

(*Insert the full legal name of the debtor*)

_____

_____

_____

(*Insert address of the debtor*)

called "the debtor"

and

_____

(*Insert the name of the trustee*)

called "the trustee."

(Check applicable category)

~ Natural person ~ Corporate or other legal entity

The debtor is insolvent and desires to assign and to abandon all property for distribution among the debtor's creditors, according to the Act,

This indenture witnesses that the debtor assigns to the trustee all the debtor's property for the uses, intents and purposes provided by the Act.

Signed at the _____ of _____, in the Province of _____

in the presence of _____

_____	_____	_____
Witness	Date	Debtor (or legal representative of the debtor)

Notes: If the debtor is a corporation, a certified copy of the resolution of the board of directors must be attached to this document.

If the debtor is deceased, attach a copy of the Court Order.

If a copy of this form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

2. Application for Bankruptcy Order

File No. BK-

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: The Bankruptcy of JOHN DOE

BETWEEN

RICHARD ROE,

applicant,

- and -

JOHN DOE,

respondent.

APPLICATION FOR BANKRUPTCY ORDER

PETER, PAUL & CO
Barristers and Solicitors,
223 Main Street
Winnipeg, Manitoba.
R3C 3W2

949-2327
Fax - 957-0121

Client File No. 1234-8

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE BANKRUPTCY OF JOHN DOE

RICHARD ROE,

applicant,

- and -

JOHN DOE,

respondent.

APPLICATION FOR BANKRUPTCY ORDER

I, RICHARD ROE, of the City of Winnipeg, in Manitoba hereby apply to the Court that JOHN DOE be adjudged bankrupt and that a Bankruptcy Order be made in respect of the property of JOHN DOE, lately residing at the City of Winnipeg, in the Province of Manitoba and say:

1. THAT the said JOHN DOE now resides at the City of Winnipeg, in Manitoba within the jurisdiction of this Court.

2. THAT the said JOHN DOE is justly and truly indebted to me in the sum of $[insert].

3. THAT I do not, nor does any person on my behalf, hold any security on the said debtor's property, or on any part thereof, for the payment of the said sum.

4. THAT JOHN DOE, within the six months next preceding the date of the filing of this application, has committed the following acts of bankruptcy, namely;

   (a) he has ceased to meet his liabilities generally as they became due.

5. THAT DAVID R. JONES, of the City of Winnipeg, in Manitoba, is a person qualified to act as Trustee of the property of the said debtor, has agreed to act as such and is acceptable to the applicant.

DATED at Winnipeg, Manitoba, this day of , 20 .

_____ _____

WITNESS SIGNATURE OF APPLICANT

ISSUED at the City of Winnipeg, in the Province of Manitoba, this day of , 20 .

_____

REGISTRAR

a) Affidavit of Verification of Statements in Application

File No. BK-

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE BANKRUPTCY OF JOHN DOE

BETWEEN:

RICHARD ROE,

applicant,

- and -

JOHN DOE,

respondent.

AFFIDAVIT OF VERIFICATION OF STATEMENTS IN APPLICATION

PETER, PAUL & CO
Barristers and Solicitors,
223 Main Street
Winnipeg, Manitoba.
R3C 3W2

949-2327

Fax - 957-0121

Client File No. 1234-8

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE BANKRUPTCY OF JOHN DOE

BETWEEN:

RICHARD ROE,

applicant,

- and -

JOHN DOE,

respondent.

AFFIDAVIT OF VERIFICATION OF STATEMENTS IN APPLICATION

I, RICHARD ROE, of the City of Winnipeg, in Manitoba, the applicant named in the application hereunto annexed,

MAKE OATH AND SAY:

1. THAT JOHN DOE is justly and truly indebted to me in the sum of $[insert], as stated in the said application.

2. THAT the facts alleged in the said application are within my own knowledge and belief.

SWORN before me at the City of Winnipeg, in the Province of Manitoba, this day of , 20 .)

_____
RICHARD ROE

_____
A Commissioner for Oaths
in and for the Province of Manitoba.
My commission expires: _____

b) Consent of Trustee

File No. BK-

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE BANKRUPTCY OF JOHN DOE

BETWEEN:

RICHARD ROE,

applicant,

- and -

JOHN DOE,

respondent.

CONSENT OF LICENSED INSOLVENCY TRUSTEE

PETER, PAUL & CO
Barristers and Solicitors,
223 Main Street
Winnipeg, Manitoba.
R3C 3W2

949-2327

Fax - 957-0121

Client File No. 1234-8

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE BANKRUPTCY OF JOHN DOE

BETWEEN:

RICHARD ROE,

applicant,

- and -

JOHN DOE,

respondent.

CONSENT OF LICENSED INSOLVENCY TRUSTEE

I, DAVID R. JONES, of the City of Winnipeg, in Manitoba hereby consent to my appointment as trustee of the property of JOHN DOE.

DATED at Winnipeg, Manitoba, this day of , 20 .

_____
DAVID R. JONES

3. Bankruptcy Order

File No. BK-

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE BANKRUPTCY OF JOHN DOE

BETWEEN:

RICHARD ROE,

applicant,

- and -

JOHN DOE,

respondent.

BANKRUPTCY ORDER

PETER, PAUL & CO
Barristers and Solicitors,
223 Main Street
Winnipeg, Manitoba.
R3C 3W2

949-2327

Fax - 957-0121

Client File No. 1234-8

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE BANKRUPTCY OF JOHN DOE

BETWEEN:

RICHARD ROE,

applicant,

- and -

JOHN DOE,

respondent.

BANKRUPTCY ORDER

UPON the application of Richard Roe, of the City of Winnipeg, in the Province of Manitoba, a creditor, filed the day of , 20 .

AND UPON reading the affidavit of Richard Roe, filed, and on hearing the submissions of counsel for the applicant;

AND it appearing to the Court that the following act of bankruptcy has been committed:

> That John Doe within the six months next preceding the date of the filing of this application, ceased to meet his liabilities generally as they became due.

1. IT IS ORDERED that the said John Doe lately residing at the City of Winnipeg, in the Province of Manitoba, be and is hereby adjudged bankrupt and a bankruptcy order is hereby made against the said John Doe.

2. IT IS FURTHER ORDERED that David R. Jones of the City of Winnipeg, in Manitoba, be and is hereby appointed trustee of the estate of the said bankrupt.

3. IT IS FURTHER ORDERED that the trustee give security in an amount to be fixed by the official receiver.

4. IT IS FURTHER ORDERED that the costs of and incidental to this application and order be paid to the applicant out of the assets of the estate upon taxation thereof.

_____
Registrar in Bankruptcy

You, John Doe, being the within named bankrupt, are required to attend at the office of , the official receiver, on the day of , 20 at the hour of o'clock in the noon, there to answer such questions with respect to your conduct, the causes of your bankruptcy and the disposition of your property as may be put by the said Official Receiver, and take notice that if you fail to present yourself for examination, the court may by warrant cause you to be apprehended and brought up for examination and may order you to be committed to the common gaol for a term not exceeding three years.

_____
Official Receiver

The solicitors for the applicant are Peter, Paul & Co., whose address is 223 Main Street, Winnipeg, Manitoba R3C 2W2.

4. Proposal

File No. BK-

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE PROPOSAL OF JOHN DOE,
OF THE CITY OF WINNIPEG,
IN THE PROVINCE OF MANITOBA

PROPOSAL

PETER, PAUL & CO
Barristers and Solicitors,
223 Main Street
Winnipeg, Manitoba.
R3C 3W2

949-2327

Fax - 957-0121

Client File No. 1234-8

THE QUEEN'S BENCH
IN BANKRUPTCY
Winnipeg Centre

IN THE MATTER OF: THE PROPOSAL OF JOHN DOE,
OF THE CITY OF WINNIPEG,
IN THE PROVINCE OF MANITOBA

PROPOSAL

I, JOHN DOE, of the City of Winnipeg, in Manitoba the above named debtor hereby submit the following proposal under the *Bankruptcy and Insolvency BIA*:

1. THAT payment of the claims of my secured creditors shall be made in accordance with the following manner:

   Secured creditors shall be paid in accordance with the present credit arrangements existing between me and the holders of secured claims, or as may be arranged between me and the holders of secured claims, or the holders of secured claims shall be permitted to realize upon their security.

2. THAT payment in priority to all other claims of all claims directed by the said Act to be so paid in the distribution of the property of an insolvent person shall be provided for as follows:

   Preferred claims, without interest, to be paid in full in priority to all claims of ordinary creditors.

3. THAT provision for payment of all proper fees and expenses of the trustee including payment of his/her legal fees and disbursements shall be made in the following manner:

   All such fees and expenses shall be paid in priority to all claims of creditors.

4. THAT the claims arising in respect of goods supplied, services rendered or other consideration given to be after the date of this proposal shall be paid in full in priority to the claims of the preferred and ordinary creditors existing at the date of this proposal.

5. THAT provision for the payment of all claims of ordinary creditors, including contingent or unliquidated claims arising out of any transaction entered into by me prior to the date of this proposal shall be made as follows:

10% of the outstanding principal amounts of debts owing to ordinary creditors, without interest, shall be paid on each of September 30, 20__, December 31, 20__, March 31, 20__, June 30, 20__ in full satisfaction of all existing debts owing by me to ordinary creditors.

6. THAT DAVID R. JONES of the City of Winnipeg, in Manitoba shall be the trustee under this proposal.

7. THAT at the meeting of the ordinary creditors to be held to consider this proposal, the said creditors shall appoint up to five inspectors whose powers shall be to advise the trustee from time to time with respect to any matter that the trustee may refer to them.

DATED at Winnipeg, Manitoba this day of , 20 .

_____
JOHN DOE

5. Proof of Claim

Form 31

PROOF OF CLAIM

(Section 50.1, 81.5, 81.6, Subsections 65.2(4), 81.2(1), 81.3(8), 81.4(8), 102(2), 124(2), 128(1), and Paragraphs 51(1)(e) and 66.14(b) of the Act)

All notices or correspondence regarding this claim must be forwarded to the following address:

_____

_____

In the matter of the bankruptcy *(or* proposal *or the* receivership) of _____ *(name of debtor),* of _____ *(city and province)* and the claim of _____, creditor.

I, _____ *(name of creditor or representative of the creditor),* of _____ *(city and province),* do hereby certify:

1. That I am a creditor of the abovenamed debtor *(or* that I am _____ *(state position and title)* of _____ *(name of creditor or representative of the creditor)).*

2. That I have knowledge of all the circumstances connected with the claim referred to below.

3. That the debtor was, at the date of bankruptcy *(or* the date of receivership *or, in the case of a proposal,* the date of the notice of intention *or* of the proposal, *if no notice of intention was filed),* namely the _____ day of _____ , 20_, and still is, indebted to the creditor in the sum of $_____, as specified in the statement of account (*or* affidavit) attached and marked Schedule "A," after deducting any counterclaims to which the debtor is entitled. *(The attached statement of account or affidavit must specify the vouchers or other evidence in support of the claim).*

4. ***(Check and complete appropriate category.)***

❒ A. UNSECURED CLAIM of $_____

(Other than as a customer contemplated by Section 262 of the Act)

That in respect of this debt, I do not hold any assets of the debtor as security and

(check appropriate description)

❒ Regarding the amount of $_____, I claim a right to a priority under section 136 of the Act.

❒ Regarding the amount of $_____ , I do not claim a right to a priority.

(Set out on an attached sheet details to support priority claim)

❒ B. CLAIM OF LESSOR FOR DISCLAIMER OF A LEASE $_____

That I hereby make a claim under subsection 65.2(4) of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based.)

❒ C. SECURED CLAIM OF $_____

That in respect of this debt, I hold assets of the debtor valued at $_____ as security, particulars of which are as follows:

(Give full particulars of the security, including the date on which the security was given and the value at which you assess the security, and attach a copy of the security documents.)

❒ D. CLAIM BY FARMER, FISHERMAN, OR AQUACULTURIST of $_____

That I hereby make a claim under subsection 81.2(1) of the Act for the unpaid amount of $_____

(Attach a copy of sales agreement and delivery receipts.)

❒ E. CLAIM BY WAGE EARNER OF $_____

❒ That I hereby make a claim under subsection 81.3(8) of the Act in the amount of **$**_____

❒ That I hereby make a claim under subsection 81.4(8) of the Act in the amount of **$**_____

❒ F. CLAIM OF EMPLOYEE FOR UNPAID AMOUNT REGARDING PENSION PLAN OF

$_____

❒ That I hereby make a claim under subsection 81.5 of the Act in the amount of **$**_____

❒ That I hereby make a claim under subsection 81.6 of the Act in the amount of **$**_____

❒ G. CLAIM AGAINST DIRECTOR $_____

(To be completed when a proposal provides for the compromise of claims against directors)

That I hereby make a claim under subsection 50(13) of the Act, particulars of which are as follows:

(Give full particulars of claim, including the calculations upon which the claim is based.)

❒ H. CLAIM OF A CUSTOMER OF A BANKRUPT SECURITIES FIRM $_____

That I hereby make a claim as a customer for net equity as contemplated by section 262 of the Act, particulars of which are as follows:

(Give full particulars of the claim, including the calculations upon which the claim is based)

5. That, to the best of my knowledge, I am (*or* the above-named creditor is) (*or* am not *or* is not) related to the debtor within the meaning of section 4 of the Act, and have (*or* has) (*or* have not *or* has not) dealt with the debtor in a non arm's-length manner

6. That the following are the payments that I have received from, the credits that I have allowed to, and the transfers at undervalue within the meaning of subsection 2(1) of the Act that I have been privy to or a party to with the debtor within the three months (*or, if the creditor and the debtor are related within the meaning of section 4 of the Act or were not dealing with each other at arm's length*, within the 12 months) immediately before the date of the initial bankruptcy event within the meaning of subsection 2(1) of the Act: (*provide details of payments, credits and transfers at undervalue*)

7. **(*Applicable only in the case of the bankruptcy of an individual*)**

❒ Whenever the trustee reviews the financial situation of a bankrupt to redetermine whether or not the bankrupt is required to make payments under section 68 of the Act, I request to be informed, pursuant to paragraph 68(4) of the Act, of the new fixed amount or of the fact that there is no longer surplus income.

❒ I request that a copy of the report filed by the trustee regarding the bankrupt's application for discharge pursuant to subsection 170(1) of the Act be sent to the above address.

Dated at _____ this _____ day of _____.

_____ _____

Witness Creditor

Telephone No.: _____

Fax No.: _____

Email Address: _____

NOTE: If an affidavit is attached, it must have been made before a person qualified to take affidavits.

WARNINGS: A trustee may, pursuant to subsection 128(3) of the Act, redeem a security on payment to the secured creditor of the debt or the value of the security as assessed, in a proof of security, by the secured creditor.

Subsection 201(1) of the Act provides severe penalties for making any false claim, proof, declaration or statement of account.