

PINDER BUECKERT & ASSOCIATES INC.

**DUTIES, RESTRICTIONS, AND RESPONSIBILITIES
IMPOSED ON A BANKRUPT**

The purpose of the following is to explain in layman terms the duties, restrictions, and responsibilities imposed on an individual while in bankruptcy. The Trustee will review these in more detail with you as part of the assessment process which is required as part of the Trustee's duties to the debtor. While the Trustee has a duty of care to provide you with complete and accurate information regarding your options, he also has a duty of care to the unsecured creditors whom he also represents in this process.

1. WHAT IS A BANKRUPTCY?

It is a legal process which provides immediate relief to an overburdened debtor by halting legal actions by creditors (garnishments, seizures, lawsuits, etc.); afterwards, it results in eliminating the debtor's responsibility for the majority, if not all, of the debts and providing a fresh financial start.

While a debtor may normally keep furniture, clothing, personal effects, a motor vehicle and some other assets as provided by the ENFORCEMENT OF MONEY JUDGEMENTS ACT (EMJA), all other assets are generally subject to the Trustee's interest on behalf of unsecured creditors. These will be realized on and proceeds will be available for the bankruptcy estate. There are some exceptions, such as the interest of secured creditors, other property claimants, etc. The Trustee will review your financial situation with you in more detail.

2. WHO CAN GO BANKRUPT OR FILE A FORMAL PROPOSAL?

In order to file an assignment in bankruptcy or a proposal, an individual has to meet certain conditions, ie:

- Owe at least \$1000.00;
- Be unable to meet regular payments as they fall due; and,
- The property owned is insufficient to enable payments of all debts.

In general, a bankruptcy or a proposal may be an appropriate solution for those who find themselves in a situation that meets one or more of the above criteria.

3. STAY OF PROCEEDINGS (Sections 60, 70, and 71)

The filing of a bankruptcy or a proposal halts all garnishments, lawsuits, or Court proceeding initiated, or that may be initiated.

The Court may grant leave to creditors to pursue lift the Stay in certain circumstances.

4. DISCHARGE FROM BANKRUPTCY

In the case of a first-time bankruptcy, you may be eligible for an automatic discharge at the expiration of either a 9 month or 21 month period after the date of bankruptcy. The length of time in bankruptcy is in part determined by household income and expenses and the size of the household being supported. However if there are conduct issues or should there be an objection filed prior to the discharge date, the Trustee will arrange for a discharge hearing to be heard by the Bankruptcy Court. After being informed about the

facts and the present economic situation of the bankrupt, the Court may issue any of the following orders:

- (a) **Absolute** It applies immediately and means that the debtor is no longer responsible for the debts he had, except for those covered by Section 178 (listed below), and debts due to secured creditors relating to assets retained by the debtor (ie. residential mortgage);
- (b) **Adjourned** the hearing is postponed indefinitely or to a later date for further consideration (you remain in bankruptcy);
- (c) **Conditional** Before receiving an absolute discharge, the bankrupt may be required to pay a certain sum of money for distribution in the bankruptcy.
- (d) **Suspended** The bankruptcy is extended for some period of time (usually a result of conduct issues before or during the bankruptcy).
- (e) **Refused** Court may refuse a discharge if the conduct is severe enough. (follow up court applications may be made)

Upon obtaining a discharge, the bankrupt is released from all debts, except for (Section 178):

- ❖ fines of penalties imposed by a Court of default on bail bond;
- ❖ alimony or support of child or spouse;
- ❖ court findings of fraud, embezzlement, misappropriation or defalcation while the property was entrusted, fraudulent misrepresentation , ie. borrowing money without full disclosure of existing debts;
- ❖ non-disclosure to the Trustee (these creditors will be entitled to the dividend that would have been paid if a claim had been submitted in the bankruptcy);and,
- ❖ Canada and Saskatchewan student loans within 7 years after the date on which the debtor ceased to be a full or part-time student

5. **PROPERTY OF THE BANKRUPT (Section 67and 68)**

The assets of the bankrupt, regardless of location, will belong to the Trustee for the creditors (subject to exemptions and rights of secured creditors), whereas assets belonging to third parties will be released by the Trustee, when their claims are proven. Property acquired by the bankrupt, such as lottery winnings or inheritance received after the bankruptcy, but prior to discharge, must be turned over to the Trustee as it constitutes as an asset divisible among the creditors.

Where a creditor holds security against any asset, they will normally be allowed to exercise their rights for that asset, as described in their security agreement or as prescribed in legislation. The trustee may have an interest in the equity of the asset and can exercise a right to redeem the security.

Tax refunds

An income tax return for the period of January 1 to the date of bankruptcy will be prepared by the Trustee. Tax refunds for that period, as well as refunds of previous years are an asset of the bankruptcy estate. A second tax return is completed for the period from the date of bankruptcy to December 31 in the year the bankruptcy was filed. Any refund for this period is also an asset of the bankruptcy estate. A liability for this period is required to be paid by the bankrupt.

Exempt property

The Trustee will not take possession of certain assets because they are exempt from seizure under the laws of the province. Exempt property will vary from one province to another but will normally cover RRSP's, clothing, household furniture, tools of trade up to a certain monetary limit, some house equity and a vehicle. Property claimed exempt by the debtor may still be subject to the rights of secured creditors (see EMJA). Farmers are allowed additional exemptions which are covered in the Saskatchewan Farm Security Act.

Wages and all sources of Income

When a bankrupt earns income in excess of that necessary to maintain a reasonable standard of living (**see surplus income standard**), they are required to make payments to the Trustee during the administration until the date of discharge. The amount of the required payment will be discussed and usually determined between the bankrupt and the Trustee, taking into consideration the requirements in Section 68 for surplus income. In the event of a dispute, the matter can be mediated and if no resolution is found there, the Court may be asked to decide on the amount to be paid. Should there be any material change in the income or family situation of the bankrupt, the amount of the payment may be varied. The calculation of surplus income is based on the average net monthly income over the length of the bankruptcy administration (9 or 21 months in the case of a first time bankrupt). Repeat bankruptcies will be longer.

All income sources during bankruptcy such as T-4 income, self-employed income, pension income, welfare and disabled persons benefits, child tax benefits, severance payments, retroactive pay, etc are subject to the calculations of surplus income.

6. **PREFERENCES and TRANSFERS of PROPERTY at UNDERVALUE**
Gifts or transfers of property during the twelve months prior to bankruptcy (five years or more in certain circumstances) are subject to review by the Trustee and may be overturned if the transactions were prejudicial to the creditors of the bankruptcy estate.

If during the three months prior to bankruptcy (twelve months if a related person), a creditor received preferential or special treatment, such as being paid while others were not, the Trustee may demand reimbursement from those creditors.

7. **DUTIES IMPOSED UPON THE BANKRUPT (Summary of Section 158)**

The bankrupt must fulfill all of the following duties:

- ❖ Disclose all assets, liabilities and sources of all income to the Trustee

- ❖ Co-operate with the Trustee in the realization of assets that are not exempt or subject to the interests of secured creditors;
- ❖ Make available to the Trustee all books and records relating to assets or affairs as requested;
- ❖ **If required**-Attend at the Office of the Official Receiver, to be examined under oath as to the facts relating to the bankruptcy; (Section 161 and 162);
- ❖ Inform the Trustee of the details of all property disposed of during the twelve months prior to the bankruptcy or such other period as determined);
- ❖ Inform the Trustee of the details of all real property disposed of during the five years prior to the bankruptcy (or such other period as determined);
- ❖ Inform the Trustee of all material changes in income during bankruptcy and of any property obtained during bankruptcy including inheritances, windfalls, etc;
- ❖ Attend the first meeting of creditors and any other meetings when called upon by the Trustee;
- ❖ Advise the Trustee of any change in address while in bankruptcy;
- ❖ Attend the required financial counselling sessions;
- ❖ Provide the Trustee with all tax information as required;
- ❖ Ensure that all surplus income payments are made.

8. BANKRUPTCY OFFENCES (Section 198 and 199)

Besides the offences under the Criminal Code which may also apply, the bankrupt may be liable to imprisonment up to three years if found guilty of any of the following offences under The Bankruptcy Act:

- ❖ Failing to perform the duties of a bankrupt in Section 158 of the B.&I.A.;
- ❖ Fraudulently disposing of assets before or after bankruptcy;
- ❖ Omitting to answer fully and truthfully all questions when examined under oath or on sworn statements;
- ❖ Making false declarations regarding assets and liabilities;
- ❖ Destroying property or obtaining credit by false representation during the period of twelve months prior to the bankruptcy and until the date of discharge; and,
- ❖ Not disclosing to the person(s) with whom he is dealing, prior to obtaining credit in excess of \$1,000.00, that he is an undischarged bankrupt, unless the credit is for the supply of necessities of life.

The above requirements may vary depending on the financial situation, timing of transactions, nature of the contract, etc.. The Trustee will explain these to you as they relate to your situation as part of the assessment process.

You should also know that, under the Canada Corporations Act and provincial legislation for corporations, you may not be a Director of a limited company while being an undischarged bankrupt.