

## REGISTERED RETIREMENT SAVINGS PLANS

Prior to the legislation enacted on July 7, 2008, funds held in most RRSPs and RRIAs were available to creditors should someone become bankrupt. The new legislation limits the amount that would be available to creditors to contributions made in the twelve months prior to the date of bankruptcy.

The change in legislation limiting the amount available to creditors on bankruptcy was to make the treatments of RRSPs more consistent with that of Registered Pension Plans. In making contributions in the twelve months prior to bankruptcy available to creditors, it eliminates the ability of a debtor to shelter funds in RRSP on the eve of bankruptcy.

## DEALING WITH LENDERS IN TROUBLED TIMES

During these recessionary times, not only will lenders be reluctant to create new loans, they will also be closely reviewing and monitoring existing clients. Your banker will be looking for signs of weakness that could negatively impact its loan position, in particular:

1. Significant changes in operations of company such as layoffs, change in management or significant decline in sales activity and deposits;
2. Violation of covenants contained within the security agreement (debt-to-equity ratio, shareholder's positions, etc);
3. 30 day good issues (see Repossession of Goods below);
4. Employee wage/vacation pay positions (given the Wage Employees Protection Plan);
5. Status of government liabilities (employee

source deductions, GST and PST); and  
6. Unusual increases in either accounts receivable and/or accounts payable.

### What to do if your lender calls:

1. Be honest and forthright;
2. Do not undertake something you cannot provide or deliver;
3. If you are going to be late delivering required information, be proactive and call the bank; do not wait to hear from them;
4. If there are negative financial results or events in your business, let your banker know, and avoid this being a surprise;
5. Your banker does not want to write off a loan. If you are sincere and forthright, your banker will try and work with you to solve the problem.

Should you have a customer go bankrupt or into receivership, the Bankruptcy and Insolvency Act allows for the repossession of goods shipped within 30 days of the date of bankruptcy or receivership, subject to meeting the following criteria;

- (a) a supplier must make a written demand in the prescribed form containing the details of the transaction;
- (b) goods are in the possession of the purchaser, trustee or receiver; are identifiable as the goods delivered; are in same state as they were when delivered; and have not been sold and are not subject to an agreement for sale to an arms length purchaser; and
- (c) goods have not been fully paid for.

The trustee or receiver has the ability to pay the amounts owing and retain the goods.

Should a company believe it is in position to repossess its goods, it is imperative that immediate action is taken upon becoming aware of the bankruptcy or receivership of a customer. The passage of any time could negatively impact the ability to recover your goods or get paid should the goods be required for ongoing operations.

*Proposed new bankruptcy legislation, which is currently not in force, includes a provision that would allow a supplier only fifteen days from the date of bankruptcy or receivership to make its claim.*

## REPOSSESSION OF GOODS

### Visit our websites:

[www.sfgroup.ca](http://www.sfgroup.ca)      [www.ustax.ca](http://www.ustax.ca)

All rights reserved. Permission to reproduce or copy in any form or means is prohibited without the express written consent of SF Partnership, LLP. All information contained in this publication is general in nature, and should not be construed as professional advice. Readers are urged to consult their professional advisors before taking any action based on this publication.

**SF Partnership, LLP**  
Chartered Accountants

The Madison Centre  
4950 Yonge Street, 4th Floor  
Toronto, Ontario  
M2N 6K1

Comments? Contact us:  
T: 416-250-1212  
F: 416-250-1225  
E-mail: [info@sfgroup.ca](mailto:info@sfgroup.ca)  
Editor: Kevyn Nightingale  
([knightingale@sfgroup.ca](mailto:knightingale@sfgroup.ca))



March, 2009

By Brahm Rosen and Steven Goldberg

In the past months, we have witnessed the collapse of several major American financial institutions, significant declines in the equity markets and turmoil in various industry sectors, most notably, automotive. These events have and will continue to impact most businesses and individuals, as banks tighten credit, RRSPs and savings have declined significantly and considerable uncertainty continues to exist in the economy.

This edition of the *Optimizer* contains some information regarding various insolvency topics and concepts and hopefully provides some helpful hints in dealing with your business and personal affairs.

## FOCUS ON TROUBLED TIMES

## Insolvency Glossary

*The following are some common insolvency terms.*

**Bankruptcy** - "State of Bankruptcy". Where a Trustee is appointed to take control of a company's or individual's assets, subject to the rights of secured creditors

**Receivership** - Remedy typically utilized by a secured lender, in which a receiver is appointed to take control of and sell a company's assets

**Proposal** - A formal process pursuant to the Bankruptcy and Insolvency Act where a company or individual formulates and presents a plan to its creditors to compromise debts

**Companies' Creditors Arrangement Act ("CCAA")** - Legislation generally utilized by larger enterprises to restructure its business and obligations

**"To Tank"** - Action taken by creditor to enforce its rights and remedies against an insolvent company, generally bankruptcy or receivership (see above)

**"Resist Arrest"** - Where Debtor Company takes action to resist creditor's attempts to enforce its rights. See above "To Tank"

**Creditor Protection** - Action taken by a company to stop actions by creditors to enforce their rights to appoint a receiver or have the company adjudged bankrupt. This is typically achieved by the company filing a proposal under the Bankruptcy and Insolvency Act or by filing for CCAA

**Stay of Proceedings** - Prohibition against creditors and other parties to commence or continue actions against a debtor. The "stay" is generally achieved by filing for Creditor Protection or Bankruptcy (see above)

**Foreclosure** - Where a secured creditor takes formal legal proceedings to exchange its debt for the asset securing it. Under foreclosure, a creditor gives up its right to pursue guarantors for any shortfall

**Power of Sale** - A process initiated by a mortgagee to sell the real property subject to its mortgage and can proceed against guarantor for any shortfall

**Forbearance Agreement** - An agreement generally between a lender and the borrower where the lender agrees not to immediately enforce its rights in exchange for the borrower agreeing to various conditions and considerations

### Inside this issue

INSOLVENCY PROCEEDINGS - A PRIMER	2
WAGE EARNER PROTECTION PROGRAM	3
REGISTERED RETIREMENT SAVINGS PLANS	4
DEALING WITH LENDERS IN TROUBLED TIMES	4
REPOSSESSION OF GOODS	4

As a result of the current recession, the likelihood of you or your company becoming directly or indirectly involved in insolvency proceedings has greatly increased. Over the course of the next several months, it is very likely that you may receive notification and information that companies with which you have business relationships are subject to insolvency proceedings.

To better assist you, the following is a summary and explanation of terms that you may encounter:

### A. BANKRUPTCY PROCEEDINGS

**Bankruptcy** - In bankruptcy proceedings, a licensed trustee in bankruptcy is appointed initially by the Superintendent of Bankruptcy and deals with the claims of unsecured creditors to whom he or she has primary responsibility to. A trustee in bankruptcy will generally only deal with assets that are not subject to the rights of a secured creditor. Bankruptcy can be initiated by a company or individual voluntarily, or upon the application by a creditor.

**Notice of First Meeting of Creditors** - In a corporate bankruptcy there must always be a first meeting of creditors. For individuals, there may or not be a first meeting of creditors depending on the nature of the bankruptcy.

**First meeting of creditors** - The purpose of the first meeting of creditors is to:

1. Allow creditors to affirm the appointment of the trustee or if necessary replace with another licensed trustee in bankruptcy;
2. Ask questions of either the bankrupt or the representative of the bankrupt corporation;
3. Give instructions to the trustee; and
4. Appoint inspectors whose role is to assist the trustee in the administration of the bankrupt estate

**Proof of claim** - This document establishes your claim in the estate. If you do not complete and submit the form to the trustee, the trustee is not obligated to provide further information.

### B. RECEIVERSHIP PROCEEDINGS

**Receivership** - In most instances, the appointment of a receiver or receiver/manager is made by a secured creditor pursuant to its security instrument. Receivership proceedings are typically initiated when a secured lender issues a demand of its loan and a Notice of Intention to Enforce its

security to its borrower. This will usually occur when the debtor has defaulted under the terms of its lending agreement or is in breach of the lending covenants. Once a receiver is appointed, it is the receiver's obligation to send out an initial report to creditors advising of its appointment, what assets are covered by the appointment, who made the appointment, a list of creditors and the preliminary plan of action.

**Receiver** - If the appointment is only for a receiver, it allows the appointed party to deal with the assets subject to the security instrument.

**Receiver and manager** - This type of appointment also allows the appointed party to operate the business of the debtor.

### C. PROPOSALS

Proposals are formal proceedings under the Bankruptcy and Insolvency Act which provides an insolvent person (individuals or corporations) a process to attempt to comprise their debts to avoid bankruptcy proceedings. A comprise can consist of a reduction of the amount to be paid, the timing of payments or a combination of both. Under the Act, there are two types of proposal, namely (i) a Division I proposal which can be filed by an individual or corporation or (ii) a Division II proposal which can only be filed by an individual.

#### (a) Division I

##### Notice of Intention to Make a Proposal ("NOI")

The filing of a NOI has the same effect on creditors as if the person had filed a proposal, in that it creates a stay of actions commenced by creditors, including unsecured, certain actions of secured creditors and landlords.

Creditors will receive a copy of the NOI notice and a list of creditors.

Within 10 days of filing the NOI the debtor must prepare and file cash flow projections. Creditors are permitted to ask for copies of the projections and the debtor is required to provide these statements unless there a court order is obtained to the contrary.

##### Proposal

Within thirty days of filing the NOI, or later if a court order is obtained extending the date of filing, the debtor must file a proposal. The

*(Continued on page 3)*

*(Continued from page 2)*

proposal contains the definitive plan which is offered to creditors.

The trustee will forward to creditors a copy of the proposal together with a notice of the first meeting and a report of the trustee containing information pertaining to the proceedings to assist creditors in their assessment and evaluation.

Creditors must complete and submit to the trustee a proof of claim and voting letter in order to participate in the vote.

If creditors accept the proposal as filed or amended, the proposal must also receive approval by the courts.

### BACKGROUND

The Wage Earner Protection Program Act ("WEPPA"), which took effect July 7, 2008, provides a super priority to employees over existing secured lenders for unpaid wages and pension payments in the event of a bankruptcy or a receivership of their employer. In the recent Federal budget of February 3, 2009, employee's claims pursuant to WEPPA were expanded to include amounts owing for severance and termination pay.

#### Super Priority

The WEPPA legislation creates a super priority over a company's current assets of up to \$2,000 per employee for wages claims in a bankruptcy or receivership. The super priority does not apply to equipment, so equipment lenders may not be directly affected by the legislation.

A further super priority has been created for unpaid pension contributions and unremitted pension deductions. There is no maximum amount for these claims which will have priority over all secured creditors in a bankruptcy or receivership.

#### Administration

A new government agency has been established to administer the program. The program guarantees payments of wage claims of up to \$3,000 per employee relating to the period six months prior to the date of bankruptcy or receivership. When a payment is made under the program, the program is subrogated to the employee's claim, which means it steps into the employees shoes in respect of the super priority.

If either creditors or the court reject a proposal, the debtor is automatically deemed to have filed an assignment in bankruptcy.

#### (b) Division II

This type of proposal is available to individuals only, with unsecured debt of less than \$75,000 (subject to amendments to the Act).

The most significant difference is that if this type of proposal is rejected by creditors, the debtor is not automatically bankrupt.

*Under proposed legislation, not currently in effect, the threshold to file a Division II proposal will be increased \$250,000.*

Trustees and Receivers are obligated under WEPPA to assist in the administration of the program.

#### Impact of WEPPA

While WEPPA may be favourable to employees, it creates issues for secured lenders and borrowers. Lenders may reduce the amount of its financing or require additional security as a result of the additional risks associated with WEPPA. Additionally, lenders may require increased monitoring of its borrowers or require that borrowers retain outside payroll services to administer its payroll in order to better control the risks of wage arrears accruing.

This legislation comes into place at a time when lenders already have increased concerns regarding its risk and exposure with its borrowers.