



# Guide to Personal Bankruptcy



*McCuaig & Company*

# **GUIDE TO PERSONAL BANKRUPTCY**

Bankruptcy is defined in the Bankruptcy and Insolvency Act (“BIA”) as the “state of being bankrupt or the fact of becoming bankrupt”. Personal bankruptcy is the bankruptcy of one’s personal estate, regardless of its size. A bankrupt is a person who makes an assignment of his/her property for the benefit of creditors under the BIA, or against whom a receiving order is made (i.e. a legal process whereby a creditor or a group of creditors petitions the court for an order forcing a bankruptcy).

## **WHO CAN MAKE AN ASSIGNMENT IN BANKRUPTCY?**

In order to make an assignment in bankruptcy a person must be insolvent as follows:

- is unable to pay debts as they become due;
- has ceased paying their current obligations;
- whose property, if sold at fair market value, would not cover all the debts they owe;
- who owes at least \$1000; and
- who is not bankrupt and resides, carries on business, or has property in Canada

## **WHERE DO I TURN ?**

Before making the decision to “go bankrupt”, you should take the time to consult with someone qualified to discuss your financial problems. That person could be your lawyer, financial counsellor, one of your creditors, or a Trustee in Bankruptcy. Whomever you meet with should be able to discuss various options that will help you with your own unique set of problems. Sometimes bankruptcy is not the best solution depending upon your personal circumstances. Some alternative solutions for you to consider are:

- Do nothing
- Informal proposal made between you and your creditors
- Orderly Payment of Debts Program (administered by some provincial governments)
- Formal proposal under the BIA

## **WHAT DO I DO?**

Once you decide to either “go bankrupt” or to file a proposal under the BIA you should consult with a bankruptcy Trustee, who is licensed by the federal government to administer the bankruptcy process. The Trustee receives his fee and pays administration expenses from money paid to him by the bankrupt, and funds received from the sale of the bankrupt’s assets. The Trustee’s fees and expenses are set out in the BIA and must be approved by the Court.

The following are some of the major steps you’ll have to take in making an assignment in bankruptcy:

- Meet with a Trustee to discuss financial problems and appropriate course of action.
- Sign Assignment Indenture and Statement of Affairs (bankruptcy papers) which are filed with an Official Receiver. This begins the bankruptcy process.
- Meet with Official Receiver (if necessary) for an examination under oath as to the causes of bankruptcy and other matters.
- Attend your First Meeting of Creditors (if one is required).
- Attend two counselling sessions (one within 60 days from the date of bankruptcy and the other within 210 days).
- Provide the Trustee with monthly statements of your income and expenses.
- If necessary, meet with the Registrar in Bankruptcy or a Justice of the Supreme Court to obtain a discharge from bankruptcy.

## **WHAT HAPPENS TO MY ASSETS IF I GO BANKRUPT?**

Once a person is bankrupt all of his/her property automatically vests with the bankruptcy Trustee, including all property currently in his/her possession and any property acquired before discharge. Certain property is excluded from this process including property that the bankrupt holds “in trust” for someone else, and property which is exempt from seizure under the laws of the province in which the property is located and the bankrupt resides. A listing of such property is available from the Trustee.

Any property which is not held in trust for others or which is not exempt under provincial law must be sold by the Trustee. The sale may be made privately to the bankrupt if the bankrupt wants to purchase the estate assets, or the assets can be sold by auction, tender or other legal process. Please keep in mind that if you are going to purchase an asset from the Trustee you do not own it until it is paid for in full. Although you may be allowed to retain possession of estate assets, ownership will not pass to you until the Trustee is paid in full and has executed a Bill of Sale or Deed. Whatever amount of money is paid to the Trustee to acquire estate assets does not include the cost of registering ownership of the assets (such as the cost of recording the deed to a property).

Some of your creditors may hold security against certain of your assets (i.e., mortgages on real property, chattel mortgage on motor vehicle or personal effects, conditional sales contract on household appliances). If such security exists, consult with the Trustee as to the impact on your estate.

When a bankruptcy occurs two income tax years are created. The first begins January 1 of the year of the bankruptcy and continues until the day before bankruptcy (pre-bankruptcy). The second begins on the day of bankruptcy and continues until December 31 of the same year (post-bankruptcy). The Trustee is required by law to prepare outstanding tax returns to the date of bankruptcy, and also files the return for the post-bankruptcy period. Income tax refunds for the pre and post-bankruptcy periods, and refunds for any years prior to the year of bankruptcy are estate assets and are therefore kept by the Trustee.

GST/HST rebates are paid to the Trustee during the course of the bankruptcy administration. Generally, they are directed to the Trustee’s office until after the Trustee is discharged, which usually comes well after the bankrupt is discharged.

Are my wages garnisheed? Generally, wage assignments and garnishments stop when a person “goes bankrupt”. From time to time, during the course of your bankruptcy the Trustee may ask you to provide information concerning your income and living expenses. This information will be used to determine whether or not you have the ability to make a payment from your earnings. Funds paid to the Trustee are used to cover the cost of your bankruptcy, and where there are sufficient funds, to pay a dividend to creditors.

## **WHAT IS THE FIRST MEETING OF CREDITORS?**

The first meeting of creditors is held only if requested by either an Official Receiver or creditors, who have at least 25% of the proven claims. It may be held at the Official Receiver’s office, the Trustee’s office, or a location convenient to the bankrupt and his/her creditors. Why does the meeting take place?

- To confirm the Trustee’s appointment (up to the first meeting, the Trustee’s appointment is temporary until confirmed by the creditors).
- To provide the Trustee with the opportunity to discuss the administration of the estate with creditors, including any problems or items of unusual nature. At this time creditors can give instructions to the Trustee on any matters which they feel are important.
- To provide an opportunity for the appointment of inspectors to supervise the Trustee’s administration.

The bankrupt must attend this meeting unless prohibited by unusual circumstance. Failure to attend without a reasonable excuse may be reported as an offense under the BIA, and have an effect on the bankrupt's discharge.

### **WHAT AM I EXPECTED TO DO WHILE I'M IN BANKRUPTCY?**

Section 158 of the BIA imposes certain duties and responsibilities on a bankrupt person. In summary, they are as follows:

- Surrender all credit cards to the Trustee, even ones for accounts where the balance is zero.
- Attend creditors meetings if required.
- Attend counselling sessions within the prescribed time periods.
- Attend an Official Receiver's examination if called.
- Provide the Trustee with detail of monthly income and expenses.
- Provide the Trustee with information necessary to file tax & GST/HST returns.
- Deliver books and records to the Trustee if necessary.
- Tell the Trustee the truth.
- Keep the Trustee advised of any change in your mailing address and telephone number.

It is important that these duties and responsibilities are taken seriously as failure to comply could affect the type of discharge issued by the Court. Please review these duties found in the handout "Notice to Bankrupt", and if you have any questions please consult with your Trustee.

### **DO I GET ANY HELP WITH FINANCIAL MANAGEMENT?**

Yes, during the course of a personal bankruptcy two "counselling" sessions are held. The first must be attended within the first 60 days of bankruptcy and is usually scheduled either to follow your meeting of creditors or approximately one month into the bankruptcy period, and the second is to be attended before 210 days of bankruptcy pass. Generally we will schedule the second session to occur five to six months following the date of bankruptcy.

During the first session the Trustee will review your current budget and help you identify and prioritize your expenses. The Trustee will also provide some written material to help you develop an understanding of "living within your means". If counselling in other matters is required the Trustee will assist you in contacting the appropriate individual or agency.

The second counselling session is designed as a follow up to the first. The Trustee will review budget worksheets for the past few months and help you identify problems and ways to avoid them. The Trustee will also discuss with you, the progress of any other counselling you are receiving.

### **WHEN DOES IT ALL END?**

A bankruptcy ends with the bankrupt's discharge (sometimes referred to as a release). A person who is bankrupt for the first time, and whose income is below the cost of living standard set by the Superintendent of Bankruptcy ("OSB Standard") is eligible for discharge after nine months of bankruptcy. In this case the discharge is granted automatically unless the Trustee, Official Receiver or one of the creditors objects. If there is no objection, the discharge is granted without a hearing and the Trustee sends a certificate in the mail. If a person, who is bankrupt for the first time, has surplus income according to the OSB Standard then the period of bankruptcy is 21 months before a certificate of discharge can be issued.

If you are bankrupt for a second time and you have no surplus income according to the OSB Standard then your bankruptcy will last 24 months. If you are bankrupt for a second time and you have surplus income according to the OSB Standard then your bankruptcy will last 36 months.

In other cases, such as this is not your first or second bankruptcy, or there an objection to your discharge, then the application for discharge is heard either before the Registrar in Bankruptcy or a Justice of the Supreme Court in Bankruptcy. You may or may not have to attend the hearing, depending on the circumstances. Regardless of the process, the Court has a choice of issuing four basic orders as follows:

- **Absolute Order:** The bankrupt is discharged of his/her debt except for the liabilities described in Section 178 of BIA.
- **Conditional Order:** The bankrupt's discharge is issued subject to certain conditions described in the discharge order. These could include payments to the Trustee of a specific amount over a specific period of time (i.e., payment of \$100 per month for 18 months), or a lump sum due within a specific period of time. Once the terms of the conditional order of discharge are met the Trustee files a report with the Court and requests that it issue an absolute discharge.
- **Suspended Order:** The bankrupt's discharge is postponed either until a specific date in the future or until the Court has an opportunity to review the bankrupt's circumstances again.
- **Refused Order:** The Court has the authority to refuse a discharge under certain circumstances. In every case, the Court reviews the bankrupt's conduct both before and during bankruptcy and if it finds that the bankrupt has committed or has been convicted of a bankruptcy offense it may issue an order refusing the discharge.

#### **ARE ALL OF MY DEBTS RELEASED?**

In most cases all of the debts brought with you into bankruptcy are released by an absolute order of discharge. However, there are some outlined in Section 178 of the BIA which are not released, as follows:

- Fines, penalties, restitution orders
- A debt or liability for alimony, family support or maintenance
- A debt or liability arising from fraud, embezzlement, or misappropriation of funds
- A debt or liability for obtaining property by false pretense
- Liability for the dividend payable to a creditor who should have been included in the bankruptcy.
- Student Loans if the bankruptcy occurs within seven years from the time which the bankrupt ceases to be a full or part-time student.
- An award of damages in a civil proceeding from intentionally inflicted bodily harm or wrongful death.
- Overpayments of Employment Insurance Benefits, less penalties.

The preceding information is provided simply as a guide to the personal bankruptcy process. We do not intend that this information be exhaustive in its coverage of the foregoing topics. For further information as to how bankruptcy may affect your personal circumstances, please contact:

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