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Bankruptcy and Insolvency (Law 584)

Professor Wood

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# 1. Introduction to Insolvency Law

## Nature, Purpose, Boundaries of Insolvency Law

### Bankruptcy Law and Insolvency Law

* Under *Constitution Act, 1867*, Parliament has exclusive authority to make laws relating to bankruptcy and insolvency
	+ *Bankruptcy and Insolvency Act*
* History of Bankruptcy and Insolvency Law in Canada
	+ *Insolvency Act, 1875* – repealed in 1880, no bankruptcy system in place until 1919
	+ *Bankruptcy Act* (1919)
	+ Great Depression
		- People begin thinking of restructuring regime -- process should allow more than liquidation
			* Beneficial to debtor and creditors
	+ Beginning of Restructuring Law
		- *Companies Creditors’ Arrangement Act* (1933)
		- Commercial Proposal Provisions of *BIA* (1992)
	+ Rise of Consumer Proposals
		- Enactment of Consumer Proposal provisions of *BIA* (1992)
		- In 2020, more consumer proposals than bankruptcies
* **Insolvency Law:** legal responses to the inability of a person to pay claims owed to others
	+ Based on debtor’s inability to pay – insufficient assets to pay debts
		- If debtor simply unwilling to pay, claimant may commence civil action (judgment enforcement law)
	+ Includes bankruptcy law and other insolvency systems
* Claims in insolvency law may arise in following situations:
	+ Debtor has insufficient assets to satisfy creditor’s claims
		- Creditor provides goods/services to debtor, where debtor agrees to repay at a future date
		- Contracts of loan -- debtor borrows money from lender
			* Term Loan: debtor repays borrowed money on a fixed schedule
			* Demand Loan: debtor repays upon lender’s demand
	+ Breach of Contract
		- Ex. Construction company liable in contract for poor building construction
	+ Tort: injuries caused by wrongful acts or omissions

### Single-Proceeding Model

* **Single-Proceeding Model**: **insolvency law provides a single proceeding for resolution and payment of claims, superseding the usual civil process to enforce claims – creditors must participate**
	+ Creates environment in which efficient and orderly liquidation may occur (*Re Eagle River International Ltd*)
	+ **Without ‘single proceeding model’, judgment enforcement system would create three problems:**
		- **(a) Duplication of Costs**: each creditor incurring separate costs of enforcement
		- **(b) Uncoordinated Enforcement**: each creditor creates own plan to recover debtor’s assets
			* Creditor less likely to negotiate with debtor if other creditors are actively enforcing claims
			* Selling assets separately results in smaller recovery than if one person controls liquidation
		- **(c) Destructive Race to Grab Assets:** each creditor attempts to recover assets before other creditors
			* Incentive to move fast
* Different insolvency regimes have different objectives
	+ Liquidation of debtor’s assets
	+ Negotiations in which creditors agree to accept less than they are entitled to
		- May save a debtor’s business
	+ Economic rehabilitation of debtor

### Objectives of Insolvency Law

* **Objectives of Insolvency Regimes**
	+ **(1) Commercial Insolvency:** liquidate and rescue
		- **(a) Liquidation:** liquidate debtor’s assets and distribute proceeds to creditors
		- **(b) Restructuring/Reorganization:** preserve business as an operating entity by reducing or adjusting creditors’ claims to provide debtor with new, viable capital structure
	+ **(2) Consumer Insolvency**: economic rehabilitation of debtor
		- **(a) Liquidation:** liquidate debtor’s assets and distribute proceeds to creditors
			* Includes consumer bankruptcy, but consumer-debtor generally has little property of value
		- **(b) Paying Future Earnings:** debtor retains assets, but satisfies all/part of claims from future earnings
* **Goals of Insolvency Law**
	+ Provide certainty in market to promote economic stability and growth
		- Creditors able to predict future outcomes
	+ Maximize value of assets
	+ Strike balance between liquidation and reorganization
	+ Ensure equitable treatment of similarly situation creditors
	+ Timely, efficient, impartial resolution of insolvency
	+ Preserve insolvency estate to allow equitable distribution to creditors – ensures assets are available to claim
	+ Transparent and predictable insolvency law, with incentives for gathering and dispensing information
	+ Recognize existing creditors’ rights and clear rules for ranking of priority claims

### Private Law and Insolvency Law

* **Private Law:** relations between legal persons, as opposed to relations between a person and the state
	+ Private law rights unaffected by insolvency, unless a rule specifically alters the private law right
		- Pre-insolvency rights remain unaltered
		- Exception: supplier of goods has special right of repossession to be exercised against receiver/trustee
	+ **(1) Law of Persons:** defines those considered ‘persons’ in law, capable of holding and enforcing rights
		- Insolvency law may restrict access to only some insolvency regimes, depending on persons involved
			* Ex. *Companies’ Creditors Arrangement Act* applies only to corporations
			* Ex. Consumer proposal provisions apply only to individuals
		- Insolvency law not concerned with the creation of legal personalities (ie. corporations)
	+ **(2) Law of Rights:** nature and scope of rights
		- **(a) Extent of the Right**
			* **(i) Proprietary Right (*in rem*):** whether right may be demanded against the world
				+ Right against any person who takes possession/control, or asserts interest
				+ Those with proprietary rights are free to assert rights unaffected by those with personal claims against debtor

Ex. secured creditors

* + - * + At times, proprietary claims may fall outside scope of insolvency regimes

Ex. in bankruptcy, secured creditor allowed to withdraw collateral from bankrupt estate and realize on it outside of bankruptcy proceedings

* + - * + Person with proprietary right may be participants in insolvency proceedings

Ex. in restructuring proceedings, secured creditor cannot enforce remedies – but, may vote on plan and is bound by a compromise or arrangement that is approved by a majority of the creditors and the court

* + - * **(ii) Personal Right (*in personam*):** whether right may be demanded against a particular person
				+ Right against person who owes an obligation
				+ Those with personal rights against debtor can only recover from debtor’s assets

Cannot look to third-party’s property

* + - **(b) Content of the Right**: what the right gives to the holder
		- **(c) Events Creating the Right**: consensual agreement, a wrong, unjust enrichment, or other event
	+ **(3) Law of Procedure:** legal processes invoked when seeking to enforce a right
		- Insolvency law is procedural – person holding right must assert it through collective procedure in insolvency law
		- Insolvency proceedings prevent claimant from pursuing claim through ordinary civil action

### Insolvency Law and Provincial Law

* Provinces have legislative authority to enact laws regarding property and civil rights
	+ Statutes modify common law principles in insolvency law
* *BIA* does not abrogate or supersede substantive provisions of other laws or statutes relating to property and civil rights that are not in conflict (*BIA*, s. 72)
	+ Trustee has all the rights and remedies provided by that law or statute as supplementary to, and in addition to, rights and remedies provided by the *BIA* (*BIA*, s. 72)
* Provincial legislation creates supplementary rights to be exercised by insolvency administrators
	+ Trustee in bankruptcy may invoke provincial fraudulent preference legislation to avoid pre-bankruptcy transfer
	+ Trustee in bankruptcy may invoke personal property security legislation to subordinate unperfected security interest
	+ Trustee in bankruptcy may temporarily occupy leased premises following bankruptcy
* *BIA* sometimes incorporates provincial statute’s rules
	+ Property exempt under provincial law is not divisible among creditors

## Constitutional Dimensions

* To be constitutionally valid, federal insolvency legislation must be aimed towards debtors unable to meet liabilities
* **Provinces cannot create insolvency regimes – but, may enact laws creating/adjusting rights in regime** (*Robinson*)
	+ Fraudulent preference legislation gives creditor right to set aside preferential transfers made by debtor
	+ Trustee in bankruptcy may subordinate unperfected security interests (*Re Giffen*)
	+ Provincial law giving special proprietary right to certain claimants is inoperative to extent it conflicts with federal law (*Rainville*)
	+ Likely that provincial law restricting enforcement of creditors’ remedies inoperative in receivership proceedings (*Lemare Lake Logging Ltd*)
		- Interferes with federal legislation
* **History of Provincial Insolvency Laws**
	+ Canada repealed federal insolvency legislation in 1880
		- Provinces enacted voluntary assignment legislation to fill gaps – permitted debtor to make assignment of his property to a trustee who would liquidate it among creditors
			* Privy Council found provincial legislation to be *intra vires* (*Attorney General for Canada (Voluntary Assignments*)
				+ Proceedings were not compulsory
				+ Debtor not required to be insolvent
	+ Before Great Depression, insolvency legislation mostly concerned with liquidation proceedings
	+ After Great Depression, *Companies’ Creditors Arrangement Act* and *Farm Creditors Arrangement Act* passed
		- New approach wherein debtor was allowed to carry on business/farming operations through negotiations with creditors
	+ Alberta enacted *Debt Adjustment Act* in 1937
		- To enforce remedy against debtor, creditor must first obtain permit from Debt Adjustment Board
		- Debt Adjustment Board may compel creditor to accept compromise or arrangement
		- SCC and Privy Council found state to be *ultra vires* provincial government (*Reference re: Debt Adjustment Act*, *Alberta (1937)*

## Sources of Insolvency Law

* **(1) Common Law**
	+ **(a) Receivership Law:** common law core of receivership remains in place
		- Some provisions of federal/provincial legislation included
	+ Common law principles operate in regimes that are predominantly statutory in nature
		- Fraud on Bankruptcy Law Principle: unlawful for a party to use contractual provisions that result in a forfeiture of property upon bankruptcy
		- *Ex parte James; Re Condon*: bankruptcy court has power to prevent trustee from acting in high-handed or unreasonable manner
* **(2) Statute:** various federal insolvency statutes create or regulate insolvency regimes
	+ *Bankruptcy and Insolvency Act*
		- Governs ‘bankruptcy regime’
		- Creates or governs several non-bankruptcy regime
	+ *Companies’ Creditors Arrangement Act*
	+ *Winding-up and Restructuring Act*
	+ *Farm Debt Mediation Act*
		- Applies only to farmers
	+ *Canada Business Corporations Act*
		- Governs receiverships relating to corporations incorporated under *CBCA*
	+ *Canada Transportation Act*
		- Applies only to insolvent railway companies
* **(3) Subordinate Legislation**
	+ *BIA* gives Governor-in-Council power to make General Rules (*BIA*, s. 29)
		- *Bankruptcy and Insolvency General Rules* cover broad range of procedural rules
			* Applications before bankruptcy court
			* Consumer proposals
			* Mediations in bankruptcy proceedings
			* Trustees’ Code of Ethics
	+ *Farm Debt Mediation Act*
		- Regulations provide procedural rules for mediations
	+ *Companies’ Creditors Arrangement Act*
		- Mandates information that must be filed with Superintendent of Bankruptcy
* **(4) Superintendent’s Directives & Forms**
	+ Superintendent of Bankruptcy may issue directives to facilitate carrying out of *BIA* (*BIA*, s. 5(4)(c))
		- Power to prescribe forms of documents (*BIA*, s. 5(4)(e))

## Ten Insolvency Regimes

* All insolvency regimes use the ‘single-proceeding’ model
* **Commercial Insolvency Systems**
	+ **(1) Bankruptcy**: liquidation of debtor’s assets and pro rata (proportional) distribution to unsecured creditors
		- Statutory framework governed by *BIA*
		- Applies to natural persons and corporations
		- Proceedings initiated under:
			* Voluntary Bankruptcy: proceedings initiated by debtor
			* Involuntary Bankruptcy: proceedings initiated by creditor
		- Liquidation Approach
			* Upon bankruptcy, debtor’s assets vest in trustee in bankruptcy
			* Trustee sells or disposes of assets and distributes proceeds among creditors
			* Distribution made according to specified scheme of distribution
	+ **Restructuring:** creates framework within which debtor attempts to reach bargain with its creditors under which they agree to settle or compromise their claims
		- **(2) Restructuring Under the *Companies’ Creditors Arrangement Act* *(CCAA*)**
			* In past, did not involve liquidation of debtor’s assets
				+ business more valuable by being preserved
			* Recently, regime used to liquidate business assets through sale of business
				+ Plan not developed and no voting takes place by creditors
			* Proceedings usually initiated by insolvent debtor
				+ Application made before Court for stay of proceedings

High degree of Court involvement

* + - * + Debtor then attempts to negotiate compromise or arrangement with creditors
				+ Creditors vote on plan – if majority of creditors approve, plans binds all creditors
		- **(3) Restructuring Under the *Bankruptcy and Insolvency Act (BIA)***
		- **(4) Restructuring Under the *Canada Business Corporations Act (CBCA)***
			* Restructurings affecting only bondholders’ interests or holders of other debt securities (CBCA, s. 192)
	+ **(5) Receivership:** permits replacement of existing managers and sale of the business as a going concern, by a secured creditor who has a security interest in the entire undertaking
		- Secured creditor appoints receiver-manager to take possession and control of debtor’s business
			* May operate business until liquidation achieved
			* Goal is to liquidate assets as a going-concern or through break-up and sale
		- Debtor’s assets do not vest in receiver-manager (unlike in Bankruptcy regime)
		- Receiver-manager may be appointed by secured creditor under security agreement, or by Court
			* Involves common law, equity, federal/provincial statutes
			* *BIA* permits appointment of national receiver who is recognized across Canada
* **Consumer Insolvency Systems**
	+ **(6a) Consumer Bankruptcy Proceedings:** liquidation of debtor’s assets and pro rata (proportional) distribution to unsecured creditors
		- Statutory framework governed by *BIA*
		- Applies to natural persons
		- Goal of debtor’s economic rehabilitation – discharge of most pre-bankruptcy claims to give debtor a fresh start
		- Proceedings initiated under:
			* Voluntary Bankruptcy: proceedings initiated by debtor
			* Involuntary Bankruptcy: proceedings initiated by creditor
		- Liquidation Approach
			* Upon bankruptcy, debtor’s assets vest in trustee in bankruptcy
			* Trustee sells or disposes of assets and distributes proceeds among creditors
			* Distribution made according to specified scheme of distribution
	+ **(6b) Consumer Proposals**: agreement between debtors and creditors, for creditors to take less than they are entitled to
		- Debtors typically keep homes and vehicles, making payments to creditors out of future income
		- Creditors may obtain more than through consumer bankruptcy proceedings
		- Debtor must obtain assistance of administrator
			* Assists debtor in preparing proposal
			* Investigates debtor’s property and financial affairs
			* Provides counselling to debtor
		- Creditors indicate assent or dissent regarding consumer proposal when filing proof of claim
			* Meeting of creditors not usually required
* **(7) Orderly Payment of Debts** (*BIA*, Part X)
	+ Inexpensive procedure, in which debtor applies to Court clerk for consolidation order that…
		- Fixes amounts to be paid into Court by debtor; and
		- Fixes times of payment, until amounts owing to creditors paid in full
	+ Only applies to provinces electing to use it: Alberta, Saskatchewan, Nova Scotia, PEI
* **(8) Mediation Under the *Farm Debt Mediation Act (FDMA)***
	+ Proceedings initiated when insolvent farmer applies to administrator for…
		- Review of financial affairs; and
			* Administrator assists farmer in preparing financial recovery plan
		- Mediation – to facilitate agreement with creditors
			* Administrator appoints professional mediator
			* No party bound to agreement unless consenting to it
* **(9) Liquidation or Restructuring under the *Winding-Up and Restructuring Act (WURA)***
	+ Only used for: banks; insurance companies; trust companies; loan companies
		- Special provisions for insolvencies of foreign banks and insurance companies
	+ Court appoints liquidator and supervises liquidation of debtor’s assets
		- High degree of court involvement
* **(10) Railway Insolvency** (*Canada Transportation Act*, s. 106-110)
	+ Only regime invoked for railways
	+ Provisions do not include liquidation of debtor-railway
	+ Courts usually interpret ‘railway company’ to mean only those incorporated under special legislation (*Montreal, Maine & Atlantique Canada Co*)

## Concept of Insolvency

### Legal Significance of Insolvency

* Difference between ‘insolvency of debtor’ and ‘insolvency regimes’
	+ Insolvency is a fact – insolvency regime is a legal response to the fact of insolvency
	+ ‘Insolvency of debtor’: factual inability of debtor to pay his creditors
		- Gatekeeping role – typically, debtor must be insolvent before ‘insolvency regime’ may be initiated
			* Insolvent debtor is a precondition for the following regimes:
				+ Voluntary assignment in bankruptcy (*BIA*, s. 49)
				+ Restructuring proceedings under *CCAA* (*CCAA*, s. 2(1))
				+ Commercial Proposals (*BIA*, s. 50)
				+ Receiverships (*BIA*, s. 243(1)-(2))
				+ Consumer Proposals (*BIA*, s. 66.1)
				+ Orderly Payment of Debts (*BIA*, s. 217)
				+ Liquidation or Restructuring under the *WURA* (*WURA*, s. 6(1)(a))
				+ Farm Debt Mediation (*FDMA*, s. 6)
				+ Railway Insolvencies (*Canada Transportation Act*, s. 106(1))
			* Does not apply to ‘involuntary bankruptcy’: creditors merely need to prove an act of bankruptcy, not insolvency
		- Insolvency used in provisions giving trustee the right to impugn pre-bankruptcy transactions
			* Fraudulent preference requires trustee prove debtor was insolvent at time of transaction (*BIA*, s. 95(1))
			* Trustee seeking to recover against director/shareholder of corporation in respect of dividend, redemption, share purchase (*BIA*, s. 101)
		- Provincial legislation uses ‘insolvency’ in:
			* Fraudulent preference statutes
			* Statutes imposing liability on directors for distributions to shareholders made when corporation was insolvent
		- Court cannot grant absolute discharge in bankruptcy, if debtor continues to trade after becoming aware of being insolvent (*BIA*, s. 173(1)(c))
	+ ‘Insolvency regimes’: provide legal definition of insolvency to determine when insolvency exists
		- Different regimes provide different legal responses to a debtor’s insolvency
		- Insolvency regimes not activated upon debtor’s insolvency – must be initiated by debtor/creditor
			* Creditor or debtor must choose which regime is most appropriate

### Definition of ‘Insolvent Person’

* **Insolvent Person: debtor ‘insolvent’ when…** (*BIA*, s. 2(1))
	+ Insolvency requires satisfaction of at least one of the following tests
	+ **(1) Cash Flow Test; or**
		- **(a) Debtor is for any reason unable to meet obligations as they generally become due; or**
			* **(i)** Whether debtor is able to pay (forward-looking)
				+ Insolvent if shown payments due in immediate future and debtor does not have means to satisfy obligations (*King Petroleum Ltd, Re*)
				+ Determine assets available to debtor to meet obligations

Lack of liquid funds not determinative

Debtor with access to credit not insolvent (*Re Bel Air Electric Inc*)

Do not consider assets not normally liquidated in the ordinary course of business (*Re Pacific Mobile Corp*)

* + - * **(ii)** Debtor merely unwilling to pay does not suffice (*Thorne Riddell*)
			* **(iii)** Determine whether an obligation qualifies as a ‘current obligation’
				+ Do not consider long-term liabilities, payable at some future date
				+ Do not consider unliquidated claims/debts subject to *bona fide* dispute
			* **(iv)** Debtor not insolvent if creditor has agreed to defer payment to later date (*Thorne Riddell*)
				+ Date specified in contract used, unless express/implied agreement or a course of conduct sufficient for estoppel (*Southern Cross Interiors Pty Ltd*)
				+ Mere failure by creditor to commence legal action does not constitute deferral (*Viteway*)
		- **(b) Debtor has ceased paying current obligations in ordinary course of business as they generally become due** (backward-looking)
			* **(i)** Applies only to debtor who carries on a business
			* **(ii)** Determine whether an obligation qualifies as a ‘current obligation’
				+ Do not consider long-term liabilities, payable at some future date
				+ Do not consider unliquidated claims/debts subject to *bona fide* dispute
			* **(iii)** Debtor not insolvent if creditor has agreed to defer payment to later date (*Thorne Riddell*)
				+ Date specified in contract used, unless express/implied agreement or a course of conduct sufficient for estoppel (*Southern Cross Interiors Pty Ltd*)
				+ Mere failure by creditor to commence legal action does not constitute deferral (*Viteway*)
	+ **(2) Balance-Sheet Test**
		- **(a) Aggregate of debtor’s property not, at fair valuation, sufficient, or if disposed of at fairly conducted sale under legal process, insufficient for payment of all obligations, due and accruing due**
			* Debtor’s assets insufficient to satisfy liabilities
			* **(i) Determine what constitutes ‘assets’**
				+ Those things belonging to debtor when insolvency test is conducted
				+ Do not include anticipated assets, profits, increases in value (*Re Consolidated Seed Exports Ltd*)
				+ Exempt assets included – but not available to satisfy creditors’ claims (*Re Schroeder*)
			* **(ii) Assess value of assets using one of two methods**
				+ **(1) Fair Valuation of Assets**

Value of assets on debtor’s balance sheet is starting point

Reflect historical cost, not current value

May be departed from if some accounts receivable unlikely to be collected, or some assets depreciated in value (*Touche Ross Ltd*)

Liquidation value of assets also considered (*King Petroleum*)

* + - * + **(2) Disposal of assets at fairly-conducted sale under legal process**
			* **(iii) Determine what constitutes ‘liabilities’**
				+ **(1) Includes all future liabilities** (*Re Stelco Inc*)

Otherwise, would prejudice long-term creditors

Some cases state ‘liabilities’ only includes obligations currently payable or properly chargeable to accounting period during which test is applied (*Enterprise Capital Management Inc*)

* + - * + **(2) Statute refers to ‘obligations’, not ‘debts – includes…** (*Re Challmie*)

**(a) Contingent Claims**: claim may or may not arise

Where probability of claim arising is certain, Court will include full-value (*Re Challmie*)

Where it is near-certain claim will not arise, Court will assess value at $0

Where probability lies between two extremes, two approaches:

(i) Determine probability claim will occur

>50% chance = full value of claim included

<50% chance = value assessed at $0

(ii) Value claim at percentage likelihood of occurrence (*Re Wiebe*)

Claim for $100, with 60% chance of occurring, assessed at $60

**(b) Unliquidated Claims**

* + - * **(iv) Assess amount of liabilities**

# 2. Foundations of Bankruptcy Law

* **Sources of Bankruptcy Law:** primarily statute-based
	+ *Bankruptcy and Insolvency Act*
	+ *Bankruptcy and Insolvency General Rules*
		- Procedural rules
	+ Superintendent’s Directives and Forms
		- Surplus Income Directive

## History of Bankruptcy Law

### English Bankruptcy Law

* *The Statute of Bankrupts, 1542*: First bankruptcy statute enacted in 1542
	+ Focused on debtors escaping obligations by leaving country or staying inside homes, preventing legal service
	+ Creditor made complaint to bankruptcy commissioner, who would summon debtor
	+ If debtor did not appear, commissioner would seize and sell debtor’s assets
	+ Two features of bankruptcy law continuing to this day
		- Single-Proceeding Model: collective procedure for all creditors’ benefit
		- Pro rata sharing principle for distribution of debtor’s assets among creditors
* More detailed bankruptcy statute enacted in 1571
	+ Created additional acts of bankruptcy that must be proven by creditors
	+ Restricted bankruptcy to debtors who were merchants or traders
* Recognition that bankruptcy law produced hardship for debtors whose loss was caused by no fault of their own
	+ Daniel Dafoe: bankruptcy does not differentiate between honest and extravagant debtors (*Essay on Projects*)
		- Honest Debtor: fails by visible necessity – loss, illness, decay of trade
		- Extravagant Debtor: fails because of excess, or to cheat creditors
		- Moderate Creditor: seeks only what he is owed and listens to reasonable proposals
		- Severe Creditor: does not care about whether debtor is honest or extravagant; no mercy
		- Beginning of economic rehabilitation of creditor
* *Statute of Anne, 1705*
	+ New objective: bankrupt is discharged from all debts owing at time he becomes bankrupt
		- Only offered to bankrupts who cooperated in proceedings
		- Prior, bankrupt remained liable for all debts to creditors
	+ Fraudulent Bankrupt: if the bankrupt does not make full disclosure of estate and effects, it is a capital offense
		- Bankrupt may be executed
* In 1800’s, restriction of bankruptcy to traders produced two different regimes:
	+ Merchants and traders subject to bankruptcy proceedings
	+ For non-merchants/traders, creditors chose between two modes of collection:
		- Execute Against Property: creditor would seize and sell debtor’s assets; or
		- Execute Against Person: creditor would seek to imprison debtor
		- Eventually, execution against property of debtor became primary remedy of creditors
	+ Division between traders and non-traders abolished in 1861
		- Bankruptcy available to all
* Bankruptcy Reforms
	+ Originally, creditors selected assignee to have administration over bankrupt’s assets
		- Led to fraud, negligence, high administration costs – eroded assets available for creditors
	+ Reinstitution of creditor control over administration of bankrupt’s assets
		- Led to minority of creditors sacrificing interests of other creditors for personal gain
		- Debtor sometimes regained control over assets through fictitious creditors
	+ *Bankruptcy Act, 1883* created new model of joint official and creditor control
		- Continues to be foundation of modern bankruptcy legislation
		- Created office of ‘official receiver’
		- Created to ensure accountability of trustees in bankruptcy
		- Philosophy was bankruptcy was not a private dispute between debtor and creditor
			* Community also had interest in commercial morality and honest trading

### Canadian Bankruptcy Law

* Initial Bankruptcy Statutes
	+ *Insolvent Act of 1869*: provided for voluntary and involuntary insolvency proceedings
		- Applied only to traders
	+ *Insolvent Act of 1875*: gave creditors greater control over proceedings
		- Restricted debtors’ ability to obtain discharge
		- Debtors no longer permitted to make voluntary assignment
	+ Criticisms: dishonest administration over estates; discharges produced fraud and recklessness; unfair traders could obtain benefits denied to others
		- Both statutes repealed in 1880
* Canada had no bankruptcy law from 1880-1919
	+ Provinces enacted various legislation
		- *Pro rata* sharing among judgment enforcement creditors
		- Permitted creditors to impugn fraudulent preferences
		- Insolvency processes – debtor could make voluntary assignment of property to trustee, who would liquidate estate under inspector’s supervision, who was appointed by creditors
		- Legislation did not provide for discharge of debtor or involuntary insolvency proceedings
* *Bankruptcy Act* (1919)
	+ Reduced occasions where application to a Court was needed
		- Voluntary assignment into bankruptcy did not require bankruptcy petition before a Court
	+ Less official administration than English Act – official receivers not given investigative responsibilities
	+ Covered both individual and corporate insolvency
* Office of the Superintendent in Bankruptcy (OSB): created in 1932 to supervise and establish qualifications for trustees in bankruptcy
	+ Given additional investigative powers in 1966

### Modern Reform Efforts

* Major reform effort in 1970’s and 1980’s – *Tasse Report* released, but no changes resulted
* Instead of replacing old bankruptcy statutes, incremental reforms made through amendments
	+ 1992 Amendments
		- Changes to treatment of Crown claims in bankruptcy
		- New right of suppliers to repossess unpaid goods
		- Automatic discharge and mandatory credit counselling for first-time bankrupts
		- Protected trustees against liability for claims of environmental damage
	+ 1997 Amendments
		- New surplus income rules regarding post-bankruptcy earnings
		- New provisions for international insolvencies
* *Wage Earner Protection Program Act*: bankruptcy reform bill, addressing controversy of wage-earner claims in insolvency
	+ Wage Earner Protection Program: insurance program, giving workers right to make claims for unpaid wages when employer goes into bankruptcy or receivership
	+ New provisions regarding disclaimers, affirmations, and assignments of executory contracts
	+ Federal exemption that shelters RRSPs from creditors’ claims
	+ Reformulated provisions regarding preferences and transactions at undervalue that allow a trustee to impugn pre-bankruptcy transactions
	+ Changes to rules governing the discharge of a bankrupt
	+ New cross-border insolvency provisions, based on the UNCIRAL Model Law
* Some features of statute have become progressively obsolete – thorough revision of entire statute required at some date

## Objectives of Bankruptcy Law

* **Bankruptcy Law has three objectives:**
	+ **(1) Create collective process through which assets of debtor are liquidated, creditors’ claims are assessed, and proceeds of liquidated assets are distributed equitably to creditors** (*Industrial Acceptance Corp*)
		- Bankruptcy is a legal process that tries to maximize the recovery of creditors as a group
			* Imposes automatic stay of proceedings that pre-empts creditors’ enforcement remedies
			* Forces creditors to work together
		- Without bankruptcy, creditors as a whole are worse off
			* Each creditor would incur cost of obtaining and enforcing judgment – duplication of costs
			* Each creditor would have incentive to rush in and grab assets before other creditors
		- Collective liquidation proceeding requires a process for assessment of claims and distribution of assets
			* Administrative, rather than judicial, process
			* Trustee in bankruptcy assesses and values creditors’ claims
			* Rules for ranking creditors’ claims
		- *Pro rata* sharing principle among creditors
			* Exceptions: preferred creditors given higher ranking
	+ **(2) Rehabilitation of individual debtor, when appropriate** (*Industrial Acceptance Corp*)
		- Not applicable if debtor is corporation or artificial entity
			* If corporation is liquidated, bankruptcy is ‘corporate death’ – does not continue on
		- Primary objective if debtor has very few assets
		- Rehabilitation of debtor achieved in different ways:
			* (i) Discharge of all debts – releases debtor from creditors’ claims that are in existence at time of bankruptcy
				+ Gives honest, but unfortunate debtor ability to be free debt he cannot pay
				+ Permits re-integration into society
				+ Assets acquired after date of discharge are not available to creditors
			* (ii) Debtor permitted to retain sufficient assets to provide debtor and family with food, accommodation, and necessities of life
				+ Some property exempt from creditors’ claims
				+ Surplus income regime
			* (iii) Mandatory Credit Counselling – attempts to reduce occurrence of repeat bankruptcies
	+ **(3) Prevention of fraud and abuse of the bankruptcy system, the promotion of commercial morality, and protection of the credit system**
		- Bankruptcy law premised on idea that bankruptcy is not merely private matter between debtor and creditor – public interests at stake
			* Information-gathering function regarding the causes of insolvencies
		- Protects commercial morality by preventing fraudulent debtors from abusing credit system
			* Bankruptcy offences may be used to discipline
			* Investigatory apparatus that permits public officials to investigate complaints
		- Creditors and trustees in bankruptcy prevented from abusing bankruptcy system or undermining public trust in credit economy
			* Provides system for licensing of trustees
		- Goal of preventing fraud and bad faith (*Shields*)
		- Rules allowing creditors to recover value that has been transferred to third-parties
			* Invoked where debtor transfers assets to third-party for less than fair value

## Fundamental Principles of Bankruptcy Law

* **Fundamental Principles of Bankruptcy Law**
	+ **(1) Bankruptcy Proceedings are Collective**: bankruptcy proceedings initiated by debtor or creditor
		- Creditor initiating bankruptcy proceedings against a debtor do so on behalf of all creditors entitled to participate in distribution of debtor’s assets
			* Trustee acts on behalf of all creditors – does not take instructions from initiating creditor only
			* Non-initiating creditors may replace initiating creditors who do not diligently prosecute the action (*BIA*, s. 43(13))
			* Courts will examine agreements between debtor and initiating creditor for discontinuing bankruptcy proceedings to ensure other creditors’ interests not prejudiced (*Re Abu-Hatoum*)
		- Initiating creditor’s legal costs and administration costs of bankruptcy are paid out of bankrupt estate (*BIA*, s. 45(1), 136(1)(b)
			* Ensures all participating creditors share in costs of bankruptcy
		- Stay of proceedings prevents creditors from opting out of bankruptcy proceedings
			* Creditors may not exercise ordinary civil remedy
	+ **(2) Debtor’s Assets Vest in Trustee in Bankruptcy**: upon bankruptcy, all of debtor’s assets automatically vest in trustee – forms ‘bankrupt estate’
		- Occurs automatically -- debtor not required to transfer or convey assets
		- Trustee ‘steps into bankrupt’s shoes’ – pre-bankruptcy rights remain unaltered (*Re Giffen*)
			* Includes contractual rights and other rights of action debtor has against third-parties
			* Trustee takes the assets, subject to same rights, equities, defences as the bankrupt
			* Trustee is not a *bona fide* purchaser for value – cannot claim priority over person who holds earlier equitable interest in debtor’s assets
			* Exceptions: trustee may…
				+ be in superior position in relation to a third-party than the debtor was
				+ be able to invoke fraudulent conveyance or fraudulent preference for pre-bankruptcy transfers of assets by a debtor to a third-party
				+ invoke provincial legislation, giving trustee priority over secured-creditor
	+ **(3) Proprietary Rights of Third-Parties are Unaffected:** only debtor’s assets vest in trustee – trustee cannot look to third-parties’ assets to satisfy claims against debtor
		- If debtor in possession of property belonging to another, trustee obliged to return it to the owner
		- If both debtor and third-party have interest in asset, only debtor’s interest vests in trustee
			* Third-party’s proprietary rights are preserved and may be asserted against the trustee
			* Secured-creditor’s right to realize not affected by bankruptcy, if complying with registration requirement ensuring priority over the trustee
				+ May remove property from bankrupt’s estate
				+ Right to realize on property exercised outside bankruptcy process
			* Ex. Mortgage; jointly-owned property
	+ **(4) Personal Rights of Creditors are Converted into Rights of Proof**
		- Those with personal claim against bankrupt loses right to enforce claim through ordinary legal process
			* Must pursue claim within bankruptcy proceedings – establish proof of claim and join in liquidation of debtor’s assets
				+ Claimant must file proof of claim with trustee
				+ Contingent and unliquidated claims may also be proved, but valuation procedure required to establish monetary value
		- Bankruptcy accelerates a creditor’s right to payment
			* Creditor may obtain bankruptcy dividend even though amount not payable until future date
	+ **(5) Statutory Scheme of Distribution Governs Payments to Creditors**
		- Proceeds of liquidation of debtor’s assets distributed to proving creditors according to statutory scheme of distribution
			* *Pari Passu*: ordinary creditors entitled to *pro rata* distribution
			* Exceptions:
				+ Preferred creditors: claims promoted and given more favorable treatment than ordinary creditors
				+ Postponed creditors: claims demoted and given less favorable treatment than ordinary creditors
				+ Family support claims paid first
		- Secured-creditors not governed by this scheme of distribution
			* Entitled to exercise secured remedies against collateral – withdraws the collateral from bankrupt estate
			* Secured-creditor claiming for deficiency following sale of collateral is asserting personal right against debtor
				+ As opposed to a proprietary right against an asset
				+ Treated the same as any ordinary unsecured creditor
	+ **(6) Bankruptcy Discharge Releases Individual Debtor from Pre-Bankruptcy Claims**
		- Only natural person may obtain discharge in bankruptcy without full satisfaction of creditors’ claims
			* Discharge releases the bankrupt from all claims provable in bankruptcy
			* Corporations or other artificial entities not entitled to discharge in bankruptcy
		- Some claims not released upon discharge:
			* Government student loan obligations
			* Family support orders
			* Claims arising after commencement of bankruptcy proceedings
		- Property acquired by debtor before bankruptcy discharge is divisible among creditors
			* Property acquired after discharge is not divisible after discharge

## Cast of Players

* **Bankrupt**
* **Creditor**
* **Licensed Insolvency Trustee/Trustee in Bankruptcy**: Assembles and liquidates assets of bankrupt estate, reviewing proof of claims, and distributing proceeds to creditors whose proofs of claims have been allowed
	+ Required to complete certain steps:
		- Calls first meeting of creditors
		- Submits reports to Court and superintendent-in-bankruptcy
	+ Officer of the Court – owes fiduciary obligation to creditors and bankrupt
	+ Private-sector actor, not government official
		- Licensed by OSB
* **Office of Superintendent-in-Bankruptcy (OSB):** regulator responsible for supervising administration of bankrupt estates
	+ Investigates complaints from debtors, creditors, or public regarding fraud, incompetence, wrongdoing
	+ Licenses trustees to administer estates – trustees must complete three-year qualification course
	+ Sets standards of conduct for trustees through directives
	+ Maintains statistics and registry of insolvency proceedings in Canada
* **Official Receiver**: federal civil servant employed by OSB
	+ Voluntary bankruptcy requires debtor to file assignment in bankruptcy with official receiver
	+ Official receiver appoints trustee in bankruptcy
		- Does not take interim control of debtor’s property prior to appointment of a trustee
	+ Official receiver examines bankrupts under oath regarding conduct and causes of bankruptcy
	+ Chairs first meeting of creditors or nominates someone to do so
* **Inspectors**: Board of Inspectors supervises trustee’s administration of bankrupt estate
	+ Creditors attending first meeting of creditors will confirm appointment of trustee, or substitute, and appoint inspectors
	+ Trustee required to obtain approval of Board of Inspectors on many matters
	+ Inspectors have fiduciary obligation to act in creditors’ interest as a group
		- Inspectors not permitted to act in own self-interest
* **Bankruptcy Court**: bankruptcy statute vests Courts of provinces/territories with jurisdiction, in law and equity, to have jurisdiction over bankruptcy – no separate bankruptcy court (*BIA*, s. 183(1))
	+ In involuntary bankruptcy proceedings, Court makes bankruptcy order against a debtor after creditors prove debtor committed an act of bankruptcy
	+ Hears applications for discharge of debtor, where automatic discharge not granted
	+ Trustee may seek direction from Court on unclear matters
	+ Other parties to bankruptcy proceeding may apply to have trustee’s decision modified or reversed
	+ Court may replace trustee in cases of fraud or conflict of interest
	+ Makes determination of parties’ rights
	+ Bankruptcy Court may not resolve matters concerning rights of ‘strangers to the bankruptcy’ (*Clarkson Gordon Inc*)
		- Must be resolved by action in ordinary civil courts

## Stages of Bankruptcy

* **(1) Commencement of Bankruptcy**: bankruptcy proceedings are legal proceedings, which must be initiated
	+ Voluntary: invoked by debtor
	+ Involuntary: invoked by creditor
* **(2) Assembling the Property**: debtor’s property vests in trustee
* **(3) Impugning Pre-Bankruptcy Transactions**: debtor conveying property to third-party before bankruptcy
	+ Asset no longer vests in trustee – undermines bankruptcy proceedings
	+ *BIA* provides trustee with remedies to set aside pre-bankruptcy proceedings in certain circumstances
* **(4) Determining Eligible Claims/Distribution**
	+ Eligibility determined by creditors filing proof of claim; trustee reviews proof of claim and determines which creditors eligible to participate in distribution
	+ Trustee distributes property according to ‘scheme of distribution’
* **(5) Discharge of Individual Debtor:** individual debtor receives bankruptcy discharge
	+ Does not apply to corporations or other artificial entities

# 3. Commencement of Bankruptcy

* **Statutory Provisions**
	+ **Corporation**: company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust (*BIA*, s. 2)
		- Does not include banks, insurance companies, trust companies, loan companies
	+ **Creditor:** person having a claim as provable as a claim under this Act (*BIA*, s. 2)
	+ **Debtor:** includes an insolvent person and any person who, at time of an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt (*BIA*, s. 2)
	+ **Locality of the Debtor:** principal place where… (*BIA*, s. 2)
		- (a) debtor has carried on business during year immediately preceding date of initial bankruptcy event
		- (b) debtor has resided during year immediately preceding date of initial bankruptcy event; or
		- (c) in cases where (a) and (b) not applicable, where greater portion of debtor’s property is situated
	+ **Date of Bankruptcy:** in respect of a ‘person’, means date of: (*BIA*, s. 2)
		- (a) granting of bankruptcy order against the person
		- (b) filing of assignment in respect of the person; or
		- (c) event that causes assignment by the person to be deemed bankrupt
	+ **Time of Bankruptcy:** in respect of a ‘person’, means time of (*BIA*, s. 2)
		- (a) Granting of bankruptcy order against the person
		- (b) Filing of assignment by or in respect of the person; or
		- (c) Event that causes an assignment by the person to be deemed bankrupt
* **Bankruptcy proceedings may be commenced in three different ways:**
	+ **(1) Voluntary Bankruptcy:** debtor initiates bankruptcy proceedings
		- Contacts insolvency professional, who assists debtor in completing necessary documents
		- Debtor required to disclose owned assets and creditors who have claims
		- Does not require court application – debtor merely signs ‘assignment in bankruptcy’ and files with official receiver (*BIA*, s. 49)
	+ **(2) Involuntary Bankruptcy:** creditors initiate bankruptcy proceedings (*BIA*, s. 42, 43)
		- One or more creditors apply to Court for bankruptcy order
			* Creditors must prove debtor has committed act of bankruptcy
			* Debtor may appear at hearing to dispute facts
	+ **(3) Automatic Bankruptcy Proceedings:** attempt to negotiate commercial proposal fails
		- *BIA* provides the debtor is deemed to have made assignment in bankruptcy

## Eligible Persons

* **Voluntary Bankruptcy:** An insolvent person or, if deceased, executor or administrator of their estate or liquidator of succession, with leave of Court, may make assignment of all of insolvent person’s property for general benefit of insolvent person’s creditors (*BIA*, s. 49(1))
	+ **(1) Debtor must reside, carry on business, or own property in Canada**
* **Involuntary Bankruptcy:** one or more creditors may file application for bankruptcy order against a debtor (*BIA*, s. 43)
	+ **(1) Debtor must reside or carry on business in Canada at time of ‘act of bankruptcy’**
* **“Person”: ‘debtor’ and ‘insolvent person’ refer to a “person”**
	+ **(1) Natural persons and artificial entities are subject to bankruptcy proceedings**
	+ **(2) “Person” defined as:** (*BIA*, s. 2)
		- **(a) Partnership: aggregate of persons**
			* Bankruptcy proceedings must be initiated by or against partners (*Re Union Fish Co*)
			* Voluntary Bankruptcy: all members of partnership should execute assignment in bankruptcy (*Re Squires Brothers*)
			* Involuntary Bankruptcy: creditors not required to present bankruptcy application against all partners (*BIA*, s. 43(15)
				+ Means bankruptcy only encompasses one partner’s separate assets and joint interest in partnership assets
				+ Creditors may bring bankruptcy application in name of partnership (*Langille*)

*BIA* defines ‘person’ as including a partnership

* + - * *BIA* applies to limited partnerships in same manner as ordinary partnerships (*BIA*, s. 85(1))
				+ Bankruptcy order in name of limited partnership operates as bankruptcy of general partner – vests all assets of general partner in trustee (*Re Kingsberry Properties Ltd Partnership*)
				+ Bankruptcy order for limited partnership vests only the limited partners’ interests in the partnership assets (*Re Kingsberry Properties Ltd Partnership*)
		- **(b) Unincorporated Association**
		- **(c) Corporation**
		- **(d) Co-operative Society**
		- **(e) Organization**
* **Not eligible for bankruptcy**:
	+ **(1) Banks, insurance companies, trust companies, loan companies, railway companies**
		- Special insolvency statutes govern their liquidation or restructuring
		- Literal reading of Act would mean banks, insurance companies, etc. would be unable to prove claim as creditor, because “creditor” also defined as a ‘person’
			* Courts overcome difficulty by finding ‘corporation’ not intended to be used in all provisions of act (*Re Selkirk Spruce Mills Ltd*)
	+ **(2) Trusts:** trusts not within Act’s definition of ‘person’
		- Property held in trust not available for distribution to creditors of trustee (*BIA*, s. 67(1)(a))
		- Contractual obligations incurred by trustee in his own name
			* Creditors may claim against trustee, but not beneficiaries of a trust
		- Trustee has right to be indemnified out of trust assets for liabilities incurred for acts properly done in performance of trustee’s duties
			* Right to indemnification is asset vesting in trustee upon bankruptcy (*Jennings*)
			* Right may be excluded by agreement between trustee/beneficiary (*Graybriar Industries Ltd*)
			* Creditors may have difficulty reaching trust assets if trustee’s right to indemnification not available because of: lack of capacity; lack of authorization; breach of equitable duty; unconnected indebtedness owed by trustee to pay funds into trust
		- Definition of ‘corporation’ now includes “income trust”
			* Income Trust: trust with assets in Canada if its units on prescribed stock exchange; or, majority of units held by a trust whose units held on prescribed stock exchange (*BIA*, s. 2)
			* Nothing in *BIA* provides creditors with direct claim against income trust’s assets
				+ Creditors unable to prove claims in bankruptcy of income trust
	+ **(3) Following individuals cannot be forced into bankruptcy, but may enter voluntary bankruptcy** (*BIA*, s. 48)
		- **(a) Individuals whose principal occupation and means of livelihood is fishing or farming**
			* Does not apply to corporations or partnerships (*Langille*)
		- **(b) Wage earners earning less than $2500**

## Consolidation of Proceedings

* **Procedural Consolidation**: Court directs bankruptcy proceedings against two or more related persons be consolidated into single proceeding
	+ Court may engage in procedural consolidation when:
		- More than one application for bankruptcy order is against same debtor or joint debtors, Court may consolidate proceedings (*BIA*, s. 43(4))
		- Court may consolidate proceedings against members of partnership where bankruptcy order obtained against one of the members (*BIA*, s. 43(16))
		- Bankruptcy court has inherent jurisdiction to control its processes – may make any such orders in appropriate cases (*BIA*, s. 183(1))
	+ Administrative convenience – reduces time and expense involved in maintaining separate proceedings
	+ Does not alter substantive right of claimants against debtors
* **Substantive Consolidation**: pooling of assets and claims
	+ All assets of various debtors are liquidated – funds generated from disposing of assets used to pay creditors
	+ Court will not exercise power if it would be prejudicial to a particular creditor (*Ashley*)
	+ Used if multiple states, who could reasonably be dealt with as one estate (*BIA*, s. 155(f))
	+ Used if debtors’ financial affairs intertwined and difficult to separate (*Envision Engineering*)
		- Substantive consolidation does not prejudice one creditor, since the order benefits all creditors (*Re Associated Freezers of Canada*)

## Involuntary Bankruptcy

* Filing date of application is ‘date of initial bankruptcy event’ (*BIA*, s. 2)
	+ Transactions entered into after date of initial bankruptcy event invalid, unless made for adequate valuable consideration

### Application for Bankruptcy Order

* **To succeed in its application for a bankruptcy order against debtor, creditor must prove:** (*BIA*, s. 43(1))
	+ **Bankruptcy order must be made against ‘eligible person’**
		- See above
	+ **Courts require strict proof of facts** (*Re Selkirk*)
		- Creditor not permitted to have discovery or examination of debtor (*Re Tunnell Ltd*)
		- Debtor wishing to dispute application must file notice setting out contesting allegations
			* Court may stay proceedings and direct a trial regarding disputed facts (*BIA*, s. 43(10))
				+ At trial, debtor may cross-examine on affidavit (*BIGR*, s. 14(2))
			* Court may ignore debtor’s dispute if:
				+ Not *bona fide*; or(*Cargill Ltd*)
				+ At least $1000 owing, though dispute is for total amount owing (*Re Vermillion Placers Inc*)
	+ **(1) Debt is owed to creditor for $1000 or more** (*BIA*, s. 43(1)(a))
		- If applicant does not qualify as a creditor under *BIA*, may still participate in bankruptcy proceedings
			* Simply cannot commence the bankruptcy proceedings
		- **(a) Must be a debt owed to a creditor**
			* **Debt: claim for payment of a fixed amount**
				+ Sum payable as liquidated money demand, recoverable by action (*Diewold*)
			* **(i) Liquidated Claim: claim for specific amount of money owed under contract or agreement**
				+ Includes future debts and debts immediately payable
				+ Includes claims in unjust enrichment
				+ If payment requires future performance or condition, not a debt
			* **(ii) Some contractual claims do not qualify as debts**
				+ **(1) Unliquidated Claim**: creditor has claim, but does not know how much debtor will owe

**(a) Unliquidated claims include:**

Breach of contract (*LG&E Natural Canada*)

Tort claims

Damages claims

**(b) Unliquidated claim does not become liquidated claim until judgment obtained for a particular amount in Court**

**(i) May bring application for bankruptcy proceedings following this judgment**

* + - * **(iii) Assignment of Debt: qualify as creditor by buying a debt belonging to a third-party creditor**
		- **(b) Debt must be for $1000 or more**
		- **(c) Debt must be in existence at time application is filed** (*Re Fred Walls & Son Holdings Ltd*)
		- **(d) Secured-creditor must surrender security, or give estimate of security’s value** (*BIA*, s. 43(2))
			* If collateral’s value is less than obligation it secures, claim qualifies as debt only for balance in excess of collateral
			* Court will not review estimation of security’s value unless a sham or absurdly low (*Columbia Properties Ltd*)
	+ **(2) Debtor has committed an ‘act of bankruptcy’** (*BIA*, s. 43(1)(b))
		- Mere insolvency, or merely having more liabilities than assets, does not suffice
		- **(a) Conduct Defeating or Delaying Creditors**
			* **(i) Debtor makes voluntary assignment in bankruptcy in another country** (*BIA*, s. 42(1)(b))
			* **(ii) Debtor makes fraudulent gift, delivery, transfer of debtor’s property** (*BIA*, s. 42(1)(b))
			* **(iii) Debtor transfers/charges property as a fraudulent preference** (*BIA*, s. 42(1)(c))
				+ Payment of money or conveyance/transfer of property (*BIA*, s. 95)

Does not include fraudulent preferences in provincial legislation – only in *BIA*

* + - * + Trustee has power to avoid a transaction – does not constitute act of bankruptcy
			* **(iv) Debtor departs or remains outside Canada, departs from dwelling house, or otherwise absents himself with intent of defeating or delaying creditors** (*BIA*, s. 42(1)(d))
			* **(v) Debtor assigns, removes, secretes, or disposes of property with intent to defraud, defeat, or delay creditors, or attempts or is about to do so** (*BIA*, s. 42(1)(g))
				+ Includes hiding of assets and imminent/attempted transfers
		- **(b) Insolvency Grounds**
			* **(i) Admission of insolvency, or communication of impending insolvency, by debtor**
				+ **(1) Debtor notifies creditor he is suspending payment of debts** (*BIA*, s. 42(1)(h))

Notification may be done orally (*Re King Petroleum Ltd*)

* + - * + **(2) At meeting of creditors, debtor shows statement of assets and liabilities that shows he is insolvent** (*BIA*, s. 42(1)(f))

Must be done in writing

Compelled examination of judgment debtor in aid of enforcing court order does not constitute meeting of creditors (*Ivany (Re*))

* + - * + **(3) Indirect admission of insolvency – debtor assigns his property to trustee for benefit of creditors**
			* **(ii) Default in commercial or consumer proposal** (*BIA*, s. 42(1)(i))
				+ But, Act now has specific procedure for automatic bankruptcy upon annulment of proposals (*BIA*, s. 63)
		- **(c) Judgment Enforcement Proceedings Commenced** (*BIA*, s. 42(1)(e))
			* **Four Acts of Bankruptcy:**
				+ Creditor may use this ‘act of bankruptcy’ if:

Another creditor is about to commence, or has commenced, judgment enforcement proceedings

Ensures equitable distribution

Commencing or about to commence judgment enforcement proceedings

Debtor had previously transferred assets somewhere else, leaving no assets available

* + - * + **(i) Property seized pursuant to judgment enforcement proceedings and judgment remains unsatisfied fifteen days after seizure** (*BIA*, s. 42(1)(e))

Preliminary steps in sale of real property may qualify as a seizure

**If interpleader or opposition proceedings have been instituted regarding property seized, time spent determining who property belongs to is not considered when calculating period of fifteen days** (*BIA*, s. 42(1)(e))

* + - * + **(ii) Debtor’s property sold by executing officer** (*BIA*, s. 42(1)(e))

Sale of land constitutes act of bankruptcy

* + - * + **(iii) Execution held by executing officer for fifteen days after written demand for payment without seizure, levy, or taking in execution** (*BIA*, s. 42(1)(e))

Does not cover:

Garnishment

Equitable execution

Enforcement against land prior to its actual sale

**If interpleader or opposition proceedings have been instituted regarding property seized, time spent determining who property belongs to is not considered when calculating period of fifteen days** (*BIA*, s. 42(1)(e))

* + - * + **(iv) Executing officer attempts to effect seizure, but indicates there is no property available to satisfy the judgment** (*BIA*, s. 42(1)(e))

Executing officer must give report setting out details of seizure -- informal correspondence between creditor and executing officer insufficient

Rebutted if debtor can prove executing officer did not engage in genuine attempt to find exigible assets (*Schultz*)

Applies to federal revenue agency’s attempt to recover unpaid income tax (*Southernmost Point*)

* + - **(d) Ceasing to Meet Liabilities Generally as they Become Due** (*BIA*, s. 42(1)(j))
			* **(i) Applicant must show sufficient evidence from which inference of fact may fairly be made that multiple creditors generally are not being paid** (*Re Holmes*)
				+ Not necessary for other creditors to join the application
				+ Policy reasons for requiring more than one creditor – bankruptcy proceedings designed to benefit all creditors (*Re Holmes*)
				+ Cannot get order merely by showing debtor has more liabilities than assets
			* **(ii) Non-payment of only a single creditor is not sufficient** (*Re Holmes*)
				+ **Exceptions** (*Re Holmes*)

**(i)** Applicant creditor is only creditor of debtor, and debtor has failed to pay despite repeated demands for payment

**(ii)** Creditor is significant creditor, and fraud or other circumstances make access to bankruptcy proceedings necessary to protect all creditors

**(iii)** Debtor admits inability to pay creditors generally

* + - * **Cash Flow Tests Used:**
				+ **(a) Debtor is, for any reason, unable to meet obligations as they generally become due; or**

**(i)** Whether debtor is able to pay (forward-looking)

Insolvent if shown payments due in immediate future and debtor does not have means to satisfy obligations (*King Petroleum Ltd, Re*)

Determine assets available to debtor to meet obligations

Lack of liquid funds not determinative

Debtor with access to credit not insolvent (*Re Bel Air Electric Inc*)

Do not consider assets not normally liquidated in the ordinary course of business (*Re Pacific Mobile Corp*)

**(ii)** Debtor merely unwilling to pay does not suffice (*Thorne Riddell*)

**(iii)** Determine whether an obligation qualifies as a ‘current obligation’

Do not consider long-term liabilities, payable at some future date

Do not consider unliquidated claims/debts subject to *bona fide* dispute

**(iv)** Debtor not insolvent if creditor has agreed to defer payment to later date (*Thorne Riddell*)

Date specified in contract used, unless express/implied agreement or a course of conduct sufficient for estoppel (*Southern Cross Interiors Pty Ltd*)

Mere failure by creditor to commence legal action does not constitute deferral (*Viteway*)

* + - * + **(b) Debtor has ceased paying current obligations in ordinary course of business as they generally become due** (backward-looking)

**(i)** Applies only to debtor who carries on a business

**(ii)** Determine whether an obligation qualifies as a ‘current obligation’

Do not consider long-term liabilities, payable at some future date

Do not consider unliquidated claims/debts subject to *bona fide* dispute

**(iii)** Debtor not insolvent if creditor has agreed to defer payment to later date (*Thorne Riddell*)

Date specified in contract used, unless express/implied agreement or a course of conduct sufficient for estoppel (*Southern Cross Interiors Pty Ltd*)

Mere failure by creditor to commence legal action does not constitute deferral (*Viteway*)

* + **(3) ‘Act of bankruptcy’ must have occurred within six months of filing application** (*BIA*, s. 43(1)(b))
		- **(a) Stale Acts of Bankruptcy: ‘act of bankruptcy’ occurring outside six-month period for filing application cannot be used to obtain bankruptcy order**
			* **(i) Sale under judgment enforcement proceedings occurring outside this period does not constitute act of bankruptcy**
			* **(ii) Determine whether debtor has ceased to meet liabilities generally, in six-month period before bankruptcy application**
				+ If application based on failure to pay single creditor, special requirements for this type of claim must be fulfilled (“exceptions” in section (d) above)
				+ If application based on failure to pay more than one creditor, must be shown creditors generally not being paid

Court will consider whether creditor failed to make a current demand

Irrelevant if clearly futile for creditor to do so (*Bombardier Credit*)

* + - **(b) Creditor may make fresh demand for payment within 6-month timeframe to be eligible for bankruptcy application**
			* Even where initial demand for payment took place outside 6-month timeframe
		- **(c) Judgment against debtor operates as a continuous demand for payment**
			* Each day that judgment is unpaid is a ‘new’ act of bankruptcy
			* Judgment may occur outside six-month period and still be valid
	+ **(4) Application must:**
		- **(a)** Be filed in a Court having jurisdiction in judicial district of debtor’s locality (*BIA*, s. 43(5))
			* Principal place of business or residence of debtor (*BIA*, s. 2)
		- **(b)** Contain affidavit of applicant, or authorized person with personal knowledge of facts
	+ **(5) Court must dismiss application if debtor can demonstrate he has ability to pay debts** (*BIA*, s. 43(7))
		- **(a) Onus on debtor to demonstrate ability to pay** (*Re Hayes*)
		- **(b) Court must dismiss application if debtor has ability to pay, but simply unwilling to** (*Ashton*)
	+ **(6) Court has judicial discretion to dismiss application, even where all grounds proven** (*BIA*, s. 43(7))
		- **(a) Credible evidence required** (*Re Churchill Forest Industries (Manitoba) Limited*)
		- **(b) Application dismissed if:**
			* **(i) Alleged facts not proven to Court’s satisfaction** (*BIA*, s. 43(7))
			* **(ii) Improper service of application on debtor** (*BIA*, s. 43(7))
				+ Prejudicial to debtor – may not know bankruptcy proceedings have commenced
			* **(iii) Debtor satisfies Court he is able to pay debts** (*BIA*, s. 43(7))
				+ Even if creditor has proven everything under s. 43(1)
			* **(iv) Bankruptcy proceedings would be futile or of no benefit to creditors**
				+ Debtor has no assets and no prospect of acquiring any (*Re Benson*)
				+ Bankruptcy proceedings would result in additional costs with no benefit to creditors (*In re Stone*)
				+ Does not apply if suspicious circumstances indicating debtor made pre-bankruptcy transfers (*Re Hutchens*)
			* **(v) Bankruptcy proceedings brought for improper purpose, or applicant acted improperly** (*Diena (Re)*)
				+ Spite, vengeance, or vendetta (*Re Westlake*)
				+ To obtain business advantage

Eliminate competitors (*Re De La Hooke*)

Terminate contracts (*Re Pappy’s Good Eats Ltd*)

* + - * + Creditor’s illegal activity caused cessation of business (*Re Kadri Food Corp*)
				+ To pressure debtor to abandon or settle dispute under litigation (*Re Aarvi Construction*)
				+ Creditor permitted to bring application to elevate their claim over another claimant (*Re Scott Road Enterprises Ltd*)
			* **(vi) Matter is better resolved through civil proceedings** (*Re La Scala Bakery*)
				+ Creditor has not proven debt amounting to at least $1000 (*Re Bearcat Exploration*)
				+ Used if only few creditors, who are already engaged in disputed litigation with debtor

Civil Courts better able to resolve controversies concerning liabilities

Bankruptcy for clear cut cases, where liability not in dispute

* + **(7) Application cannot be withdrawn without leave of Court** (*BIA*, s. 43(14))
		- Court must be satisfied withdrawal of application will not prejudice other creditors (*Re Abu-Hatoum*)
	+ **(8) If Court satisfied all facts alleged are proven and application properly served, bankruptcy order made** (*BIA*, s. 43(6))
		- Court will appoint licensed trustee (*BIA*, s. 43(9))
		- Bankruptcy occurs on date the bankruptcy order is granted by the Court (*BIA*, s. 2)
		- If debtor appeals bankruptcy order, proceedings stayed until appeal disposed of (*BIA*, s. 195)
			* Debtor’s property remains vested in trustee pending appeal (*Black & White Sales Consultants*)

### Proceedings Against Securities Firms

* **Securities Firm:** person carrying on business of buying and selling securities from/to/for a customer (*BIA*, s. 253)
* **May apply for bankruptcy order against security firm if:**
	+ **(1)** Applicant is a: provincial securities commissions, securities exchange, customer-compensation body, receivers/liquidator of securities firm; and
	+ **(2)** Applicant shows an act of bankruptcy within six months prior to filing of application (*BIA*, s. 256(1))
		- Act of Bankruptcy:
			* Suspension of firm’s registration to trade in securities, or suspension of membership in exchange, if due to failing to meet capital adequacy requirements (*BIA*, s. 256(2))

### *Re Holmes* (ONSC)

**Ratio**

* **Where only one creditor exists, Court may grant application for bankruptcy order in special circumstances:**
	+ **(i) Applicant creditor is only creditor of debtor, and debtor failed to pay despite repeated demands**
	+ **(ii) Creditor is significant creditor, and fraud or other circumstances make access to bankruptcy proceedings necessary to protect all creditors**
	+ **(iii) Debtor admits inability to pay creditors generally, though each creditor’s identity not disclosed**
* **Court must be satisfied there is sufficient evidence from which an inference of fact may fairly be drawn that creditors generally are not being paid**

**Facts:** D ceased paying debt to bank. Bank brought application for bankruptcy order. **Issue:** Whether application for bankruptcy order may be granted? **Analysis:** P alleges debtor ceased meeting liabilities as they became due. ‘Act of bankruptcy’ not proven: no other creditors exist in evidence. P has not proven special circumstances for only one creditor. Court may not infer other creditors are not generally being paid. **Holding:** Application dismissed.

### *Moody v Ashton* (SKCA)

**Ratio**

* **If Court finds debtor is able to pay debts, application is dismissed** (*BIA*, s. 43(7))

**Facts:** P applied for bankruptcy order against D. **Issue:** Whether bankruptcy order may be granted? **Analysis:** D a wealthy individual – simply choosing not to pay debts. **Holding:** Appeal allowed.

### *Bank of Montreal v Scott Road Enterprises* (BCCA)

**Ratio**

* **Secured-creditor may bring bankruptcy order to establish its priority in the scheme of distribution**
	+ **In the event of bankruptcy, priority of claims is exclusively under federal jurisdiction**

**Facts:** P appointed receiver who took over D’s possessions and closed business. P sought bankruptcy order to prevent other creditors’ statutory liens from taking effect, which would take priority over P’s claim as secured creditor. **Issue:** Whether Court may dismiss application for bankruptcy order if brought by secured-creditor for purpose of destroying priority other creditors would have had? **Analysis:** At date of filing the application, D had ceased to meet its obligations. **Holding:**

## Interim Receiver

* **Interim Receiver: licensed trustee appointed by Court after application filed, if necessary for protecting debtor’s estate** (*BIA*, s. 46(1))
	+ Purpose is to conserve property and ensure it is not disposed of from time of bankruptcy application, until application heard on its merits (*Re Independent Gypsum Supply*)
	+ **(a) In determining whether to appoint interim receiver, Court will consider:**
		- **(i) Strength of applicant’s claim to bankruptcy order; and**
			* Creditor must demonstrate strong *prima facie* case on balance of probabilities (*Re Strain*)
		- **(ii) Likelihood that harm will be suffered by creditors if interim receiver not appointed**
			* Must be grave danger assets will not be recovered (*Re Pure Harmonics*)
			* Must be evidence of imminent threat that asset is in jeopardy, not purely speculation or conjecture (*Re Austroquip Manufacturing*)
	+ **(b) Debtor’s property does not vest in interim receiver** (*Re Soren Brothers*)
		- Interim receiver only acts as watchdog or monitor (*Re Big Eddy Shops*)
		- Interim receiver will not interfere with debtor’s business, except as necessary to conserve property or comply with Court order (*BIA*, s. 46(2))
			* Normally cannot sell debtor’s property
			* Sale of perishable property permitted if Court orders so (*BIA*, s. 46(2))
		- Interim receiver cannot prevent payment to judgment enforcement creditors of funds that were paid into court under garnishment proceedings
		- If application for bankruptcy order successful, common for interim receiver to be appointed trustee (*Re Continental Record*)
			* Familiar with debtor’s affairs

## Voluntary Bankruptcy

* **Assignment in Bankruptcy: insolvent person may make assignment of his property for general benefit of insolvent person’s creditors** (*BIA*, s. 49(1))
	+ **If debtor is corporation, assignment made by:**
		- **Resolution of directors** (*Re Tru-Value Investments*)
		- **Power delegated to officer through bylaws** (*Re Regional Steel Works (Ottawa -1987*)
	+ **Individual partner in a partnership may make bankruptcy assignment**
		- **Bankruptcy only affects partner’s individual assets and his interest in firm’s assets**
		- **To create bankruptcy of entire interest in firm’s assets, all partners must be parties to assignment** (*Squires Brothers*)
	+ **(1) To make voluntary assignment in bankruptcy:**
		- **(a) Claims of creditors must amount to $1000**
			* **(i) May make assignment in bankruptcy, even if debt owed to single creditor** (*Gordon*)
		- **(b) Person must not be undischarged bankrupt (ie. bankruptcy proceedings already underway)**
		- **(c) Person must reside, carry on business, or have property in Canada**
		- **(d) Debtor must be insolvent:** (*BIA*, s. 2)
			* **(a) For any reason unable to meet his obligations as they generally become due;**
			* **(b) Ceased paying current obligations in ordinary course of business as they generally become due; or**
			* **(c) Aggregate of his property is not, at fair valuation, sufficient to enable payment of all his obligations due and accruing due, or, if disposed of at fairly conducted sale under legal process, would not be sufficient to pay all obligations due and accruing due**
	+ **(2) If insolvent person dead, executor or administrator of estate or liquidator of succession may make assignment with leave of court** (*BIA*, s. 49(1))
	+ **(3) Assignment must be accompanied by sworn statement, showing:** (*BIA*, s. 49(2))
		- **(a) debtor’s property that is divisible among his creditors**
		- **(b) creditor’s names and addresses**
		- **(c) amount of each creditor’s respective claim**
	+ **(4) Assignment offered to official receiver in debtor’s locality** (*BIA*, s. 49(3))
		- **(a) Inoperative until filed with official receiver**
	+ **(5) Official receiver appoints licensed trustee** (*BIA*, s. 49(4))
		- **(a) Debtor usually selects trustee – but, creditors may select their own** (*BIA*, s. 49(4))
		- **(b) If unable to find licensed trustee willing to act, official receiver will cancel assignment after giving bankrupt five days notice** (*BIA*, s. 49(5))
	+ **(6) Official receiver completes assignment by filling in name of trustee – debtor becomes bankrupt at date and time of filing** (*BIA*, s. 2)
	+ **(7) Court may annul bankruptcy if determines bankruptcy assignment should not have been made** (*BIA*, s. 181(1))
		- **(a) All sales, dispositions of property, payments duly made by trustee are valid**
		- **(b) Property of bankrupt shall vest in person the Court appoints, or revert to bankrupt on terms and conditions set by Court**
		- **(c) Annulment granted if:** (*Re Wale*)
			* **(i) Debtor not insolvent person when he made assignment**
				+ **(1) Person insolvent if:** (*BIA*, s. 2)

**(a) For any reason unable to meet his obligations as they generally become due;**

**(b) Ceased paying current obligations in ordinary course of business as they generally become due; or**

**(c) Aggregate of his property is not, at fair valuation, sufficient to enable payment of all his obligations due and accruing due, or, if disposed of at fairly conducted sale under legal process, would not be sufficient to pay all obligations due and accruing due**

* + - * **(ii) Debtor abused process of Court; or**
				+ Whether debtor destroyed himself and his assets, rather than allow wife the benefit of assets(*Re Good*)
				+ **(1) Court considers all circumstances, including whether:** (*Re Wale*)

**(a) Debtor’s financial situation genuinely overwhelming, or whether it could be managed**

**(b) Timing of assignment related to another agenda, or was bankruptcy inevitable in near future**

Whether assignment took place soon before trial for division of family assets (*Re Wale*)

**(c) Debtor was forthcoming in revealing situation to his creditors, or did he hid assets or prefer some creditors over others**

**(d) Debtor converted money or assets to himself, which would otherwise have been assets in the bankruptcy**

**(e) Debtor had positive relationship with creditors, and whether they would have assisted him by granting time or terms of repayment, or if goodwill had been destroyed by past unfulfilled promises**

**(f) Whether past relationships cast light on possible bad faith motive for making assignment**

**(i) business partnerships; shareholder arrangements; spouses; competitors for assets; personal acquaintances**

* + - * **(iii) Debtor committed fraud on creditors**

### *Re Wale* (Ont SC)

**Facts:** Wife brings application for Court to annul bankruptcy assignment.  **Analysis:** Week prior to family law trial, husband made assignment in bankruptcy, moved out of house, stored furniture and tools, stopped running business, sold inventory, stopped paying mortgage. Was insolvent – ceased paying current obligations as they generally became due. Primary motive was to not make assets available to ex-wife before trial.  **Holding:** Application granted. Bankruptcy assignment annulled.

## Automatic Bankruptcy

* **Automatic Bankruptcy: occurs when debtor’s attempts to reach commercial proposal with creditors fails – debtor deemed to have made assignment when:**
	+ **(1) Cash flow statements or proposal not filed in statutory time limits** (*BIA*, s. 50.4(8))
	+ **(2) Creditors vote down consumer proposal** (*BIA*, s. 57)
		- **(a) Or, creditors deemed to have voted down proposal** (*BIA*, s. 50(12.1); 57)
		- **(b) Does not result in automatic bankruptcy – stay of proceedings ends and creditors free to exercise remedies against debtor** (*BIA*, s. 69.2(1))
	+ **(3) Court does not approve consumer proposal** (*BIA*, s. 61(2))
	+ **(4) Court later annuls consumer proposal** (*BIA*, s. 63(4))

# 4. Property of the Bankrupt

* **Property: two concepts of property**
	+ **(1) Narrow Sense of Property**
		- **(a) Personal Rights: enforceable against identifiable person or class of persons**
			* **(i) When creditor lends money to debtor, creditor obtains personal right against debtor**
			* **(ii) If person has personal right against bankrupt, that right is lost, or suspended, upon occurrence of bankruptcy**
		- **(b) Proprietary Rights: right available against indefinite class of persons**
	+ **(2) Broader Sense of Property: all valuable rights, without regard to whether they are personal or proprietary rights**
		- **(a) Used in identifying which of debtor’s assets will be available to satisfy creditor’s claims**
* Bankrupt and claimant may have property right in same thing
	+ Bankrupt’s jewelry store has customer’s watch
		- Bankrupt has property right in watch through possessory lien
		- Customer remains owner of watch
* **Fundamentals of Property of the Bankrupt:**
	+ **(1) Only debtor’s assets are available to satisfy creditors’ claims**
		- **(a) Property of third-parties does not vest in trustee**
			* **(i) Creditors cannot look to bankrupt’s spouse to satisfy debts**
			* **(ii) Spouse’s property does not vest in trustee**
			* **(iii) If bankrupt owns jointly-held assets, only his interest in those assets vests in trustee**
	+ **(2) Proprietary rights granted by debtor prior to bankruptcy are unaffected**
		- **(a) If debtor transfers asset before bankruptcy, he no longer owns it – does not vest in trustee**
		- **(b) If debtor grants limited/security interest, unaffected by bankruptcy – holder of limited or security interest retains proprietary right**
			* **(i) Whole reason creditors ask for security interests**
	+ **(3) Third-party’s personal rights converted into a right to prove for a dividend in bankruptcy (ie. unsecured creditors)**
		- **(a) Stay of proceedings prevents third-parties from enforcing personal right against bankrupt**
			* **(i) Instead, holder of personal rights against bankrupt must prove their claim in bankruptcy proceedings**
			* Ex. If person puts down-payment on boat, but seller goes bankrupt before boat delivered
	+ **(4) Trustee takes asset subject to all limitations and defences**
		- **(a) Trustee takes assets “warts and all”**
			* **(i) Third-parties may bring actions against trustee**
	+ **(5) Assets acquired prior to discharge are divisible; assets acquired after discharge are not**
		- **(a) At commencement of bankruptcy proceedings, all property owned by debtor at time of bankruptcy vests in trustee**
			* Whether bankrupt has possession of property irrelevant
		- **(b) Property acquired, or to be acquired, by debtor after commencement of bankruptcy proceedings, but before discharge, also available to satisfy creditors’ claims**
		- **(c) Any property acquired after discharge is not available to satisfy creditors’ claims**

## *BIA*

* **Proceeding by Creditor When Trustee Refuses to Act**
	+ Where creditor requests trustee to take proceeding that is for benefit of bankrupt’s estate and trustee refuses or neglects to, creditor may obtain court order authorizing him to take proceeding in his own name (*BIA*, s. 38(1))
		- Creditor takes proceeding in his own name, expense, and risk (*BIA*, s. 38(1))
		- Notice must be given to other creditors of contemplated proceeding (*BIA*, s. 38(1))
		- If order made, trustee assigns to creditor all his right, title and interest in the chose-in action or subject matter of proceeding (*BIA*, s. 38(2))
		- Any benefit derived from a proceeding, including claim and costs, belongs exclusively to creditor instituting the proceeding (*BIA*, s. 38(3))
			* Surplus, if any, belongs to estate
* **Property of Bankrupt**
	+ **(1)** **Property of a bankrupt divisible among his creditors shall not comprise:** (*BIA*, s. 67(1))
		- **(a)** property held by the bankrupt in trust for any other person;
		- **(b)** any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
		- **(b.1)** goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
		- **(b.2)** prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
		- **(b.3)** without restricting the generality of paragraph (b), property in a registered retirement savings plan, a registered retirement income fund or a registered disability savings plan, as those expressions are defined in the *Income Tax Act*, or in any prescribed plan, other than property contributed to any such plan or fund in the 12 months before the date of bankruptcy
	+ **(2) Property of a bankrupt does not consist of:** (*BIA*, s. 67(1))
		- **(a)** all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
			* **(i)** is not subject to the operation of this Act, or
			* **(ii)** in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the [*Family Orders and Agreements Enforcement Assistance Act*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-4-2nd-supp/latest/rsc-1985-c-4-2nd-supp.html), is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
		- **(b)** such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit
	+ **(3) Notwithstanding any provision that deems property to be held in trust for Crown, property of bankrupt shall not be regarded as being held in trust for Crown, unless it would be so regarded in absence of a statutory provision** (*BIA*, s. 67(2))
		- **(a) Does not apply to:**
			* **(i)** amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, [subsection 23(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec23subsec3_smooth) or [(4)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec23subsec4_smooth) of the [*Canada Pension Plan*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html) or [subsection 86(2)](https://www.canlii.org/en/ca/laws/stat/sc-1996-c-23/latest/sc-1996-c-23.html#sec86subsec2_smooth) or [(2.1)](https://www.canlii.org/en/ca/laws/stat/sc-1996-c-23/latest/sc-1996-c-23.html#sec86subsec2.1_smooth) of the [*Employment Insurance Act*](https://www.canlii.org/en/ca/laws/stat/sc-1996-c-23/latest/sc-1996-c-23.html) (each of which is in this subsection referred to as a “federal provision”)
			* **(ii)** amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where
				+ **(a)** that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
				+ **(b)** the province is a **province providing a comprehensive pension plan** as defined in [subsection 3(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec3subsec1_smooth) of the [*Canada Pension Plan*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html), that law of the province establishes a **provincial pension plan** as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in [subsection 23(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec23subsec3_smooth) or [(4)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec23subsec4_smooth) of the [*Canada Pension Plan*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html),

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

## Property Vesting in the Trustee

* **Upon occurrence of bankruptcy, debtor’s property immediately vests in trustee in bankruptcy** (*BIA*, s. 71)
	+ **(1) Property of a bankrupt divisible among creditors is comprised of all bankrupt’s property, wherever situated, at date of bankruptcy, or that may be acquired by or devolve on bankrupt after bankruptcy, but before discharge** (*BIA*, s. 67(1)(c))
		- **After-Acquired Property: money or other property before discharge**
			* Don’t buy lottery tickets until after discharge – money won would go to creditors
				+ The right to the ticket is what vests in trustee – even if bankrupt did not win until after discharge, money would vest in trustee
			* Gifts
				+ Mere promises do not constitute binding obligations
		- **(a) Property includes:** (*BIA*, s. 2)
			* **(i) All property, situated in Canada or elsewhere**
				+ **(1) Personal Rights**

**(a) Rights of action**

**(i) Unpaid seller’s lien – allows seller to retain possession of goods until paid**

Does not mean seller owns property – can retain somebody else’s property until seller paid what they are owed

**(ii) If trustee indicates he is willing to perform bankrupt’s obligations, may seek to have third-party perform obligations**

**Trustee has choice to affirm or disclaim contractual obligations**

**(b) Does not include personal integrity claims -- law will not turn bodily pain or mental anguish into profit for creditors** (*Sibley*)

* + - * + **(2) Property Rights:**

**Money**

**Goods**

**Land and every description of property, real or personal, legal or equitable**

**Obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property**

* + - * **(ii) Such powers in respect of property as might have been exercised by bankrupt for his own benefit**
		- **(b) Property does not include:** (*BIA*, s. 67(1))
			* **(i) Property held by bankrupt in trust for another**
			* **(ii) Property exempt from execution or seizure under any laws applicable in province within which property is situated and within which bankrupt resides; or**
			* **(iii) Goods and services tax credit payments that are made in prescribed circumstances to bankrupt**
				+ Often, method used for bankrupt to pay trustee
			* **(iv) Prescribed payments relating to essential needs of an individual that are made in prescribed circumstances to bankrupt**
			* **(v) Property in RRSP, or registered retirement income fund, as defined in *Income Tax Act***
				+ **Exception: property contributed to such plan or fund in 12 months before date of bankruptcy constitutes ‘property’ of bankrupt**
	+ **(2) No need for assignment, transfer, or act of conveyance**
	+ **(3) Bankrupt ceases to have capacity to deal with or dispose of their property** (*BIA*, s. 71)
	+ **(4) Trustee “steps into bankrupt’s shoes”: assets vesting in trustee subject to all limitations or defences that could be asserted against bankrupt** (*Yale)*
		- **(a) Trustee not a *bona fide* purchaser for value – if bankrupt had gained property through fraud, transferor retains right of rescission against trustee** (*Re Lethbridge Equipment Exchange*)
		- **(b) If property rights shared with another:**
			* **(i) Joint Tenancy: joint tenancy severed and coverts into tenancy-in-common** (*Re White*)
				+ Vesting of interest in trustee results in loss of unity of title
				+ Trustee obtains undivided one-half interest in property
				+ Right of survivorship lost
				+ Trustee does not have right to sell entire interest and pay out other co-owner with portion of sale proceeds (*Re Reeder*)
				+ Trustee may commence partition and sale of land, but Court may continue to refuse to grant order if causing serious hardship (*McKenzie (Trustee of)*)
			* **(ii) Trustee acquires property subject to dower right or homestead right held by non-owning spouse**
				+ Trustee may dispose of interest, but non-owning spouse must consent to transfer, or requirement of spouse’s consent must be waived by a Court (*Re Gates*)
			* **(iii) Trustee may claim a third-party with legal title to property holds the property in trust for the bankrupt** (*Kopr*)
	+ **(5) Property vests in trustee on date of bankruptcy:**
		- **(a) Involuntary bankruptcy: date of bankruptcy order**
		- **(b) Voluntary bankruptcy: date of filing of assignment by official receiver**
	+ **(6) If debtor disposed of property prior to date of bankruptcy, that asset does not vest in the trustee**
	+ **(7) Assets acquired by bankrupt following bankruptcy, but before discharge, also vest in trustee** (*BIA*, s. 67(1)(c))

### Anti-Deprivation Rule

* **Fraud on Bankruptcy Law Principle: contract may not contain provision that removes value from reach of insolvent person’s creditors** (*Bramalea Inc*)
	+ Violates public policy of equitable and fair distribution on bankruptcy
	+ **(1) Anti-Deprivation Rule:**
		- **(a) Common Law Anti-Deprivation Rule: contractual provision that removes value from reach of insolvent person’s creditors is void for violating public policy of equitable and fair distribution on bankruptcy**
			* **(i) Effects-based test – intention is irrelevant**
			* **(ii) Invalidates provisions that are engaged by debtor’s bankruptcy or insolvency** (*Chandos Construction*)
				+ **(1) Defeasance of Absolute Interest:** may not transfer an interest that is forfeited upon occurrence of bankruptcy (*Ex parte Jay*)
				+ **(2) UK Law: for anti-deprivation rule to be engaged, must be intention to evade insolvency law** (*Belmont*)

**(a) Rule does not apply if parties act in good faith and transaction serves legitimate commercial purpose, considering:**

Whether source of bankrupt’s asset is person to whom it is to go on bankruptcy

**(b) Rule does not apply in Canada**

Would undermine policy of protecting bankrupts

Would create uncertainty – parties cannot know at time of contracting whether Court, years later, will find contract entered into in good faith and for legitimate commercial purpose (*Chandos Construction*)

Parties would pretend to have good faith intentions to create preference over other creditors (*Chandos Construction*)

* + - * **(iii) Determinable or Limited Interests: occurrence of event marks end of interest’s duration** (*Re Knechtel Furniture*)
				+ Does not violate anti-deprivation rule
				+ Leases or licenses that terminate upon occurrence of bankruptcy do not violate rule
			* **(iv) Example:**
				+ Clause in partnership provides that, in event of one partner’s insolvency, non-insolvent partner may purchase interest of insolvent partner
		- **(b) Statutory Anti-Deprivation Rule: person cannot use contractual provision to terminate, claim accelerated payment, or claim forfeiture, under any agreement with a bankrupt, only because of the individual’s bankruptcy or insolvency** (*BIA*, s. 84.2)
			* **(i) Does not apply if bankrupt is corporation or artificial entity**
			* **(ii) Primary purpose is to protect bankrupt, not other creditors**
				+ **(1) Cannot waive protection of this agreement** (*BIA*, s. 84.2)
			* **(iii) Common law anti-deprivation rule continues to apply as well** (*Chandos Construction*)
			* **(iv) Includes defeasance of absolute interest and determinable interests**
				+ Includes leases and licenses

Landlord cannot terminate lease, merely because lessee went bankrupt

Landlord cannot terminate lease on basis of unpaid rent, taking place before bankruptcy

Utility company cannot terminate lease, merely because lessee went bankrupt

* + - * **(v) Court may declare rule inapplicable if it causes applicant significant financial hardship** (*BIA*, s. 84.2(6))
	+ **(2) *Pari Passu* Rule: forbids contract provision that allows a creditor to receive more than its proper share** (*Chandos Construction*)
		- **(a) Irrelevant whether provision triggered by insolvency or bankruptcy** (*Chandos Construction*)

#### Chandos Construction Ltd v Deloitte Restructuring Inc (SCC)

**Ratio**

* **Property of bankrupt vests in trustee** (*BIA*, s. 71)
	+ **Anti-deprivation rule renders void contractual provisions preventing property from passing to trustee**
		- **Provision in contract may not award one party money in event of other party’s bankruptcy**
* **Test for anti-deprivation rule:**
	+ **(1) Relevant clause must be triggered by event of bankruptcy or insolvency; and**
	+ **(2) Effect of clause must be to remove value from bankrupt or insolvent’s estate**
		- **(a) Clause that eliminates property from bankrupt’s estate, but not value, may not offend rule**
		- **(b) Taking security, getting insurance, or requiring third-party guarantee when contracting with other party does not offend rule**

**Facts:** Chandos entered contract which would award it money in event of other party’s bankruptcy. **Issue:** Whether provision invalid due to anti-deprivation rule? **Holding:** Appeal dismissed.

### Non-Transferable Property

* **Even where bankrupt is contractually prohibited from transferring his rights to another, trustee may have power to transfer in certain circumstances**
	+ **(1) Court has power to assign debtor’s rights and obligations to specified person who agrees to assignment** (*BIA*, s. 84.1(1))
		- **(a) Applies to all contracts, except:**
			* **(i) Post-bankruptcy contracts, eligible financial contracts, collective agreements**
			* **(ii) Agreements ineligible because of their nature** (*BIA*, s. 84.1(3))
				+ Auto dealership agreement not a personal contract (*Welcome Ford*)
	+ **(2) In deciding whether to make transfer, Court considers:** (*BIA*, s. 84.1(4))
		- **(a) Whether assignee consents to transfer**
			* **(i) Unreasonable withholding of consent may be considered** (*Welcome Ford*)
		- **(b) Whether assignee able to perform obligations; and**
			* **(i) Whether assignee agrees to observe lease’s terms and not conduct more objectionable or hazardous business than that conducted by bankrupt**
			* **(ii) Court may consider assignee’s business reputation in community or creditworthiness** (*Griff*)
			* **(iii) Assignee remains subject to restrictive covenants that limit types of business that may take place on leased premises** (*Micro Cooking Centres*)
		- **(c) Whether appropriate to assign rights and obligations to that particular person**
	+ **(3) Court may not effect transfer until it believes all monetary defaults will be remedied by date specified in order** (*BIA*, s. 84.1(5))

### Patents and Copyrights

* **Patents: trustee may sell patented articles without restrictions that were binding on debtor** (*BIA*, s. 82(1))
	+ **(1) Manufacturer/vendor who objects has right to purchase patented articles from trustee at invoice price, with reasonable deduction for deterioration or depreciation** (*BIA*, s. 82(2))
* **Copyrights: trustee has more limited rights than those enjoyed by debtor**
	+ **(1) Applies to writings and recordings** (*Re Song Corp*)
	+ **(2) If work unpublished and no expenses incurred at time of bankruptcy, work reverts to author** (*BIA*, s. 83(1))
	+ **(3) If work put into type and expenses incurred, work reverts to author on payment of expenses**
	+ **(4) If trustee decides not to carry out contract after 6 months, contract terminates and work reverts to author**
	+ **(5) If work published and put on market, trustee may deal with published work**
		- **(a) Author entitled to receive same royalties he would have received from bankrupt**
		- **(b) Trustee may not assign copyright, except on terms giving author same rate of royalties** (*BIA*, s. 83(2))
	+ **(6) Before disposing of copies of manufactured work, trustee must offer them to author at price and conditions as trustee deems fair and proper** (*BIA*, 83(3))

### Licenses and Quotas

* **License: right to do something, that would otherwise not be lawful**
	+ **(1) Only some licenses fall within definition of property and vest in trustee – depends on whether license is something of value that might satisfy creditors’ claims**
		- **(a) Transferable license is property, but restrictions imposed by person who issues license must be respected** (*Re Rogers*)
		- **(b) License is not property if issuer has absolute and unfettered discretion to grant or withdraw licenses** (*Bouckhuyt*)
			* **(i) Professional license, recognizing skill and competency of bankrupt, is not property**
		- **(c) Existence of commercial market for license may be considered** (*Finesse Holsteins*)
		- **(d) Whether license has characteristics analogous to existing property right**
			* **(i) Where license gives holder a right to acquire property in fish that were caught, similar to *profit a prendre* and considered property** (*Saulnier*)

#### Saulnier v Royal Bank of Canada (SCC)

**Ratio**

* **Fishing license is property under *BIA***
	+ **License, coupled with proprietary interest in the harvest – similar to *profit a prendre***
		- **Whether proprietary interest is contingent on fish being caught is irrelevant** (*BIA*, s. 2)
	+ **If license expires during bankruptcy, trustee has same right as original holder to seek replacement**

**Facts:** Saulnier held fishing licenses. Made assignment in bankruptcy. Trustee in bankruptcy signed agreement to sell Saulnier’s fishing licenses to third-party. Saulnier refused, arguing licenses did not vest in trustee as property. **Issue:** Whether commercial fishing license constitutes ‘property’ vesting in trustee in bankruptcy? **Analysis:** Fishing license is analogous to *profit a prendre*. Fishing license vests in trustee and is subject to being sold to third-party. **Holding:** Appeal dismissed.

### Veto Rights

* **Veto Right: statutory right to veto or withhold consent**
	+ Non-owning spouse may withhold consent to disposition of homestead (*Homesteads Act*)
	+ Lender must offer to lease land back to farmer who has defaulted on loan (*Saskatchewan Farm Security Act*)
* **If veto right is non-transferable and only available to debtor, it is not property that vests in trustee** (*Czerwonka*)
* **If veto right is transferable, regarded as property that vests in trustee** (*Mulatz*)
	+ **Even if right to assign limited to small class of persons**
* **If veto right relates to property and is capable of being surrendered or waived for valuable consideration, it is property that vests in trustee** (*Chartier*)
	+ **Even if right is non-transferable**

### Rights of Action

* **Upon occurrence of bankruptcy, bankrupt ceases to have capacity to dispose of or deal with property** (*BIA*, s. 71)
	+ **If right of action vests in trustee, bankrupt loses right to bring or continue the action – trustee may pursue right of action**
		- Rights of action for breach of contract
		- Right to seek accounting of wrongfully gained profit
		- Claims in tort of conversion for interference with bankrupt’s goods(*Re Ritenburg*)
		- If bankrupt had voidable title due to acquiring property by fraud, trustee only gets voidable title
			* Third-party may recover from trustee
		- If single cause of action gives rise to personal injury claim and claim for income or revenue governed by surplus income provision, cause of action vests in trustee
			* Trustee must hold damages recovered for personal injury claim in constructive trust for bankrupt (*Ord*)
		- If bankrupt injures another and carries insurance for the loss, but insurance policy states money is payable to insured, right of action vests in trustee (*Re Harrington Motor Co*)
			* All creditors of bankrupt may share in funds
			* Where possible, Courts interpret policy as payable to injured person, rather than bankrupt (*Re Major*)
		- If bankrupt carries property insurance, funds payable to trustee in event of loss, notwithstanding any law or contractual provision that provides otherwise (*BIA*, s. 24(2))
		- Right to seek division of assets, if a triggering event has occurred at date of bankruptcy (*Tinant*)
			* Spouse has right to apply for division of assets upon separation
			* If triggering event occurs after bankruptcy, but before discharge of bankrupt, right of action vests in trustee as after-acquired property (*Re Gray*)
			* If no triggering event, right to seek division of assets at some future time is not considered property (*Kopr*)
	+ **If right of action does not vest in trustee, bankrupt maintains right to pursue action** (*Gano*)
		- Personal injury claim to recover damages to bankrupt (*Re Ritenburg*)
		- Claim for damages for loss or damage to exempt property (*Re Brodie*)
		- Claims relating to divorce/custody (*Gano*)
		- Claims relating to solicitor-client privilege (*Bre-X Minerals*)
		- Claims for punitive damages (*Gano*)
		- Claim for income or revenue that is governed by surplus income provision (*Wallace*)
		- If cause of action characterized as personal to bankrupt, so as not to be considered property of bankrupt, funds recovered in respect of claim do not vest in trustee (*Re Airey*)
			* Includes claims for injury to reputation from defamation or malicious prosecution (*Cherry*)
* **To fall within definition of ‘property’, claim must be capable of being pursued in Court**
	+ **(1) Ability to apply for discretionary awards for compensation from criminal injuries compensation board is not property** (*Re Campbell*)
		- Even if award compensates injury to victim’s property
	+ **(2) Right that is subject to a judge’s discretion is considered property** (*Tinant*)

### Set-Off

* **Set-Off: applies to all claims made against bankrupt’s estate and all actions instituted by trustee for recovery of debts due to bankrupt in same manner and extent as if bankrupt were plaintiff or defendant, except to extent claim for set-off affected by provisions of this Act regarding frauds or fraudulent preferences** (*BIA*, s. 97(3))
	+ **Right to set-off normally only applies to two parties**
	+ **Bankrupt owes money to creditor, but creditor also owes money to bankrupt**
	+ **Set-off only available for claims against bankrupt’s estate which existed on or before date of bankruptcy**
	+ **Right of set-off available in bankruptcy, to same extent as it is in ordinary civil proceedings**
	+ **Amount owed by party to trustee is reduced by amount the bankrupt owes to that party** (*BIA*, s. 97(3))
	+ Counter-demand which D holds against P, arising out of separate transaction from P’s cause of action (*Delco Light Co*)
	+ Right which exists between two parties, each of whom under an independent contract owes an ascertained amount to the other, to set off his respective debt by way of mutual deduction (*John Wills, Inc*)
		- In any action brought for the larger debt the residue only, after such deduction, is recovered
	+ Defence to paying a debt (*Chandos Construction*)
	+ Example:
		- A owes $1000 to B, and B owes $2000 to A. B goes bankrupt.
		- If set-off permitted:
			* two claims are netted out: A gets $1000 in bankruptcy proceedings
				+ A likely only to get 10% this amount at end of bankruptcy proceedings
		- If set-off not permitted:
			* A brings action for $2000 against B
				+ A likely only to get 10% of this amount at end of bankruptcy proceedings
			* B brings action for $1000 against A
			* A actually loses money at end of proceedings
	+ **(1) Legal Set-Off: right to set-off arises by statute**
		- **(a) Legal set-off requires:**
			* **(i) Both claims must be liquidated claims or debts; and**
				+ **(1) Claims may be independent or unconnected – need not arise from same transaction between the two parties**
				+ **(2) Party with claim for unliquidated damages cannot claim legal set-off**

**(i) Cannot claim legal set-off for damages – becomes liquidated damages after judgment obtained for certain amount**

* + - * + **(3) If debt does not arise until some act or condition performed, set-off unavailable**
				+ **(4) Available even if debt is payable at some point in future** (*Coopers & Lybrand*)
			* **(ii) Claims must be mutual cross-obligations: cross-claims must be between same parties and in same right**
				+ **(i) Debt that arises after bankruptcy cannot be set-off against debt that arises before bankruptcy** (*Re Air Canada*)

Ex. If A owes $100 to B before B’s bankruptcy, but B owes A $50 after bankruptcy, A cannot set-off claims

Not mutual debts

Debt for $100 no longer owed to B, but has vested in trustee

* + - * + **(ii) Bankruptcy of debtor does not destroy right of set-off available at date of bankruptcy** (*Re Paquet*)
				+ **(iii) Bankruptcy of debtor prevents legal set-off for contingent claim that does not become debt until after bankruptcy** (*Mitchell, Houghton* *Ltd*)

Example:

C gives personal guarantee for debt owed by bankrupt

C also indebted to bankrupt

If C not called upon to pay on guarantee at date of bankruptcy, obligation remains contingent liability – cannot be set-off against debt C owes B

* + - * + **(iv) Claimant may not set-off claims that have been acquired from other creditors after bankruptcy** (*Northern Electric Co*)

Example:

C owes debt to bankrupt

After B’s bankruptcy, another creditor assigns C a claim against B

Claim acquired by C is claim against trustee for dividend to be paid out of bankrupt’s estate

No mutuality, so legal set-off unavailable

* + - * + **(v) Set-off applies to debts owed by bankrupt that were not triggered by the bankruptcy** (*Chandos Construction*)
	+ **(2) Equitable Set-Off: right to set-off arises from equity**
		- **(a) Equitable set-off requires:**
			* **(i) Two claims arise out of same contract, transaction, or event; and**
			* **(ii) Inequitable not to permit the cross-claim to be raised**
				+ **(1) Allows unliquidated claim to be set-off against debt or other liquidated claim** (*Telford*)
	+ **(3) Contractual Set-Off: right to set-off arises from agreement between parties**
		- **(a) Two parties agree to contractual set-off that expands or limits ordinary right of set-off**
			* **(i) Party has right to set-off any unliquidated claims against debts owing for claims that lack mutuality** (*Re Brunswick Chrysler Plymouth*)
			* **(ii) Contract may also narrow or eliminate right to set-off, preventing other party from asserting legal or equitable set off** (*Columbia Trust Co* *(Liquidator of)*)
		- **(b) No requirement that mutuality of claims be present**
			* **(i) Parties may agree A has right to set-off a claim owed by B to A’s subsidiary**

#### *Re Dahl* (BCSC)

**Ratio**

* **Set-off applies to all claims made against bankrupt’s estate and all actions instituted by trustee for recovery of debts due to the bankrupt in same manner and extent as if bankrupt were plaintiff or defendant** (*BIA*, s. 97(3))
	+ **Except to extent set-off affected by frauds or fraudulent preferences in Act**
	+ **Right of set-off must exist at time of bankruptcy** (*Synychych*)
		- **For claims against bankrupt, only applies to claims existing on or before date of bankruptcy**
* **Inheritance is ‘property’ that vests in trustee**
* **Equitable Set-Off: equitable circumstances giving right to a person against an opposing party to an action**
	+ **(1) Relationship between cross-obligations such that it is unfair or inequitable to permit one to proceed without taking opposing claim into account**
		- **(a) D’s claim must be closely or intimately connected with P’s claim** (*Cam-Net Communications*)
	+ **(2) Equitable set-off requires:** (*Coba Industries*)
		- **(a) Party relying on set-off must show an equitable ground for protection against adversary’s demands**
		- **(b) Equitable ground must go to very root of P’s claim before set-off allowed**
		- **(c) Cross-claim must be so clearly connected with P’s demand, that it would be manifestly unjust to allow P to enforce payment without considering cross-claim**
		- **(d) P’s claim and cross-claim need not arise out of same contract; and**
		- **(e) Unliquidated claims are on same footing as liquidated claims**

**Facts:** Dahl was beneficiary under will for 25% interest in estate. Dahl made voluntary assignment into bankruptcy. After assignment into bankruptcy, she misappropriated funds from will as executrix. Kearns then appointed as sole executrix of estate.  **Issue:** Whether trustee should equitably set-off money wrongly taken by Dahl against 25% interest Dahl is to receive under will? **Analysis:** Inheritance vested in trustee. Dahl, as separate party, took money which estate wants to have set-off. Equitable set-off unavailable to Kearns: because of bankruptcy, equities of other creditors in bankruptcy must be considered – Kearns is not in a better position than bank is. Trustee owns beneficial interest, separate from Dahl’s misappropriations.

### Non-Realizable Property

* **If trustee of opinion that debtor’s asset that has vested in trustee unable to be realized, trustee must return property to debtor before trustee applies for discharge** (*BIA*, s. 40(1))
	+ **(1) If trustee believes lawsuit inappropriate, right of action incapable of realization and returned to debtor** (*MLA Northern Contracting*)
	+ **(2) If trustee fails to act, debtor may seek order for return of property** (*BIA*, s. 40(2))
	+ **(3) Unrealizable property does not automatically revest in debtor upon debtor’s discharge** (*Canadian Imperial Bank of Commerce*)
	+ **(4) After returning unrealizable property to debtor, trustee may not thereafter seek to realize on property** (*Re Shelson*)
	+ **(5) Trustee may not realize on property if trustee misleads debtor into thinking he will not seek to do so** (*Marino (Trustee of*))
	+ **(6) Trustee may realize against asset if debtor misleads trustee of property’s existence or value** (*Rocher*)

## Non-Divisible Property

* **Bankruptcy proceeds in two stages:** (*Royal Bank of Canada*)
	+ **(1) Property-Passing Stage:**
		- **(a) Non-divisible property continues to vest in trustee**
			* **(i) Debtor does not have capacity until property transferred back**
	+ **(2) Estate Administration Stage:**
		- **(a) Property of bankrupt does not include:** (*BIA*, s. 67(1))
			* **(i) Property held by bankrupt in trust for any other person;** (*BIA*, s. 67(1)(a))
			* **(ii) Property exempt from execution or seizure under laws applicable in province within which property is situated and within which bankrupt resides**

### Trust Property

* **Trust: equitable obligation imposed on trustee to hold and administer subject matter of trust for beneficiary**
	+ **(1) Trust is effective only if existing at time of bankruptcy**
		- **(a) Trust arises when duty to make restitution arises** (*Rawluk*)
	+ **(2) Subject matter of a trust may be property right or personal right**
		- **(a) Person owed money may create trust of that right in favor of beneficiary**
			* **(i) If person owed money goes bankrupt, personal right of action to recover debt not available to creditors**
		- **(b) If trustee goes bankrupt, beneficiary must show existence of subject matter of trust, or its traceable value**
			* **(i) If trustee has wrongfully disposed of asset, beneficiary has action against trustee for breach of trust – may be proven in bankruptcy claims**
	+ **(3) Trust property not divisible among bankrupt’s creditors** (*BIA*, s. 67(1))
		- **(a) Trust property still vests in trustee, but not distributed to creditors** *(Ramgotra*)
			* **(i) Trust property returned to bankrupt before discharge** (*BIA*, s. 40)
			* **(ii) Because trust property vests in trustee, bankrupt unable to administer trust for beneficiary**
	+ **(4) If beneficiary of trust goes bankrupt, his beneficial interest vests in trustee**
		- **(a) s. 67(1) does not apply to beneficiaries**
	+ **(5) Types of Trusts:**
		- **(a) Express Trusts: to create express trust, must be…** (*Abakhan & Associates*)
			* **(i) Clear intention to create trust**
				+ **(1) Use of word ‘trust’ not necessary** (*Re Ontario Worldair*)
				+ **(2) Agent who has power to sell principal’s property does not hold money in trust for principal – becomes a debt, not trust**

**(a) If parties agree monies held in trust, intention exists** (*Canadian Pacific Airlines*)

* + - * + **(3) Customer making prepayment for future delivery of goods does not intend to create trust**

**(a) Seller may unilaterally create trust to protect customer’s prepayment, even without customer’s awareness** (*Re Kayford*)

* + - * **(ii) Subject matter of trust must be certain**
				+ **(1) Property must be ascertainable**

**(a) Whether identity of property is lost, with no substitute property into which its value may be traced** (*Re Graphicshoppe*)

Merely having certificates acknowledging ownership of wine do not have legal or equitable interest in insolvent dealer’s inventory(*Re London Wine*)

* + - * **(iii) Persons intended to be beneficiaries must be clearly indicated; and**
			* **(iv) Trust must be completely constituted**
				+ **(1) If settlor bankrupts before property transferred to trustee, trust fails – creditors of settlors will obtain benefit of property**

**(a) Bankrupt may hold property under resulting trust for settlor**

* + - **(b) Resulting Trusts: arises when…**
			* **(i) Express trust fails**
				+ **(1) Trustee holds assets on resulting trust for settlor**
			* **(ii) Person transfers property gratuitously to another; or** (*Pecore*)
				+ **(1) Presumption of resulting trust rebutted by evidence that gift was not intended**

Does not apply to gift from husband to wife, or father to child

* + - * **(iii) Person pays purchase price to vendor and directs it be transferred into name of another**
		- **(c) Constructive Trusts: imposed by Court to benefit person who has been wrongfully deprived**
			* **(i) Courts reluctant to find constructive trust in insolvency – gives beneficiary of trust a proprietary right that effectively gives it a preference over all other creditors**
			* **(ii) Requirements for constructive trust:** (*Soulos*)
				+ **(1) Breach of equitable obligation**

**(a) Remedy to reverse unjust enrichment**

**(i) Unjust enrichment occurs when:**

**D enriched**

**P suffered corresponding deprivation**

**Absence of juristic reason for enrichment**

Mistaken payment – Court imposes constructive trust to compel recipient to hold it on behalf of mistaken payor

**(ii) Allows claimant to jump queue in front of unsecured creditors** (*Baltman*)

**(iii) Requirements for constructive trust to be imposed for unjust enrichment:**

**(1) Unjust enrichment must be asset capable of being subject matter of trust; and**

Gains relating to services would not give rise to constructive trust

**(2) D did not acquire full beneficial use of asset before unjust enrichment arose**

Claimant intended ownership should pass to recipient, but subsequent event produces unjust enrichment

**(b) Compel person to give up property acquired as result of wrongdoing** (*Soulos*)

**(i) Property obtained by wrongdoer must be identifiable, or traceable into other property** (*Reid*)

Breach of confidence

Breach of fiduciary duty (*Lac Minerals*)

Gain obtained through deliberate killing (*Schobelt*)

**(c) Circumstances involving attempts to transfer assets**

Vendor of land under agreement for sale holds land on constructive trust in favor of purchaser, until conveyance completed

**(d) Enforce wills or oral agreements to sell land, if non-compliance with writing requirements**

* + - * + **(2) Gain must have arisen from using assets that were supposed to be applied for another’s benefit**
				+ **(3) Legitimate reason for seeking a proprietary remedy; and**
				+ **(4) No factors rendering constructive trust unjust**

**(a) Whether constructive trust would prejudice interests of intervening creditors**

**(i) If wrongdoer is insolvent, proprietary remedy will likely prejudice creditors – unlikely constructive trust imposed**

**Merely means claimant will be required to share *pari passu* with other creditors by seeking enforcement of claim**

* + - **(d) Statutory Trusts: person owing obligation deemed to hold property in trust for claimant – artificial creation of legislation to enhance claims held by certain classes of claimants**
			* **(i) If statutory trust is in favor of Crown, bankrupt’s property not deemed to be held in trust for Crown, unless it would be so regarded without provision present in federal or provincial legislation** (*BIA*, s. 67(2))
				+ If trust is in favor of Crown, unlikely to be valid, unless it is for source deduction
				+ Claim by Crown for unremitted provincial sales tax
				+ Claim by Crown for unremitted GST from employer (*Excise Tax Act*, s. 222)
				+ **(1) Unlikely to meet requirements of common law trust**

**(a) Unlikely to have intention to be held separate for Crown**

* + - * + **(2) Exception: statutory trusts created for source deductions are valid -- give Crown right to take possession or proceeds of property from trustee in bankruptcy** (*BIA*, s. 67(3))

Claim by Crown for income tax, EI, CPP (*Income Tax Act*, s. 227(4.1))

* + - * **(ii) If statutory trust is in favor of party other than the Crown, must meet common law requirements for trust to be valid** (*Henfrey Samson Belair*)
				+ **(1) Certainty of intention may be found in legislation creating the statutory trust** (*Guarantee Company of North America*)
				+ Unremitted pension contributions (*Employment Pension Plans Act*, s. 52)
				+ Claims by unpaid employees for unpaid wages (*Employment Standards Code*, s. 109(2))

#### BIA

* **Property of bankrupt divisible among his creditors does not include property held by bankrupt in trust for any other person** (*BIA*, s. 67(1))
	+ **Property of bankrupt not regarded as held in trust for Crown, unless it would be regarded as such in absence of statutory provision** (*BIA*, s. 67(2))
		- Common law requirements for trust apply
		- **Exceptions: Crown has right to take possession or proceeds of source deductions from trustee in bankruptcy**
			* **Amounts under *Income Tax Act* or *Employment Insurance Act,* provincial pension plans** (*BIA*, s. 67(3))

#### British Columbia v Henfrey Samson Belair Ltd (SCC)

**Ratio**

* **Bankruptcy act exempts trust property held by bankrupt from distribution to creditors**
	+ **Gives trust claimants absolute priority**
* **Subject to rights of secured creditors, Crown receives proceeds realized from bankrupt’s property last**
* **To constitute trust property under *BIA*, general principles of trusts must be present**
	+ **If money collected is mingled with other assets and becomes unidentifiable, not a trust under *BIA***

**Facts:** Dealership collected sales tax for provincial government under provincial Act. Dealership mingled sales tax with other assets. Dealership made assignment in bankruptcy.  **Issue:** Whether provincial Act creates statutory trust or is a mere Crown claim? **Analysis:** Provincial Act creates statutory trust, that lacks essential characteristics of trust – not identifiable or traceable. Province’s claim merely a claim for unpaid lien, to be paid last when bankrupt’s assets distributed to creditors.  **Holding:** Appeal dismissed.

### Exempt Property

* **Exempt Property: bankrupt’s property exempt from execution or seizure under provincial law, within which property is situated and within which bankrupt resides** (*BIA*, s. 67(1)(b))
	+ Permits debtor to preserve independence and self-sufficiency so cost of continued maintenance of debtor does not fall on society (*Re Pearson*)
	+ **(1) Exempt property still vests in trustee, but not liquidated and distributed to creditors** *(Ramgotra*)
		- **(a) Exempt property returned to bankrupt before discharge** (*BIA*, s. 40)
		- **(b) To deal with property, bankrupt must apply for disclaimer, revesting property in bankrupt** (*BIA*, s. 20(1))
	+ **(2) Exemptions only given to individuals, not corporations**
	+ **(3) Whether property is exempt is determined at date of bankruptcy**
		- **(i)** After date of bankruptcy, provincial law no longer relevant
	+ **(4) Must look to provincial law to determine whether property is exempt – whatever is exempt under provincial law, is exempt under federal bankruptcy law**
		- **(i) Alberta: *Civil Enforcement Act***
			* **(1) RRSPs exempt, even if contributions made within last 12 months** (*Civil Enforcement Act*, s. 92.1)
				+ **(a) Payment out of a registered plan to a plan holder is not exempt** (s. 92.1(2))

**(i)** Transfer of property in one registered plan to another registered plan does not constitute a payment out of a registered plan (s. 92.1(4))

* + - * + **(b) Federal RRSP exemption:** RRSP, registered retirement income fund, and registered disability savings plan, are exempt, except contributions made in 12 months before date of bankruptcy,(*BIA*, s. 67(1)(b.3)

**(i)** Only applies to provinces without provincial provision

* + - * **(2) Registered Disability Savings Plan** (s. 92.1(3))
				+ **(a)** Includes current or future obligation under plan
				+ **(b)** Any payments out of registered disability savings plan to plan holder are exempt from any enforcement process
			* **(3) Registered Education Savings** Plan (s. 92.1(3.1))
				+ **(a)** Includes current or future obligation under the plan, and any payments, or refunds of payments, out of a registered education savings plan to or for a beneficiary to assist the beneficiary to further the beneficiary’s education at a post‑secondary school level are exempt from any enforcement process, but any other payments or refunds of payments out of a registered education savings plan are not exempt (s. 92.1(3.1))

Following transfers do not constitute payments or refunds of payments out of a registered education savings plan: (s. 92.1(4.1)

(a) transfer of property held in one registered education savings plan to another registered education savings plan as described in subsection 146.1(6.1) of the federal Act;

(b) transfer of property held in a registered education savings plan to a registered disability savings plan pursuant to an election under subsection 146.1(1.1) of the federal Act;

(c) transfer of property held in a registered education savings plan to an RRSP in respect of which subsection 204.94(2) of the federal Act applies.

Transfer of property held in one registered plan to another registered plan does not constitute a fraudulent or preferential transfer under the [*Fraudulent Preferences Act*](https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-f-24/latest/rsa-2000-c-f-24.html) (s. 92.1(5))

* + - * + A transfer of property held in a registered education savings plan referred to in subsection (4.1) does not constitute a fraudulent or preferential transfer under the [*Fraudulent Preferences Act*](https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-f-24/latest/rsa-2000-c-f-24.html) (s. 92.1(5.1)
				+ Does not apply to contract of life insurance that is a registered plan or registered education savings plan (s. 92.1(6))
			* **(4) Exempted property from writ proceedings:** (*Civil Enforcement Act*, s. 88)
				+ **(a) food required by debtor and his dependants during next 12 months**
				+ **(b) necessary clothing of debtor and his dependants**

**(i)** maximum exemption for clothing is $4000 (*Civil Enforcement Regulation*, s. 37(1)(a))

* + - * + **(c) household furnishings and appliances**

**(i)** maximum exemption for household furnishings and appliances is $4000 (*Civil Enforcement Regulation*, s. 37(1)(b))

* + - * + **(d) one motor vehicle**

(i) maximum exemption for motor vehicle is $5000 (*Civil Enforcement Regulation*, s. 37(1)(c))

* + - * + **(e) medical/dental aids required by debtor and his dependants**
				+ **(f) if debtor’s primary occupation is farming, up to 160 acres of land, if debtor’s principal residence located on that land and that land is part of his farm**
				+ **(g) principal residence of debtor, including mobile home**

**(i)** maximum exemption for principal residence is $40,000 (*Civil Enforcement Regulation*, s. 37(1)(e))

If debtor is co‑owner, exemption amount reduced to amount that is proportionate to debtor’s ownership interest in residence

* + - * + **(h) if debtor’s primary occupation is not farming, personal property up to value prescribed by regulations that is used by debtor to earn income from his occupation**

**(i)** maximum exemption is $10,000 (*Civil Enforcement Regulation*, s. 37(1)(d))

* + - * + **(i) if enforcement debtor’s primary occupation is farming, personal property necessary for proper and efficient conduct of enforcement debtor’s farming operations for next 12 months**
				+ **(j) property as prescribed by the regulations**

**(a)** where enforcement debtor sells exempt property or property that is exempt up to prescribed value, proceeds from that sale, or the proceeds from that sale up to the stated value, are exempt for period of 60 days from day of sale, if proceeds not intermingled with other funds of debtor (*Civil Enforcement Regulation*, s. 37(2))

**(b)** following payments made to debtor, if proceeds not intermingled with any other enforcement debtor’/s funds: (*Civil Enforcement Regulation*, s. 37(2))

**(i)** income support payment paid under the [*Income and Employment Supports Act*](https://www.canlii.org/en/ab/laws/stat/sa-2003-c-i-0.5/latest/sa-2003-c-i-0.5.html),

**(ii)** handicap benefit paid under the [*Assured Income for the Severely Handicapped Act*](https://www.canlii.org/en/ab/laws/stat/sa-2006-c-a-45.1/latest/sa-2006-c-a-45.1.html), or

**(iii)** widow’s pension paid under the [*Widows’ Pension Act*](https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-w-7/latest/rsa-2000-c-w-7.html),

* + **(5) Four Scenarios:**
		- **(a) Exempt asset sold prior to bankruptcy**
			* **(i) Alberta: voluntary sale of exempt property does not automatically result in loss of the exemption – proceeds exempt for 60 days from day of sale, if those proceeds are not intermingled with other funds of enforcement debtor** (*Civil Enforcement Regulation*, s. 37(2))
			* **(ii) Other Provinces**
				+ **(1) Voluntary sale: proceeds not exempt**
				+ **(2) Involuntary/forced sale: debtor may claim exemption for surplus funds available after paying secured creditors**
		- **(b) Exempt asset converted to non-exempt property, after bankruptcy**
			* **(i) Asset is exempt and any proceeds are also exempted**
				+ **(1) does not depend on whether sale is voluntary or involuntary** (*Re Gruber*)
				+ **(2) does not depend on keeping funds separate, or time period specifications** (*Re Gruber*)
		- **(c) Non-exempt property converted to exempt property, before bankruptcy**
			* **(i) Asset remains exempt**
				+ **(1) Unlikely to be fraudulent conveyance – setting aside transfer made by debtor to third-party**
				+ **(2) Court may control debtor misbehavior by refusing to give debtor discharge until value of assets paid to trustee**
		- **(d) Value-capped exempt asset increases in value after bankruptcy**
			* **(i) Value of asset determined when trustee realizes on the asset – not on date of bankruptcy** (*Re Mackay*)
				+ Post-bankruptcy increases may accrue to benefit of creditors
			* **(ii) Any value beyond exemption is distributed among creditors** (*Re Mackay*)
			* **(iii) Trustee must decide on appropriate course of action before discharge** (*Re Mackay*)
				+ **(1) Trustee cannot wait indefinitely to see if property increases in value**
				+ **(2) Trustee may request conditional discharge – debtor keeps property, but discharged on condition that he pay certain amount to trustee**
		- **(e) Bankrupt acquires exempt property after date of bankruptcy, but before discharge**
			* **(i) Exempt status determined at date property is acquired by bankrupt** (*Re Monteith*)
				+ Bankrupt uses surplus income to buy exempt property
				+ Bankrupt’s spouse transfers her interest in matrimonial home
* Examples:
	+ A and B jointly own parcel of land. B dies. A makes assignment in bankruptcy.
		- A gets all land through right of survivorship
		- All of land vests in trustee
	+ A and B jointly own parcel of land. A makes assignment in bankruptcy. B dies.
		- Only A’s interest in property vests in trustee
		- **Bankruptcy severs joint tenancy, creating tenancy in common**
	+ A repairs car owned by B. B does not pay A. A makes assignment in bankruptcy.
		- Trustee gets A’s right of action against B
		- If A still has possession of vehicle, garagekeeper’s lien vests in trustee
			* **Lien is property vesting in trustee**
		- If A still has possession of any property (even if not car), common law lien that vests in trustee
	+ A repairs car owned by B. B does not pay. B makes assignment in bankruptcy.
		- A has right to prove claim in bankruptcy
			* Not a right against the trustee
		- If A does not have lien (proprietary right), but only right of action (personal right), can only prove claim in bankruptcy

#### BIA

* **Property of Bankrupt**
	+ Property of a bankrupt divisible among his creditors shall not comprise: (s. 67(1))
		- **(b.1)** goods and services tax credit payments that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b);
		- **(b.2)** prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt and that are not property referred to in paragraph (a) or (b); or
	+ Property of a bankrupt does not include: (s. 67(1))
		- all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
			* **(i)** is not subject to the operation of this Act, or
			* **(ii)** in the case of a bankrupt who is the judgment debtor named in a garnishee summons served on Her Majesty under the [*Family Orders and Agreements Enforcement Assistance Act*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-4-2nd-supp/latest/rsc-1985-c-4-2nd-supp.html), is garnishable money that is payable to the bankrupt and is to be paid under the garnishee summons, and
		- such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.
* **Deemed Trusts**
	+ Notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision (s. 67(2))
* **Exceptions**
	+ Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, [subsection 23(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec23subsec3_smooth) or [(4)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec23subsec4_smooth) of the [*Canada Pension Plan*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html) or [subsection 86(2)](https://www.canlii.org/en/ca/laws/stat/sc-1996-c-23/latest/sc-1996-c-23.html#sec86subsec2_smooth) or [(2.1)](https://www.canlii.org/en/ca/laws/stat/sc-1996-c-23/latest/sc-1996-c-23.html#sec86subsec2.1_smooth) of the [*Employment Insurance Act*](https://www.canlii.org/en/ca/laws/stat/sc-1996-c-23/latest/sc-1996-c-23.html) (each of which is in this subsection referred to as a “federal provision”) nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where: (s. 67(3))
		- **(a)** that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or
		- **(b)** the province is a **province providing a comprehensive pension plan** as defined in [subsection 3(1)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec3subsec1_smooth) of the [*Canada Pension Plan*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html), that law of the province establishes a **provincial pension plan** as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in [subsection 23(3)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec23subsec3_smooth) or [(4)](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html#sec23subsec4_smooth) of the [*Canada Pension Plan*](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-8/latest/rsc-1985-c-c-8.html),

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

#### Provincial and Federal Exemption Statutes

* **Provincial law provides exemption for certain types of goods considered necessary for individual maintenance or livelihood**
	+ Exemptions for certain pensions and future retirement plans
	+ Exemption for real and personal property situated on First Nations reserve (*Indian Act*)

#### Pre-Bankruptcy Disposition of Exempt Property

* **If bankrupt sells exempt property prior to bankruptcy and receives proceeds, right to claim exemption of proceeds depends on whether proceeds were exempt under the applicable exemption law at date of bankruptcy**
	+ **(1) Exemption statue does not specifically provide exemption for proceeds of property**
		- **(a) If debtor voluntarily sells property, debtor may not claim exemption of proceeds** (*Wilson*)
		- **(b) If property sold due to forced sale, debtor may claim exemption of proceeds** (*Higgins Co*)
	+ **(2) Exemption statute specifically provides for exemption in respect of proceeds**
		- **(a) Proceeds of sale of exempt property are exempt for 60 days from day of sale, if proceeds not intermingled with other funds of debtor** (*Civil Enforcement Regulation*, s. 37(2))
			* If exempt property sold more than 60 days before date of bankruptcy, proceeds not exempt
			* If 60 day period lapses after date of bankruptcy, proceeds still exempt – exemption determined at date of bankruptcy

#### Post-Bankruptcy Disposition of Exempt Property

* **After date of bankruptcy, provincial or federal exemption law does not apply**
* **If debtor makes post-bankruptcy sale of exempt property, proceeds are exempt** (*Re Gruber*)
	+ **Even if bankrupt voluntarily entered transaction**
	+ Law should facilitate reorganization of bankrupt’s affairs by permitting him to support family or reduce expenses (*Re Gruber*)

#### Value-Capped Exemptions

* **Exemptions may be:**
	+ **(1) Absolute: claimed regardless of property’s value**
	+ **(2) Subject to maximum value limitation**
		- **(a) If property exceeds maximum value, trustee may sell the property -- creditors entitled to any excess, after debtor paid from proceeds of sale** (*Re Pearson*)
		- **(b) If value of property increases following date of bankruptcy, so that it exceeds maximum value limitation, value of property assessed at date trustee deals with property**
			* **(i) Post-bankruptcy increase in value that places property’s value above maximum limitation, is distributable among creditors** (*ICI Paints*)
		- **(c) During estate administration stage, following bankruptcy, trustee must decide upon best course of dealing with property**
			* **(i) If value of property below maximum exempt value, trustee may decide to disclaim interest and revest in bankrupt**
				+ **(1) Trustee cannot afterewards seek to recover increase in value** (*Zemlak*)
		- **(d) During discharge stage:**
			* **(i) If value can be realized for creditors through sale, trustee should proceed to sale**
			* **(ii) Surplus value, in excess of exemption, may be taken into account through**
				+ **conditional discharge** (*Re MacKay*)
				+ **sale of trustee’s interest in property to bankrupt** (*Re Rassell*)
	+ **(3) Available only if property’s value less than specified value on date of bankruptcy** (*Re Fields*)

#### Exceptions to Exemptions

* **Exemption statute may state that exemptions do not apply to certain classes of creditors (ie. assets may be distributed among creditors anyways)**
	+ **(1) Debtor cannot claim exemption for judgment of: support payments, maintenance, alimony, or for act in which debtor committed criminal offence** (*Civil Enforcement Act*, s. 93)
	+ **(2) Exemption only applies when expected claimant brings enforcement proceedings against property** (*Re Harris*)
		- After stay of proceedings lifted, creditor may proceed against exempt asset under provincial judgment enforcement law

#### GST Credit Payments

* **GST Credit: tax-free, quarterly payment for individuals with low income**
	+ **(1) Not available for distribution to creditors** (*BIA*, s. 67(1)(b.1)
	+ **(2) May be used to pay expenses incurred in bankruptcy**
		- **(a) If sufficient monies to cover these costs, value of credit payments paid to bankrupt** (*Re McGowan*)
* **Prescribed payments relating to bankrupt’s essential needs are exempt** (*BIA*, s. 67(1)(b.2))

#### RRSPs

* **RRSPs and Registered Retirement Income Funds are exempt** (*BIA*, s. 67(1)(b.3))
	+ **(a) Contributions made in 12 months before date of bankruptcy are not exempt**
	+ **(b) Most provinces give exemption regardless of whether or not insurance company issues them**

#### Re Gruber (ABQB)

**Ratio**

* **Determine which property is exempt on date of bankruptcy**
	+ **(1) Asset that is exempt at date of bankruptcy remains exempt, notwithstanding subsequent dealings with asset – nothing causes bankrupt to lose exemption, including liquidation of asset**
		- **(a) If bankrupt sells exempt asset after date of bankruptcy, proceeds are also exempt**
		- **(b) Irrelevant whether sale was forced or voluntary**

**Facts:** House bankrupt lived in was exempt at date of bankruptcy. Bankrupt voluntarily sold interest in exempt property before discharge.  **Issue:** Whether proceeds from exempt property home are exempt, if sold before discharge? **Analysis:** Bankrupt entitled to exemption of interest in his home at date of bankruptcy. Equity was less than $40,000. Fact that he sold property prior to discharge does not affect his entitlement to net proceeds of sale as exempt property.  **Holding:**

#### Re MacKay (ABQB)

**Ratio**

* **Value of exempt asset is determined at time asset is sold**
	+ **(1) Value not determined at date of bankruptcy**
* **For a house to be exempt, house must be:**
	+ **(1) principal residence of bankrupt; and** (*Civil Enforcement Act*, s. 88(g))
	+ **(2) bankrupt’s principal residence at date of bankruptcy** (*Holthuysen*)
* **Stages of Bankruptcy** (*Royal Bank of Canada*)
	+ **(1) Property-Passing Stage: trustee takes possession of assets forming bankrupt’s estate**
	+ **(2) Estate Administration Stage: trustee divides bankrupt’s property among creditors**
		- **(a) Three types of property:**
			* **(i) Property which is wholly exempt, regardless of value**
				+ **(1) Trustee cannot exercise distribution powers to use that which is exempt for creditors’ benefit**
			* **(ii) Property which is not exempt**
			* **(iii) Property which has limited exemption**
				+ **(1) If equity in property exceeds limited exemption, surplus equity subject to realization by creditors**

**(a) Surplus equity may be realized on by trustee; or**

**(b) Surplus equity may be realized on by creditors**

**(i) Creditor may appear at application for discharge and ask for conditional order for payment of surplus equity; or**

**Surplus equity then shared among all proved creditors**

**(ii) Creditor can get s. 38 order to let it realize on surplus equity**

**Does not have to share with other creditors**

* **After bankrupt receives discharge, nobody can raise issue about surplus equity in property**
	+ **(1) If value of property goes up, trustee and creditors cannot ask bankrupt to pay more**
	+ **(2) If value of property goes down, bankrupt cannot ask to pay less**

**Facts:** Bankrupt sold house after date of bankruptcy, but before discharge. House gained value between date of bankruptcy and sale.  **Analysis:** Bankrupt entitled to exemption, as house was his principal residence on date of bankruptcy. Bank did not raise issue about bankrupt’s equity in house prior to discharge.  **Holding:** Application dismissed.

## Post-Bankruptcy Income

### After-Acquired Property

* **After-Acquired Property: property acquired after bankruptcy vests automatically in trustee and may be used to satisfy creditors’ claims** (*Wallace*)
	+ **(1) Pre-discharge asset subject to contingency that is satisfied after discharge automatically vests in trustee**
		- Gifts, legacies, inheritances, or other windfalls vest automatically in trustee
			* Trustee may claim lottery winnings, where lottery ticket acquired pre-discharge (*Re Sindaco*)
			* Trustee may claim testamentary gift, subject to condition the beneficiary survive (*Re Brausen*)
	+ **(2) Contingent right different than mere expectation – beneficiary under a will does not obtain any interest prior to testator’s death**
	+ **(3) Where third-party acquires assets using property that vested in trustee, trustee may use tracing principles to assert claim against third-party’s assets** (*Jones*)
		- Bankrupt transferring funds that had vested in trustee to wife, who invested money – trustee claimed investment dividends (*Jones*)
* **Post-discharge assets do not vest in trustee** (*BIA*, s. 178(1))
	+ **Creditors cannot look to post-discharge assets to satisfy claim, unless within limited class of claims surviving discharge**

### Surplus Income

* **Surplus Income: portion of individual bankrupt’s total income that exceeds amount necessary to enable bankrupt to maintain reasonable standard of living** (*BIA*, s. 68(2))
	+ **(1) Surplus income does not automatically vest in trustee** (*Marzetti*)
		- **(a) Earnings of bankrupt only vest in trustee upon payment of monies to the trustee**
	+ **(2) Determine Total Income: all of bankrupt’s revenues, from whatever nature or source they are received, between date of bankruptcy and discharge** (*BIA*, s. 68(2))
		- **(a) Includes:**
			* Income earned before bankruptcy, not was not received at time of bankruptcy (*Re Landry*)
			* damages received for wrongful dismissal
			* money received as pay equity settlement
			* money received under Act of Parliament or legislature of province that relates to workers’ compensation
			* pension payments (*Re Byrne*)
			* Child/spouse support (*Re O’Brien*)
			* Farm support payments (*Kallenberger*)
			* Personal injury claim for lost earning capacity (*Re Bell*)
				+ Only for compensation for lost income in period before bankruptcy, or after bankruptcy but before discharge
				+ Compensation for future loss of earning capacity unavailable to creditors
		- **(b) Does not include:**
			* Amounts received by bankrupt between date of bankruptcy and date of discharge, received as gifts, legacies, inheritance, or any other windfall (*BIA*, s. 68(2))
			* Money unconnected to personal effort or resource (*Re Coates*)
			* Military-danger pay (*Re Duffney*)
			* Disability pensions (*Re Duffney*)
			* After-acquired property that automatically vests in trustee
				+ Income tax refund owing to bankrupt (*BIA*, s. 67(1)(c))
				+ Payments of proceeds from sale of real estate (*Re Millin*)
		- **(c) If property is considered income, provincial exemptions do not apply** (*Re Coates*)
	+ **(3) After determining total income, subtract expenses to determine available monthly income**
		- **(a) Subtract monthly remittances of income tax, EI, CPP** (*OSB Directive 11R2*, para 5(2)(a))
		- **(b) Subtract other expenses, including:** (*OSB Directive 11R2*, para 5(2)(a))
			* Family support payments
			* Child-care expenses
			* Medical expenses
			* Court imposed fines or penalties
			* Permitted Income Tax Act employment expenses
			* Debt, where stay lifted by Court
			* Interest on non-dischargeable debt
	+ **(4) Superintendent directs standards used in determining amount of income necessary for bankrupt to maintain reasonable standard of living** (*BIA*, s. 68(1))
		- **(a) If available income exceeds amount set in standards, excess is considered surplus income**
			* **(i) Surplus income = available monthly income – superintendent’s standard** (*OSB Directive*, para 5(5))
		- **(b) Calculation used in fixing amount to be paid to bankrupt’s estate** (*OSB Directive, 11R2*, para 5(6)-(7))
			* **(i) If surplus income less than $200, no payment required**
				+ **Determine surplus income AFTER completing calculation of surplus income**

Figure after calculation must be $200 or more in order to pay

* + - * **(ii) If surplus income is $200 or more, half of surplus income must be paid to trustee**
			* **(iii) If more than one income earner in family unit, amount bankrupt must pay is same percentage as his portion of family unit’s available monthly income**
				+ **(a) Determine family surplus income, then adjust it by:**

**Net income of bankrupt/net income of family**

* + **(5) Trustee fixes amount bankrupt must pay to bankrupt estate, informs official receiver and any creditor requesting the information, and takes reasonable efforts to ensure debtor complies with requirement to pay** (*BIA*, s. 68(4))
		- **(a) Trustee makes fresh surplus income determination if trustee becomes aware of material change in debtor’s financial situation** (*BIA*, s. 68(3))
	+ **(6) If trustee and bankrupt disagree on amount to be paid, mediation procedure used** (*BIA*, s. 68(6))
		- **(a) Creditor may request mediation within 30 days after day on which trustee informed creditor of amount to be paid** (*BIA*, s. 68(7))
		- **(b) Trustee may apply to Court to fix amount to be paid in following circumstances:** (*BIA*, s. 68(10)
			* **(i) Official receiver requests trustee apply to Court, if trustee has not implemented recommendation made by official receiver**
			* **(ii) Matter not resolved by mediation**
			* **(iii) Bankrupt failed to comply with requirement to pay**
				+ **Order to pay is enforceable against debtor’s total income** (*BIA*, s. 68(15))
				+ **Court may order employer or person obliged to pay bankrupt is bound to pay money to trustee** (*BIA*, s. 68(13))

**Obligation ends on day automatic discharge would have been obtained** (*BIA*, s. 68(16))

* + - * **(iv) Where bankrupt employed by a relative, Court may fix amount that is fair and reasonable as:** (s. 68(11))
				+ (a) Salary, wages, or other remuneration for services being performed by bankrupt for person employing bankrupt; or
				+ (b) Payment for, or commission of, in respect of services being performed by a bankrupt for a person
				+ Court may determine the part of the salary, wages, remuneration, or commission that shall be paid to trustee on basis of the amount fixed by the Court, unless it appears the services have been performed for benefit of bankrupt and are not of substantial benefit to person for whom they were performed

### *Re Landry* (ONCA)

**Ratio**

* **‘Things in action’ are property** (*BIA*, s. 2)
	+ **Damages for breach of contract, wrongful dismissal**
	+ **Award of damages is ‘property’** (*BIA*, s. 67(1)(c))
* **‘Property’ does not include property that is exempt from execution or seizure under provincial law, if:** (*BIA*, s. 67(1)(b))
	+ **(1) Property is situated within that province; and**
	+ **(2) Bankrupt resides within that province**
* **Total income includes all of bankrupt’s revenues, whatever nature or source** (*BIA*, s. 68)
	+ **Includes lost earning awards that are earned after discharge – but, only for time missed during bankruptcy**
	+ **s. 68 of *BIA* supersedes s. 67 of *BIA* regarding ‘total income’**
		- **‘income’ not exempt under s. 67, to extent it is superseded by s. 68**
	+ **Trustee may use s. 68, even after bankrupt has been discharged**
	+ **Trustee may use s. 68, even if property procedure not followed due to circumstances**
	+ **To determine amount bankrupt must pay to estate of bankrupt out of total income:** (*BIA*, s. 68)
		- **(1) Superintendent directed to establish standards for determining portion of bankrupt’s total exceeding that necessary for him to maintain reasonable standard of living**
		- **(2) Trustee, considering these standards and personal/family situation of bankrupt, must fix amount bankrupt is required to pay, inform official receiver of his decision, and take reasonable measures to ensure bankrupt complies with requirement to pay**
		- **(3) Where official receiver determines fixed amount not in accordance with applicable standards, official receiver must recommend appropriate amount**
		- **(4) Where trustee and bankrupt disagree on amount to be paid, trustee must send request to official receiver that matter be determined by mediation**
			* **(a) Creditor may also request mediation**
		- **(5) Mediation takes place in accordance with prescribed procedures**
		- **(6) Trustee may apply to Court, so Court may fix amount bankrupt is to pay, on request of inspectors, creditors, or official receiver, where:**
			* **(a) trustee has not implemented recommendation made by official receiver**
			* **(b) issue submitted to mediation unresolved; or**
			* **(c) bankrupt fails to comply with requirement to pay**

**Facts:** Landry brought claim for unjust dismissal. Decision was appealed. Before paying lawyer, she declared bankruptcy and obtained discharge. Trustee told Landry that it maintained right to claim eventual award of damages for unjust dismissal.  **Issue:** Whether Landry’s claim or award constitutes property of bankrupt, vesting in trustee? If so, whether property is exempt? **Analysis:** ‘Wages’ is property exempt under provincial law. Impossible for trustee to follow proper procedure to determine amount bankrupt must pay under s. 68, as arbitration award had not yet occurred – application was simply premature, but may still be brought.  **Holding:** Appeal allowed.

# 5. Proprietary Claims of Third-Parties

* **Occurrence of bankruptcy does not permit trustee to confiscate assets belonging to third-parties**
	+ **(1) Third-party who successfully claims interest in asset may withdraw it from bankrupt’s estate**
		- **(a) If third-party establishes absolute ownership of asset, asset completely removed from estate**
		- **(b) If third-party’s right more limited, asset not completely removed from estate**
			* **(i) Person who jointly owns land with bankrupt may not take land completely from estate**
				+ Bankruptcy severs joints tenancy and converts it to tenancy-in-common
				+ Trustee may bring proceedings for partition and sale of interest, or may sell bankrupt’s interest
	+ **(2) Proprietary rights in existence at date of bankruptcy are effective against trustee**
		- **(a) Deemed trusts are extinguished upon occurrence of bankruptcy**
	+ **(3) Personal rights converted into a right to prove a claim in bankruptcy**
		- **(a) Claimant does not have proprietary right in any asset**
		- **(b) Exception: unpaid suppliers of goods may receive proprietary right upon bankruptcy**

## Asserting Proprietary Claims Against the Trustee

* **Third-party claiming proprietary right in asset in trustee’s possession must file proof of claim** (*BIA*, s. 81(1))
	+ **(1) Must be supported by affidavit setting out basis for claim and sufficient particulars to identify property** (*BIA*, s. 81(1))
	+ **(2) Trustee may, within 15 days:** (*BIA*, s. 81(2))
		- **(a) Admit the claim, and deliver possession of property to claimant; or**
		- **(b) Dispute the claim, and provide reasons**
			* **(i) Onus on claimant to establish claim** (*BIA*, s. 81(3))
			* **(ii) If claimant does not appeal trustee’s decision to dispute claim within fifteen days, claimant deemed to have abandoned all right and interest in property** (*BIA*, s. 81(4))
				+ **Court has discretion to extend time period** (*BIA*, s. 187(11))

## Secured Creditors

* **Creditors obtaining security interest may assert proprietary claim to some or all of bankrupt’s property**
	+ **(1) Secured creditor’s enforcement remedies regulated by non-bankruptcy principles**
		- **(1) Enforcement proceedings against land governed by provincial mortgage foreclosure law**
		- **(2) Enforcement proceedings against personal property governed by personal property security law**
	+ **(2) Collateral is removed from bankrupt’s estate**
	+ **(3) Proceeds from realization of collateral satisfy obligation owed to secured creditor**
		- **(a) Proceeds not shared among creditors**
		- **(b) If surplus following enforcement sale, trustee entitled to claim proceeds, unless another party has higher interest**
	+ **(4) Secured creditor asserts claim in bankruptcy if collateral’s value insufficient to satisfy secured obligation**

### Definition of Secured Creditor

* **Secured Creditor: person holding mortgage, hypothec, pledge, charge, or lien on or against debtor’s property as security for debt due or accruing due to person from debtor; or person whose claim is based on, or secured by, negotiable instrument held as collateral security and on which debtor only indirectly or secondarily liable** (*BIA*, s. 2)
	+ **(1) ‘Secured creditor’ under *BIA* includes:**
		- **(a) Holder of non-consensual lien** (*BIA*, s. 2)
			* **(i) Common law possessory lien of repairer: withholding possession of repaired goods until paid**
			* **(ii) Non-possessory statutory lien given to garage keeper**
		- **(b) Holder of real property mortgage** (*BIA*, s. 2)
		- **(c) Conditional Sales Agreements and Finance Leases are likely security interests under *BIA***
			* **(i) Under *PPSA*, transaction considered security interest if, in substance, secures payment or performance of obligation** (*PPSA*, s. 3)
				+ Security interest if lease provides for option to buy asset for $1 at end of lease

In substance, a finance agreement

* + **(2) ‘Secured creditor’ under *BIA* does not include:**
		- **(a) Lessor – property and goods merely returned to lessor at end of lease**
		- **(b) ‘Deemed security interests’ under *PPSA* are not security interests under *BIA***
			* **(i) Deemed security interest: transactions not securing payment or performance of obligation, but within scope of *PPSA* to impose registration requirement and priority rules**
				+ **(1)** Lease of goods for term of more than one year
				+ **(2)** Sale of accounts
			* **(ii) Failing to register or perfect these interests may result in subordination to trustee under personal property security legislation**

### Treatment of Secured Creditors on Bankruptcy

* **Treatment of Secured Creditors on Bankruptcy:**
	+ **(1) S. 81 procedure for third-parties to assert proprietary claims against property held by trustee does not apply to secured creditors**
	+ **(2) Procedure for secured creditor asserting security interests in property that has vested in trustee:**
		- **(a) Supersedes general procedure for asserting proprietary claims against trustee** (*Ford Credit Canada*)
		- **(b) Bankruptcy of debtor does not prevent secured creditor from realizing his security – Court cannot postpone secured creditor’s right to realize or deal with security, except:** (*BIA*, s. 69.3(2))
			* **(i) Trustee may ask Court to grant a stay – but, right to realize cannot be postponed for more than 6 months** (*BIA*, s. 69.3(2)(a))
			* **(iii) Court may order this section does not apply to secured creditor if:** (*BIA*, s. 69.4)
				+ **Creditor likely to be materially prejudiced;** **or**
				+ **Equitable on other grounds to make such a declaration**
		- **(c) If trustee has knowledge property may be subject to security interest, trustee may demand person file proof of security that gives full particulars, including a valuation of asset** (*BIA*, s. 128(1))
			* **(1) If person does not do so within 30 days, trustee can, with leave of Court, sell or dispose of property, free of security interest** (*BIA*, s. 128(1.1))
				+ **(a) Trustee may sell collateral without following this procedure, but buyer does not take interest free of the security interest** (*United Used Auto*)
				+ **(b) Creditor entitled to receive dividend in respect only of balance due to him after deducting assessed value of property** (*BIA*, s. 128(2))
			* **(2) Trustee may require further evidence to support claim** (*BIA*, s. 135(1))
			* **(3) Trustee has right to inspect collateral if in possession of secured party** *(BIA,* s. 79)
			* **(4) If trustee declines to challenge secured party’s interest, bankrupt or other creditors may do so** (BIA, s. 135(5))
			* **(5) If trustee dissatisfied with assessed value of collateral in proof of security, trustee may require the collateral be offered for sale** (*BIA*, s. 129(1))
				+ **(a) Alternatively, trustee may redeem security interest by paying assessed value of collateral to secured creditor** (*BIA*, s. 128(3))
				+ **(b) Secured creditor can force trustee to make decision between right to force sale and right to redeem** (*BIA*, s. 130)

**(i) Trustee loses right to do either if not responding within one month**

* + - **(d) Under-secured secured creditor may prove in bankruptcy to extent of any deficiency** (*BIA*, s. 127(1))
			* **(i) Under-secured secured creditor: collateral’s value insufficient to satisfy obligation secured**
				+ Bank with secured interest in tractor for $80,000, but tractor only worth $50,000
			* **(ii) Where secured creditor surrenders his security to trustee for general benefit of creditors, he may prove his whole claim** (*BIA*, s. 127(2))
		- **(e) Trustee may disallow claim in whole, or in part** (*BIA*, s. 135(2))
			* **(i) Must give notice to secured creditor setting out reasons** (*BIA*, s. 135(3))
			* **(ii) Secured party may appeal decision to Court within 30 days** (*BIA*, s. 135(4))

### Non-Compliance with Validity and Perfection Requirements

* **Nothing in *BIA* requires secured creditor to register or perfect security interest**
* **Provincial statute may impose registration or perfection requirements for valid secured interest**
	+ **(1) Security interest in collateral not effective against trustee in bankruptcy if security interest is unperfected at date of bankruptcy** (*PPSA*, s. 20)
		- **(a) Security interest must satisfy formal requirements to be effective against third-parties; and**
			* **(i) Non-possessory security interest enforceable against third-party if:** (*Personal Property Security Act*, s. 11(2)(c))
				+ **in writing; and**
				+ **provides adequate description of collateral**
		- **(b) Security interest must be perfected**
			* **(i) Unperfected security interest in personal property is subordinated as against a trustee** (*Re Giffen*)
				+ **(1) Exception: security interests in real property – registry systems governing land do not give trustee priority over unregistered interest in land**

Lack of registration or mortgage does not prevent secured creditor from asserting interest and gaining priority over trustee

* + - * **(iii) To determine whether security interest is perfected:**
				+ **(1) Security interest must have attached, or come into existence; and**
				+ **(2) Perfection step must be completed** (Ont *PPSA*, s. 19)

**(a) Registration; or**

Security interest invalid if seriously misleading error, such as: (Ont *PPSA*, s. 46(4))

Name of debtor

Description of collateral

**(b) Taking possession of collateral** (Ont *PPSA*, s. 22)

### Subrogation to Rights of Secured Creditor

* **Subrogation: permits party to exercise rights of another person**
	+ **(1) Person without valid security interest may be subrogated to rights of secured creditor – may then exercise the rights of a secured creditor**
	+ **(2) Occurs when:**
		- **(a) Surety pays principal debtor’s debt – surety entitled to be subrogated to any security interest creditor has in respect of debt** (*Re Windhmam Sales*)
		- **(b) At debtor’s request, lender pays out loan of third-party – lender entitled to be subrogated to any security interest held by third-party** (*Re N’Amerix Logistix Inc*)
		- **(c) Marshalling of Securities: senior secured creditor has security interest in two funds, while junior secured creditor has security interest in only one fund** (*Re Bread Man*)
			* **if senior secured creditor enforces its remedies against common fund, will undercut junior secured party**
			* **Marshalling of securities permits senior secured party to enforce its secured interest against common fund, and junior secured party has right to be subrogated to security held by senior secured party against other fund**

### Security Interests in Post-Bankruptcy Property

* **Secured creditor may enforce its interest only if security interest attached to collateral before property vests in trustee**
* **Secured creditor may have security interest in property acquired by debtor after security agreement is executed**
	+ **(1) Ineffective in respect of property acquired by debtor after debtor obtains discharge** (*Danny Bye*)
	+ **(2) Not necessary that amount be due and payable at time of bankruptcy – suffices if events giving rise to the obligation have occurred** (*Re Dominion Used Store Fixtures*)
* **Assignment of existing or future wages, made before bankruptcy, is of no effect in respect of wages earned after bankruptcy** (*BIA*, s. 68.1(1))
* **Assignment of existing or future amounts receivable as payment, commission, or professional fees for services rendered by debtor, before debtor became bankrupt, of no effect in respect of such amounts earned after bankruptcy** (*BIA*, s. 68.1(2))

### Inversion of Priorities on Bankruptcy

* **Generally, priority secured creditor has over other claimants is unchanged by occurrence of bankruptcy**
* **Circumstances where priority status of secured creditor improves upon bankruptcy:**
	+ **(1) Creditors with claims given preferred creditor status under bankruptcy law** (*BIA*, s. 136(1))
		- **(a) Provincial statutes give such preferred claimants priority over secured creditors**
			* Landlord exercising right of distress against goods for unpaid rent has priority over competing security interest, other than purchase-money security interest

### Effect of Discharge on Rights of Secured Creditors

* **Secured creditor may enforce security interest after discharge**
* **After-acquired property clause in security agreement is effective against post-bankruptcy/pre-discharge property**
* **Under *PPSA*, security interest does not attach to property unless debtor has rights in property**
	+ **If property vests immediately in trustee in bankruptcy, without ever vesting in debtor, security interest does not attach to post-bankruptcy asset, since debtor never acquires rights in it**
* **After-acquired property clause in security agreement is not effective against post-discharge property** (*Danny Bye*)

### *Holy Rosary Parish (Thorold) Credit Union v Robitaille*

**Ratio**

* **Assignment of after-acquired property, in exchange for valuable consideration, is valid**
	+ **(1) Enforceable when property comes into assignor’s possession – transferred immediately to assignee**
		- **Property passes to trustee, subject to security interest**
	+ **(2) Modified by statute**
		- **(a) Debtor’s assignment of existing or future wages, made before he became bankrupt, is of no effect in respect of wages earned after bankruptcy** (*BIA*, s. 68.1(1))
			* **(i) Wage assignment not enforceable after occurrence of bankruptcy**
		- **(b) Debtor’s assignment of existing or future amounts receivable as payment, commission, or professional fees in respect of services rendered, before debtor became bankrupt, of no effect in respect of amounts earned after bankruptcy** (*BIA*, s. 68.1(2))

**Facts:** Robitaille borrowed money from credit union and gave 30% of wages as security for loan, then made assignment in bankruptcy.

### *Holy Rosary Parish (Thorold) Credit Union v Danny Bye*

**Ratio**

* **Loan creates debt provable in bankruptcy**
	+ **Assignment of future property as security is means of collecting debt – secured creditor must prove claim in bankruptcy**
		- **After discharge, may not claim interest in property**

**Facts:** Bye obtained loan from credit union, in exchange for 30% of future wages as security for loan. Bye made assignment in bankruptcy.

## Unpaid Suppliers of Goods

* **Ranking of Claims:**
	+ **(1) Thirty-day goods**
	+ **(2) Agricultural producer’s charge**
	+ **(3) *Income Tax Act* statutory deemed trust**
	+ **(4) Wage-earner charge**
	+ **(5) Pension contribution charge**

### Thirty-Day Goods

* **If supplier sells goods to purchaser, for use in purchaser’s business, and supplier delivers goods to purchaser or purchaser’s agent, and purchaser has not fully paid for goods, supplier may have access to and repossess goods at his own expense** (*BIA*, s. 81.1(1))
	+ Undoes harm suffered by suppliers if debtor orders excessive amounts of inventory immediately before bankruptcy – encourages suppliers to continue to supply goods to business encountering financial difficulties
		- Particularly concerning if shareholder has given personal guarantee to secured creditor
	+ **(1) Purchaser must release goods if:** (*BIA*, s. 81.1(1))
		- **(a) Supplier presents written demand for repossession to purchaser, trustee, or receiver, containing details of transaction, within 15 days after bankruptcy** (*BIA*, s. 81.1(5))
		- **(b) Goods delivered within 30 days before day on which purchaser became bankrupt**
		- **(c) At time when demand presented, goods…; and**
			* **(i) Are in possession of purchaser, trustee, or receiver**
				+ **(1) May be held by third-party** (*Thompson*)
			* **(ii) Are identifiable as the goods delivered by supplier and not fully paid for**
				+ **(1) Commingling of fuel oil does not destroy identity of goods** (*Port Alice Speciality Cellulose*)

**(a) New fuel delivered to single tank**

**(b) No other fuel was commingled**

**(c) Qualities of new and old fule were same and remain as such**

**(d) Volume before and after commingling is known**

**(e) Volume of fuel drawn down is known**

**(f) Fuel in tank can be inferred to have been evenly drawn down**

* + - * **(iii) Are in same state as they were on delivery**
				+ Right is lost if goods transformed into a finished product, or work-in-progress
			* **(iv) Have not been re-sold by purchaser; and**
			* **(v) Are not subject to an agreement for sale**
		- **(d) Purchaser, trustee, or receiver, does not, after demand presented, pay to supplier the entire balance owing**
	+ **(2) If goods partly paid for at time of demand, supplier has right to repossess:**
		- **(a) Goods in proportion to unpaid amount; or** (*BIA*, s. 81.1(2))
		- **(b) All goods, if supplier re-pays amount of partial payment** (*BIA*, s. 81.1(2))
	+ **(3) Purchaser or trustee/receiver may retain goods if full purchase price paid to supplier after demand is made** (*BIA*, s. 81.1(1)(d))
	+ **(4) Supplier’s right to re-possess thirty-day goods ranks ahead of other claimants, including secured creditors and statutory deemed trusts, except:** (*BIA*, s. 81.1(6))
		- **(a) *bona fide* purchaser for value, who purchases goods from debtor without knowledge, takes goods free of thirty-day rule from supplier** (*BIA*, s. 81.1(6))

### Agricultural Producer’s Charge

* **Agricultural Producer’s Charge: farmer/fisherman/aquaculturalist who sells and delivers products to purchaser within 15 days prior to date of bankruptcy has security on all of purchaser’s inventory to secure unpaid price** (*BIA*, s. 81.2(1))
	+ Includes “products of agriculture, sea/lakes/rivers, and ‘aquaculture’ (*BIA*, s. 81.2(3))
	+ **(1) Written demand for re-possession must be within 30 days after bankruptcy**
	+ **(2) If trustee/receiver takes possession or disposes of inventory, trustee/receiver liable to extent of net amount realized on disposition of inventory**
	+ **(3) Security does not arise if goods sold to buyer prior to bankruptcy**
		- **(a) Security cannot be claimed against proceeds of pre-bankruptcy sales**
	+ **(4) Security has priority over any other claim, including secured creditors**
		- **(a) Subordinate to claim of supplier’s right to repossess thirty-day goods**
	+ **(5) Farmer/fisherman/aquaculturist may still exercise s. 81.1 rights** (*BIA*, s. 81.2(5))

## Employee Charges

### Wage-Earner Charge

* **Wage-Earner Charge: claim of clerk, servant, travelling salesperson, labourer, or worker, who is owed wages/salary/commission/compensation by bankrupt for services rendered during period beginning on day 6 months before date of initial bankruptcy event, and ending on date bankruptcy is secured, to extent of $2000, less any amount paid for those services by trustee or receiver, by security on bankrupt’s current assets on date of bankruptcy** (*BIA*, s. 81.3(1))
	+ **(1) Different than Wage Earner Protection Program: federal insurance scheme to protect wages of employees if employer goes bankrupt**
		- Maximum amount payable to wage earner is $7296.17
		- Program covers unpaid wages, vacation pay, severance pay, termination pay
		- **(a) Wage claims must have arisen within 6 months of bankruptcy or receivership**
		- **(b) Person eligible to receive payment if:** (*WEPPA*, s. 5)
			* **Wage earner cannot file claim if an officer or director** (*WEPPA*, s. 6)
			* **(i) employment ended for reason proscribed by regulation**
			* **(ii) Former employer bankrupt or subject to receivership; and**
			* **(iii) Individual owed eligible wages by former employer**
		- **(c) Wage earner must file claim with Minister – insolvency official has obligation to provide information to Minister concerning employees**
		- **(d) Employee generally goes through this program – receives greater amount in sooner time**
			* **(i) Subrogation occurs, wherein Crown now asserts s. 81.3 rights 🡪 go to ‘Crown claims’ section**
	+ **(2) Wage-earners given statutory secured charge on ‘current’ assets, defined as: cash, cash equivalents (cheques), inventory, accounts receivable, or proceeds of dealing with any of these assets** (*BIA*, s. 2)
		- **(a) Does not cover ‘equipment’, real property, or intellectual property rights (unless held as ‘inventory’)**
		- **(b) Secured charge has priority over any other security, including secured creditors, except:**
			* **(i) Unpaid supplier’s right to repossess 30-day goods** (*BIA*, s. 81.1)
			* **(ii) Security in favor of suppliers of agricultural products** (*BIA*, s. 81.2)
			* **(iii) Deemed trusts** (*BIA*, s. 67(3))
				+ Unpaid remittances of income tax, EI, CPP, source deductions
	+ **(3) Wage-earner receives statutory secured charge at maximum of $2000, less any amount paid to employee by trustee**
		- **(a) Includes vacation pay, but not termination or severance pay** (*BIA*, s. 81.3(9))
	+ **(3) Director or officer of bankrupt corporation not entitled to claim charge** (*BIA*, s. 81.3(6))
	+ **(4) Wages owed must be for services rendered from: period beginning on day that is six months before date of initial bankruptcy event, to date of bankruptcy**
	+ **(5) If trustee disposes of current assets covered by employee’s secured-charge, trustee/receiver liable for amount realized on disposition** (*BIA*, s. 81.3(5))

### Pension Contribution Charge

* **Pension Contribution Charge: if bankrupt is employer who participated in prescribed pension plan for benefit of employees, employees given secured charge on all of bankrupt’s assets to secure unpaid pension contributions** (*BIA*, s. 81.5(1))
	+ **(1) Charge covers all assets -- not limited to current assets**
	+ **(2) No cap on amount of security**
	+ **(3) No time period that limits recovery**
	+ **(4) Charge does not secure special payments owing in respect of solvency deficiency in defined benefit pension plan**
	+ **(5) Security interest ranks ahead of all other claims, including those of secured creditors, except:** (*BIA*, s. 81.5(2))
		- **(a) Unpaid supplier’s right to repossess 30-day goods** (*BIA*, s. 81.1)
		- **(b) Security in favor of suppliers of agricultural products** (*BIA*, s. 81.2)
		- **(c) Deemed trusts** (*BIA*, s. 67(3))
			* Unpaid remittances of income tax, EI, CPP, source deductions
		- **(d) Wage-earner charge** (*BIA*, s. 81.3)
	+ **(6) If trustee disposes of assets covered by pension contribution charge, trustee liable for amount realized on disposition of assets** (*BIA*, s. 81.5(3))

## Crown Claims

* Pre-1992 Position
	+ Secured creditors often invoked bankruptcy to invert priorities – Crown unable to assert non-consensual lien or security interest created by provincial status
		- Crown relegated to status of preferred creditor (*BIA*, s. 136)
* Post-1992 Position
	+ Crown claims no longer given preferred creditor status under s. 136
	+ Instead, *BIA*, s. 86, 87 governs status of statutory security interest created in favor of Crown
* **Crown claims have unsecured creditor ranking in bankruptcy** (*BIA*, s. 86(1))
	+ Body dealing with workers’ compensation (ie. WCB) is ‘Crown’(*BIA*, s. 86(1))
	+ Section does not apply to ‘deemed trusts’
	+ **(1) Exceptions: Crown claim will have secured creditor status if…**
		- **(a) Secured claim can be ordinarily obtained by person other than Crown** (*BIA*, s. 86(2))
			* **(i) Claim secured by a security conferred by law of general application** (*BIA*, s. 86(2))
				+ **(1) Crown able to obtain consensual security interest**
			* **(ii) Crown claim registered in real or personal property registry**
		- **(b) Statutory security in favor of *CRA* under *ITA*, s. 224(1.2); or** (*BIA*, s. 86(3))
			* **(i) Gives Crown statutory security interest in accounts to secure unpaid source deductions**
		- **(c) Crown registered its security interest before date of initial bankruptcy event** (*BIA*, s. 87(1))
			* **(i) Crown claim registered in real or personal property registry** (*PPSR*, s. 31)
			* **(ii) Must register before:**
				+ **(1) Date application for bankruptcy order is filed, if involuntary bankruptcy**
				+ **(2) Date of assignment in bankruptcy, if voluntary bankruptcy**
	+ **(2) Priority Rules: if Crown registered security interest in time, to resolve competitions between Crown claim and secured creditor’s claim:** (*BIA,* s. 87(2))
		- **(a) Crown’s claim subordinate, if secured creditor completed all steps necessary to make them effective against other creditors before registration of Crown claims** (*BIA*, s. 87(2)(a))
			* **(i) Secured creditor must comply with validity and perfection requirements**
				+ **(1) If security interest governed by provincial personal property security law, registration insufficient**

**(a) Security interest must be attached (come into existence) and perfection step (registration) must be completed**

* + - * **(ii) If secured creditor has not obtained written security agreement, or has not given value at time of registration of Crown claim, secured creditor cannot rely on this rule**
			* **(iii) Unclear if secured creditor gets priority in property acquired by debtor after registration of Crown claim**
				+ For security interest to attach, debtor must have rights to collateral – Court might hold not all steps necessary to make security effective against other creditors has been taken
				+ Court might see ‘all steps’ requirement to refer to active steps to be taken by secured party, rather than preconditions for attachment – in this event, *BIA* gives secured party priority
	+ **(3) Crown can only claim as secured creditor for amount owing at time of registration of secured interest, plus interest accruing on that amount** (*BIA*, s. 87(2)(b))
		- **(a) Does not rank as secured creditor for costs associated with seizure or enforcement of security, or for costs owed to Crown after registration occurs** *(Re Gillford Furniture Mart)*
		- **(b) Prevents Crown from making registration before obligation owing to it arises**
			* Generally, Crown claim arises when debtor in financial difficulty, while secured creditor claim arises when debtor is fine – secured creditor usually enjoys priority

## Environmental Remediation Orders

* **Trustee not liable for:** (*BIA*, s. 14.06(2))
	+ **(1) Environmental damage occurring prior to trustee’s appointment**
	+ **(2) Post-appointment damage, unless caused by trustee’s gross negligence or willful misconduct**
	+ **(3) Trustee may abandon contaminated site and avoid personal liability for clean-up costs, if:** (*BIA*, s. 14.06(4))
		- **(a) Within time specified by order, or within 10 days, trustee complies with order, or abandons or disposes of interest in property, with notice to person who issued order**
		- **(b) Before order granted, trustee abandoned or renounced interest in property**
* **Crown has security interest on contaminated land and any adjacent land, for remedial costs of environmental damage** (*BIA*, s. 14.06(7))
	+ **(1) Security interest given super-priority status over any other claim or security against property**
	+ **(2) Security interest does not attach to any other assets, other than land and contiguous land**

## Sales Transactions

* **If buyer goes bankrupt:**
	+ **(1) If title in goods passed to buyer before bankruptcy, buyer is owner and property in goods vests in trustee**
		- **(a) Seller no longer has interest in goods**
			* **(i) Can prove claim for unpaid price as unsecured creditor**
	+ **(2) If title to goods did not pass to buyer before bankruptcy, seller remains owner and may assert proprietary right to goods against trustee**
		- **(a) Bankruptcy does not terminate contract of sale – trustee may affirm contract and obtain goods by paying price to seller**
		- **(b) If seller maintains possession, may assert ‘unpaid seller’s lien’**
		- **(c) If seller negotiated security interest on goods to protect against non-payment, seller is secured creditor**
		- **(d) Seller may be able to assert 30-day goods rule**
* **If seller goes bankrupt:**
	+ **(1) Buyer may assert proprietary right in goods against trustee only if title to goods passed to buyer under contract of sale**
		- **(a) If property had not passed to buyer, seller’s property vests in trustee**
			* **(i) Buyer has unsecured claim in bankruptcy**
* **To determine if title has passed to buyer:**
	+ **(1) Property in goods transferred at time parties to contract intend it to be transferred** (*Sale of Goods Act*, s. 22(1))
		- **(a) Lack of intent may be implied from circumstances**
	+ **(2) If parties’ intentions cannot be determined, application of default rules in sale of goods legislation applied** (*BIA*, s. 23)
		- **(a) Specific Goods: goods identified and agreed upon at time of contract** (*BIA*, s. 1)
			* **(i) If seller agrees to sell specific goods to buyer, the specific goods must be delivered**
			* **(ii) If specific goods in deliverable state, goods pass immediately to buyer upon making agreement**
			* **(iii) If something more needed to make goods into deliverable state, goods pass when the thing is done and buyer has notice**
		- **(b) Unascertained Goods: goods that have not been specifically identified**
			* **(i) For property to pass, must be irrevocable earmarking of goods, such that it is no longer open to seller to substitute other goods**
				+ Buyer cannot acquire title until subject matter of claim is known (*BIA*, s. 21)
	+ **(3) Transfer of title may occur before, after, or at same time as delivery of possession of goods**
		- **(a) Fact that buyer has not received possession of goods does not prevent tile passing**
	+ **(4) Property may pass to buyer, even though buyer has not yet paid** (*Saskatchewan Telecommunications*)
		- **(a) Buyer may claim goods from trustee**
		- **(b) Bankrupt seller’s right to be paid vests in trustee – trustee may bring personal action against buyer if price not paid when due**
			* **(i) Trustee may also assert unpaid seller’s lien against goods in bankrupt seller’s possession**
	+ **(5) Seller may secure unpaid purchase price under provincial personal property security legislation**
		- **(a) Must be perfected to be effective against trustee**

## Family Property Claims

* **If non-owing spouse bankrupt, right to pursue action for division of assets against owning-spouse vests in trustee**
	+ **(1) Condition precedent to application:** (*Family Property Act*, s. 5(1))
		- **(a) Judgment of divorce granted or declaration of nullity of marriage made**
		- **(b) Spouse granted judgment of judicial separation**
		- **(c) Spouse granted declaration of irreconcilability under *Family Law Act***
		- **(d) Court satisfied spouses living separate and apart for continuous period of one year immediately prior to commencement of application**
		- **(e) Court satisfied spouses living separate and apart and one spouse is dissipating property to other spouse’s detriment**
* **Under matrimonial property legislation, spouse has right to apply to Court for matrimonial property order against owning-spouse**
	+ **(1) Choice of rights is discretionary**
		- **(a) Court may order spouse pay sum of money to other spouse** (*Family Property Act*, s. 9(2))
		- **(b) Court may order that a security be given on a spouse’s property to secure obligation to pay** (*Family Property Act*, s. 9(3))
		- **(c) Court may order property vests in a spouse** (*Family Property Act*, s. 9(2))
	+ **(2) Non-owning spouse does not have proprietary right to property of other spouse until Court makes order vesting property, or creates some other proprietary right** (*Maroukis*)
		- **(a) If bankruptcy occurs before Court makes order, property of owning spouse vests in trustee**
			* **(i) Court cannot make order giving other spouse proprietary right in property** (*Burson*)
			* **(ii) Non-owning spouse merely has right to make provable claim in bankruptcy**
		- **(b) Spouse may assert proprietary claim on basis of resulting or constructive trust**
	+ **(3) Order requiring owning-spouse pay sum of money to non-owning spouse merely creates personal right**
		- **(a) Does not give claimant any right in owning-spouse’s property** (*Re Coulthard*)
		- **(b) Non-owning spouse must prove claim in bankruptcy**
	+ **(4) Court order does not have proprietary effect unless it vests property in claimant, or creates charge on property to secure obligation to pay**
		- **(a) If order made to transfer property to spouse, in exchange for that spouse’s money, transfer is conditional – no right acquired in property until monetary obligation satisfied**
			* **(i) If spouse given entitlement goes bankrupt before satisfying monetary obligation, property does not vest in trustee** (*Millar*)
	+ **(5) If spouse owns exempt property and subsequently goes bankrupt, Court may lift stay of proceedings and permit non-owning spouse to bring application under matrimonial property legislation** (*Schreyer*)
		- **(a) If owning spouse does not disclose other spouse as creditor, then is discharged in bankruptcy, Court may set aside discharge** (*BIA*, s. 187(5))

### *Jesson v Jesson*

**Ratio**

* **Family property claim not ‘provable’ in bankruptcy under *BIA*, s. 121**
	+ **Family property claim only payable if order or agreement made before date of bankruptcy**
	+ **Stay provisions of *BIA*, s. 69.3 do not apply to matrimonial property proceedings**
* **Trustee must address matrimonial property claim before trustee can properly determine bankrupt’s estate**
	+ **Inappropriate to delay considering spouse’s matrimonial property claims until after discharge**
	+ **Spouse should not be able to use bankruptcy system to stall obligation to disclose and determine matrimonial property entitlements**
* **Spouse making matrimonial or family property claim, after other spouse’s bankruptcy proceedings have begun, must do so under *BIA*, s. 81:**
	+ **(1) Claimant spouse must file proof of claim, verified by affidavit, with trustee, giving grounds on which claim is based and sufficient particulars to enable property to be identified**
		- **(a) Trustee may also send notice to any person to prove his claim in property within 15 days**
	+ **(2) Trustee has 15 days to admit claim and deliver possession of property to claimant, or send notice that claim is disputed**
		- **(a) Claimant has 15 days to appeal trustee’s decision to Court**
	+ **(3) Onus of establishing claim is on claimant**

**Facts:** After divorce proceedings initiated, husband made assignment in bankruptcy. Wife applied to life stay in place on husband’s bankruptcy, to pursue child and spousal support claims and proceed with matrimonial property action.

# Preserving the Bankrupt Estate

* **Bankruptcy is collective proceeding through which claimants with personal rights against debtor may enforce claims against debtor’s assets**
	+ **(1) Permitting unsecured creditors to remove assets from bankrupt estate would destabilize system**
		- **(a) Ordinary litigation must stop on occurrence of bankruptcy**

## Stay of Proceedings

* **‘Stay of Proceedings’**
	+ **(1) Purpose of ‘stay of proceedings’:**
		- **(a) Prevents creditors from commencing or continuing legal action**
			* **(i) Prevents multiple actions and reduces costs adjudicating various claims** (*Wilanour Resources*)
		- **(b) Replaces situation in which creditors rush to seize assets before other creditors**
			* **(i) Ensures orderly liquidation and *pro rata* sharing, to enhance value of assets** (*Fitzgibbon*)
	+ **(2) Scope and Effect of Stay**
		- **(a) No creditor has any remedy against debtor or debtor’s property, or can commence or continue any action, execution, or other proceedings, for recovery of claim provable in bankruptcy** (*BIA*, s. 69.3(1))
			* **(i) Bankruptcy procedure governs all claims provable in bankruptcy**
			* **(ii) Provable Claim: claim in existence at date of bankruptcy**
				+ **Post-bankruptcy claims not provable and not subject to stay**
	+ **(3) Duration of Stay**
		- **(a) Stay of proceedings commences on date of bankruptcy by operation of law** (*BIA*, s. 69.3(1))
		- **(b) Stay of proceedings ends when trustee is discharged** (*BIA*, s. 69.3(1.1))
			* **(i) Claimant with provable claim may enforce claim against bankrupt’s property after trustee is discharged** (*Ramjag*)
				+ **(1) Some Courts have found claimants with provable claims remain subject to the stay of proceedings after trustee is discharged** (*Re Morgan*)
				+ **(2) Proper course is to reappoint trustee, who liquidates asset and distributes proceeds according to bankruptcy scheme of distribution** (*BIA*, s. 41(11))
			* **(ii) Creditor retains his claim after trustee is discharged – creditor need not bring civil proceedings to protect its claim after trustee discharged, but before debtor is discharged** (*Decker*)
	+ **(4) Secured Creditors**
		- **(a) Secured creditors not affected by automatic bankruptcy stay** (*BIA*, s. 69.3(2))
			* **(i) May withdraw collateral from bankrupt’s estate**
		- **(b) Trustee may apply to Court to postpone enforcement by secured creditor for no longer than 6 months** (*BIA*, s. 69.3(2))
			* **(i) Court does not make order if it would prevent secured creditor from realizing or dealing with financial collateral** (*BIA*, s. 69.3(2.1))
		- **(c) If collateral insufficient to satisfy obligation, secured creditor may prove claim for deficiency as provable claim**
			* **(i) Claim for deficiency is subject to ‘stay’**
	+ **(5) Lifting the Stay:** **creditor may apply to Court for declaration that ‘stay’ should not operate against that creditor, if Court satisfied creditor likely to be materially prejudiced by continued operation of provision, or equitable on other grounds** (*BIA*, s. 69.4)
		- **(a) Court may grant declaration to lift the stay, where:** (*BIA*, s. 69.4))
			* **(a) Multiple defendants and bankrupt is necessary party to complete adjudication of facts** (*Re Turner*)
			* **(b) Complex action that cannot be disposed of in summary fashion** (*Wilanour*)
			* **(c) Civil proceedings are near completion – allows matter to resolve efficiently**
			* **(d) Bankrupt is insured and purpose of action is to determine liability, so injured party may recover from bankrupt’s insurer** (*Re Duvall*)
				+ Plaintiff simply looking to recover from insurance company -- minimal effects on bankrupt’s estate
			* **(e) Claim is not released by discharge**
		- **(b) If Court declares stay is lifted, will order no enforcement may be taken after judgment**
			* **(i) Would give one creditor preference over other creditors**
			* **(ii) Enforcement would be useless – debtor’s property vested in trustee, so debtor owns no assets to satisfy judgment until after debtor obtains discharge**
	+ **(6) Stay of proceedings does not apply to family support claims under s. 121(4)** (*BIA*, s. 69.41(1))
		- **(a) Cannot commence or continue action or other proceeding, or claim remedy, against property of bankrupt that has vested in trustee, or surplus income amounts payable under s. 68** (*BIA*, s. 69.41(2))
			* **(i) Person making family support claim under s. 121(4) can only go after exempt property and income that debtor gets to keep**
	+ **(7) Compensation order may be made against offender-bankrupt personally, as penalty under *Criminal Code*** (*Fitzgibbon*)
		- **(a) Judge may order compensation be paid by offender to victim, if damage or loss to property** (*CC*, s. 738(1))
			* **(i) Amount paid may not exceed replacement value as of date order is imposed, minus value of any part of property that is returned** (*CC*, s. 738(1)(a))
			* **(ii) If offender fails to pay, victim may obtain judgment against offender** (*CC*, s. 741(1))
		- **(b) In determining whether order for compensation should be made:** (*Zelensky*)
			* **(i) Whether aggrieved person invoking compensation order to emphasize sanctions against offender and to benefit himself**
			* **(ii) Whether civil proceedings have been taken and pursued**
				+ **(1) Order should only be made if accused does not have interest in civil proceedings being brought against him, to have benefit of discovery procedure and production of documents**
			* **(iii) Means of offender**
			* **(iv) Whether criminal Court will be involved in long process of assessing loss**
				+ **(1) Order should only be made if amount can be readily ascertained**
		- **(c) While compensation order may be made against offender personally, enforcement not available**
			* **(i) Court may make order for compensation against offender personally as criminal sanction**
				+ **(1) Victim becomes unsecured creditor in bankrupt’s estate, sharing *pro rata* with other unsecured creditors**
				+ **(2) Leave of Court not necessary to make order – but, if beneficiary of compensation order seeks to proceed, must first obtain consent of bankruptcy Court**
		- **(d) Order of discharge does not release bankrupt from fines, penalties, restitution orders, imposed by Court for offence** (*BIA*, s. 178(1))
* **‘Stay of Proceedings’: Upon bankruptcy, no creditor has any remedy against debtor or debtor’s property, and cannot commence or continue any action for recovery of claim provable in bankruptcy** (*BIA*, s. 69.3(1))
	+ **(4) Incomplete Enforcement by Creditors: bankruptcy order or assignment has preference over all judgment enforcement remedies or processes, unless completely executed by payment to creditor** (*BIA*, s. 70(1))
		- **(a) Money paid into Court for garnishment proceedings must be given to trustee, if not paid to judgment creditor at date of bankruptcy** (*Beaver Trucking*)
		- **(b) Surplus available after secured creditor forces sale of property vests in trustee** (*Re Radovini*)
		- **(c) Executing officer must give trustee any seized property, or proceeds of sale of property** (*BIA*, s. 73(2)-(3))
		- **(d) Seizing creditor cannot deduct enforcement costs from proceeds realized**
			* **(i) Costs recoverable as preferred claim if creditor qualifies as first creditor to have initiated enforcement proceedings** (*BIA*, s. 70(2))
		- **(e) If landlord or municipality seizes property, but has not sold it at date of bankruptcy, property must be given to trustee upon bankruptcy order or assignment** (*BIA*, s. 73(4))
			* **(i) Costs form first charge on property – entitled to priority over competing secured creditors** (*Burdyny*)
	+ **(5) Validity of Proceedings Taken Without Leave: creditor may commence action or enforce claim without knowledge of ‘stay of proceedings’**
		- **(a) Court grants leave *nunc pro tunc* to proceed with action** (*Blais*)
			* **(i) Judgment enforcement proceedings taken after the ‘stay of proceedings’ are ineffective to transfer any interest in property seized** (*Amanda Designs*)
		- **(b) If property sold pursuant to judgment enforcement proceedings, good faith buyer acquires good title** (*BIA*, s. 73(1))
			* **(i) Proceeds of sale must be turned over to trustee** (*Hudson*)
	+ **(8) ‘Stay of Proceedings’ does not prevent federal or provincial government from exercising statutory ‘requirement to pay’ procedure** (*ITA*, s. 224(1.2)) (*BIA*, s. 69.5))
		- **(a) Recovery of income tax, CPP, EI**
		- **(b) Does not apply to GST** (*Points North Freight Forwarding*)
	+ **(9) No creditor with claim payable under order or agreement made before bankruptcy, when spouse was living part from bankrupt,has remedy, or shall commence or continue action, against property of bankrupt that has vested in trustee** (*BIA*, s. 69.41(2))
	+ **(10) ‘Stay of proceedings’ does not apply to operation of provincial legislation that has similar purpose to *ITA*, s. 224(1.2), for sums withheld or deducted by person from payment to another and is is similar in nature to income tax or CPP** (*BIA*, s. 69.5))
	+ **(11) No ‘stay’ affects regulatory body’s investigation of insolvent person, or action taken by regulatory body against insolvent person** (*BIA*, s. 69.6(2))
		- **(a) Court may order stay against regulatory body’s action or investigation, if:** (*BIA*, s. 69.6(3))
			* **(i) viable proposal could not be made; and**
			* **(ii) not contrary to public interest**
		- **(b) If dispute as to whether regulatory body seeking to enforce its rights as a creditor, Court may make order that regulatory body is doing so, and enforcement of those rights is stayed** (*BIA*, s. 69.6(4))
	+ **(12) Every bankruptcy order or assignment takes precedence over all judicial or other attachments, garnishments, certificates that have effect of judgments against bankrupt’s property, except those completely executed by payment to creditor, or rights of secured creditor** (*BIA*, s. 70(1))

### *R v Fitzgibbon*

**Ratio**

* **Judge may order compensation be paid to victim of convicted person** (*CC*, s. 653)
	+ **(1) In determining whether order for compensation should be made:** (*Zelensky*)
		- **(a) Whether aggrieved person invoking s. 653 to emphasize sanctions against offender and to benefit himself**
		- **(b) Whether civil proceedings have been taken and pursued**
			* **(i) Order should only be made if accused does not have interest in civil proceedings being brought against him, to have benefit of discovery procedure and production of documents**
		- **(c) Means of offender**
		- **(d) Whether criminal Court will be involved in long process of assessing loss**
			* **(i) Order should only be made if amount can be readily ascertained**
* **Discharge does not release bankrupt from debt/liability for fraudulent acts committed while acting in fiduciary capacity**
* **No remedy or action may be taken against bankrupt’s property without leave of Court in bankruptcy**
	+ **Court may make order for compensation against offender personally as criminal sanction under *Criminal Code*, s. 653**
		- **Victim becomes unsecured creditor in bankrupt’s estate, sharing *pro rata* with other unsecured creditors**
		- **Leave of Court not necessary to make order – but, if beneficiary of compensation order seeks to proceed, must first obtain consent of bankruptcy Court**

**Facts:** Lawyer defrauded and stole money from clients. Court made order for compensation to be paid to law society, who was subrogated to victim’s rights after paying victims. At time of Court order, lawyer was undischarged bankrupt.  **Issue:** Whether judge of criminal court may order restitution while offender is undischarged bankrupt?

## Preventing the Bankrupt from Dealing with the Estate

* **To preserve bankrupt estate for benefit of creditors, necessary to prevent bankrupt’s post-bankruptcy dealings:**
	+ **(1) Trustee must acquire control over assets and be in position to dispose of assets**
		- **(a) Bankrupt must cooperate with trustee to: identify assets, disclose records, and aid in realization of assets**
		- **(b) Bankrupt’s property cannot be removed from province in which bankruptcy proceedings commenced, unless Court approves** (*BIA*, s. 76)
	+ **(2) Upon bankruptcy, bankrupt ceases to have capacity to dispose or deal with property, which vests immediately in trustee** (*BIA*, s. 71)
		- **(a) If bankrupt mistakenly or fraudulently transfers interest in property to third-party, transaction ineffective**
			* **(i) Bankrupt no longer has interest in property**
			* **(ii) Irrelevant whether transferee took in good faith and for value**
			* **(iii) Third-party purchaser may have personal action against bankrupt**
				+ **(1) Post-bankruptcy claim – not subject to ‘stay of proceedings’ and not extinguished upon discharge**

**(a) In seeking to recover claim, purchaser unable to resort to any assets that have vested in trustee**

* + - **(b) Any dealing with post-bankruptcy assets by person in good faith and for value is valid against trustee** (*BIA*, s. 99)
			* **(i) Applies only to property acquired by debtor after bankruptcy**
		- **(c) Transfer of land to *bona fide* purchaser of land, for valuable consideration, is valid, unless trustee first registers in land registration system** (*BIA*, s. 75)
			* **(i) Onus on trustee to register notice of bankruptcy in land titles system**
				+ If trustee does not do so, s. 75 prevails
			* **(ii) Maintains integrity of land titles system**
* **Bankruptcy order or assignment may be registered by trustee for real property in which bankrupt has an interest** (*BIA*, s. 74(1))
	+ **(1) Trustee becomes registered owner** (*BIA*, s. 74(2))
	+ **(2) If bankruptcy order or assignment has not been registered, trustee may file caveat on land** (*BIA*, s. 74(3))
* **No payment, contract, dealing, or transaction involving a bankrupt between date of initial bankruptcy event and date of bankruptcy is valid, except the following transactions made in good faith:** (*BIA*, s. 97(1))
	+ **(1) payment by bankrupt to bankrupt’s creditors**
	+ **(2) Payment or delivery to bankrupt**
	+ **(3) Transfer by bankrupt for adequate valuable consideration**
		- **(a) Adequate Valuable Consideration: consideration of fair and reasonable money value** (*BIA*, s. 97(2))
	+ **(4) Contract, dealing, or transaction for adequate valuable consideration**

## Executory Contracts

* **Trustee has duty to take possession and control of debtor’s assets and dispose of them**
	+ **(1) Property: any type of property, situated in Canada or elsewhere, including money, goods, things in action, land and every description of property, real or person, legal or equitable, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of, or incident to property** (*BIA*, s. 2)
	+ **(2) If bankrupt’s side of bargain already been fully performed, contractual right vests in trustee and trustee may demand other party’s performance**
	+ **(3) If other party has fully performed, but bankrupt has not, other party cannot demand performance from trustee**
		- **(a) Party must prove claim for damages for breach of contract, or recovery of price in bankruptcy**
* **Executory Contract: unperformed obligations by both parties, but performance by one party not required unless other party willing and able to perform**
	+ **(1) One party can demand performance, but only if that party also performs its obligations**
	+ **(2) Bankruptcy does not, in itself, cause contract to end or constitute breach of contract**
	+ **(3) Trustee’s Options:**
		- **(a) Affirmation of Contract: trustee indicates it is willing to perform contractual obligations**
			* **(i) Trustee must notify other party of intention to affirm within reasonable time**
				+ **If failing to do so, other party may treat contract as repudiated and may refuse to perform further obligations**
			* **(ii) Trustee cannot affirm if contract was validly terminated prior to bankruptcy**
				+ **(1) *Ipso Facto* Clause: automatically terminates contract on commencement of insolvency proceedings**

**(a) Person cannot terminate or amend agreement because of other party’s bankruptcy only** (*BIA*, s. 84.2))

**(i) Does not prevent termination of contract on ground other than commencement of bankruptcy or insolvency proceedings**

**(ii) Lessor cannot terminate or amend lease because of bankruptcy, or fact that bankrupt has not paid rent before time of bankruptcy** (*BIA*, s. 84.2(2))

**(iii) Public utility company cannot discontinue service because of bankruptcy, or fact that bankrupt has not paid for services rendered or material provided before time of bankruptcy** (*BIA*, s. 84.2(3))

**(iv) Does not prevent person from asking for payments for goods, services, leased property after bankruptcy, or requiring advance of money or credit** (*BIA*, s. 84.2(4))

**(v) Any provision in an agreement purporting to override this provision is of no force or effect** (*BIA*, s. 84.2(5))

**(vi) If this section causes a party significant financial hardship, may apply to Court for declaration this provision does not apply** (*BIA*, s. 84.2(6))

* + - **(b) Disclaimer of Contract: trustee indicates it is not willing to perform contractual obligations**
			* **(i) Trustee not personally liable for breach of contract**
				+ **(1) Other party may prove claim for breach of contract in bankruptcy**
			* **(ii) Disclaimer does not rescind contract – contract does not cease to exist**
		- **(c) Assignment of Contract: trustee assigns contract to third-party**
			* **(i) Trustee may apply to Court to make order assigning bankrupt’s rights and obligations under an agreement to any person** (*BIA*, s. 84.1(1))
				+ **(1) Assignment transfers rights and obligations to third-party** (*BIA*, s. 84.1(1))
				+ **(2) Irrelevant whether contract contains non-assignment clause**
				+ **(3) Consent of other party to contract not required** (*Ford Credit*)

**(a) Overrides common law unilateral right of innocent party to accept repudiation of contract and end contract** (*Ford Credit*)

Party can no longer unilaterally terminate contract if other party repudiates

* + - * + **(4) Consideration trustee receives in exchange for assignment distributed amongst creditors**

Contractual rights may be valuable part of bankrupt’s estate (*Ford Credit*)

* + - * **(ii) In deciding whether to make order, Court considers:** (*BIA*, s. 84.1(4))
				+ **(a) whether person to whom rights and obligations are to be assigned able to perform obligations; and**

**(i) Agreements not assignable if based on personal characteristics** (*Ford Credit*)

**(1) Contracts where identity of other party is central:**

Attorney-client contracts

Contracts for artworks

* + - * + **(b) Whether appropriate to assign rights and obligations to that person**

**(i) Unreasonable withholding of consent by other party to contract is considered** (*Ford Credit*)

**(ii) Whether assignment to that person would substantially cure breaches of contract** (*Ford Credit*)

* + - * **(iii) Court only makes order if satisfied that all monetary defaults in relation to agreement, other than those arising only because of person’s bankruptcy or failure to perform non-monetary obligation, remedied on or before day fixed by Court** (*BIA*, s. 84.1(5))
			* **(iv) Does not apply to rights and obligations that are not assignable due to:** (*BIA*, s. 84.1(3))
				+ To be interpreted in light of s. 84.1(4) and whether it is appropriate to assign rights and obligations (*Ford Credit*)
				+ **(1) agreement entered into on or after date of bankruptcy**
				+ **(2) eligible financial contract; or**
				+ **(3) collective agreement**
			* **(v) In case of individual, can only make application if carrying on a business** (*BIA*, s. 84.1(2))
				+ **(1) Only rights and obligations in relation to business are assigned**
	+ **(4) Leases**
		- **(a) Trustee may temporarily occupy leased premises for as long as required** (*Landlord’s Rights on Bankruptcy*, s. 5)
			* **(i) Trustee must pay amount of rent stipulated in lease**
			* **(ii) Payment made for accelerated rent is credited against amount payable by trustee**
			* **(iii) Trustee may surrender possession at any time** (*Landlord’s Rights on Bankruptcy*, s. 6)
				+ **(1) If trustee occupies leased premises for 3 months or more, must give landlord 3 months’ notice in writing of trustee’s intention to surrender possession, or 3 months’ rent in lieu of notice** (*Landlord’s Rights on Bankruptcy*, s. 7)
		- **(b) If trustee disclaims lease, right of landlord to claim contractual damages is limited**
			* **(i) Lessee is debtor to landlord for all surplus rent in excess of 3 months’ rent due at date of receiving order or assignment** (*Landlord’s Rights on Bankruptcy Act*, s. 3)
				+ Also any accelerated rent to which landlord entitled under lease, but not exceeding amount equal to 3 month’s rent
			* **(ii) Landlord may not claim as debt any portion of unexpired term of lessee’s lease** (*Landlord’s Rights on Bankruptcy Act*, s. 4)
		- **(c) If premises leased by retail merchant, wholesale merchant, manufacturer, or person whose ostensible occupation is buying and selling goods, wares, or merchandise of trade and commerce:** ((*Landlord’s Rights on Bankruptcy*, s. 8)
			* **(i) Trustee may elect to retain leased premises for whole or portion of unexpired term**
			* **(ii) Trustee may pay landlord all overdue rent and assign lease to person who:**
				+ **(1) Covenants to observe and perform lease’s terms**
				+ **(2) Agrees to conduct trade or business not reasonably of more objectionable or hazardous nature that than conducted by lessee; and**
				+ **(3) Approved by Court as person fit and proper to be in possession of leased premises**
				+ **(4) Assignee must deposit sum equal to 6 months’ rent to landlord**
				+ **(5) If trustee assigns lease, liability of trustee and bankrupt’s estate is limited to payment of rent for period of time during which trustee remains in possession of leased premises** (*Landlord’s Rights on Bankruptcy*, s. 9(3))
		- **(d) Trustee may disclaim lease at any time before giving notice of trustee’s intention to surrender possession, or before coming under obligation to give notice of intention** (*Landlord’s Rights on Bankruptcy*, s. 9)
			* **(i) Trustee’s possession and occupation of leased premises while dealing with bankrupt’s estate is not evidence of intention to elect to retain possession** (*Landlord’s Rights on Bankruptcy*, s. 9(2))

### *Ford Credit Canada v Welcome Ford Sales*

**Ratio**

* **Test for fundamental breach:** (*Shelanu Inc*)
	+ **(1) Whether party’s conduct deprived other party of substantially the whole benefit of the contract**
		- **(a) Whether the event deprived party who has further undertakings to perform of substantially the benefit which it was the parties’ intention, as expressed in the contract, that he should obtain in consideration for performing those undertakings**
			* **(i) Party refusing to cooperate with trustee, is not fundamental breach**

**Facts:** D operated dealership and went bankrupt. P provided evidence it was owed $4M after D’s misappropriation. Trustee purported to assign D’s contractual rights and obligations to a third-party. **Issue:** Whether dealership agreement terminated because of fundamental breach? **Analysis:** P refused to cooperate with re-opening of business by receiver – only reason agreement could not be performed. Sale of dealership to purchaser will cure breaches P complains of.  **Holding:** Appeal dismissed.

# Enhancing the Bankrupt Estate

* **Impeaching Pre-Bankruptcy Transactions: pre-bankruptcy transactions reviewed to determine if they can be impeached**
	+ **(1) Increases assets available to creditors who prove their claims in bankruptcy**
	+ **(2) If trustee unwilling to act, creditor may receive Court order to impeach pre-bankruptcy transaction** (*BIA*, s. 38(1))
		- **(a) Any benefit derived from proceedings belongs exclusively to creditor** (*BIA*, s. 38(3))
			* **(i) Surplus belongs to bankrupt’s estate**
		- **(b) Creditor must give notice to other creditors, to ensure they have opportunity to join in action** (*BIA*, s. 38(1))
* **Trustee has two sources for its impeachment powers:**
	+ **(1) Provincial Law** (*BIA*, s. 72(1))
		- **(a) *Fraudulent Preferences Act***
			* **(i) Interpreted as requiring intent of debtor and creditor to effect preference** (*Hudson*)
			* **(ii) Debtor may rebut presumption of preference by showing creditor pressured him** (*Hudson*)
		- **(b) *Fraudulent Conveyances Act*, 13 Eliz., c.5**
	+ **(2) Federal Law** (*BIA*, s. 95-101)
		- **(a) Preferences: transfer from debtor to creditor in designated window prior to bankruptcy, leaving other creditors unpaid and undermining bankruptcy scheme by disrupting *pari passu* sharing principle** (*BIA*, s. 95)
			* **(i) Transfer must be a ‘preference’ in fact – must have effect of prejudicing other creditors**
				+ **(1) If property transferred was exempt, not a preference -- creditors have no expectation of going after that property**
			* **(i) Arm’s Length Dealing: debtor and third-party acting at arm’s length**
				+ **(1) Transaction must be in favour of creditor**

**(a) Transactions covered:** (*BIA*, s. 95(1))

**(i) Transfer of property**

Debtor transfers title to vehicle to third-party in exchange for debt owed

**(ii) Provision of services**

**(iii) Granting of charge/security on property**

Debtor grants security interest in property to unsecured creditor

**(iv) Payment or obligation incurred**

**(v) Judicial proceedings taken or suffered**

* + - * + **(2) Debtor must be insolvent at time of transaction**

**(a) Tests for insolvency:**

**(i) Cash flow test**

**(ii) Balance sheet test**

* + - * + **(3) Debtor must have intention to give that creditor a preference; and**

**(a) Debtor must have intention to prefer that creditor**

**(b) If transaction has effect of giving the creditor a preference, rebuttable presumption it was made with a view to prefer** (*BIA*, s. 95(2))

**(i) Doctrine of pressure abolished**

Debtor cannot merely state creditor was ‘pressuring’ him

**(ii) Presumption rebutted if:**

**(1) Payment made in ordinary course of business**

**(2) Transfer made to permit debtor to remain in business**

**(3) Pre-existing agreement to transfer existed**

* + - * + **(4) Transaction must have been made during period beginning 3 months before date of initial bankruptcy event, and ending on date of bankruptcy**

**(a) Date of initial bankruptcy event: when bankruptcy proceedings were first instituted**

**(i) Involuntary bankruptcy: date of filing of application**

**(b) Date of bankruptcy: when bankruptcy order made**

* + - * **(ii) Non-Arm’s Length Dealing: debtor and third-party not acting at arm’s length**
				+ **(1) For transaction to be void as a preference:**

**(a) Transaction must be in favor of creditor**

**(i) Transactions covered:** (*BIA*, s. 95(1))

**(1) Transfer of property**

Debtor transfers title to vehicle to third-party in exchange for debt owed

**(2) Provision of services**

**(3) Granting of charge/security on property**

Debtor grants security interest in property to unsecured creditor

**(4) Payment or obligation incurred**

**(5) Judicial proceedings taken or suffered**

**(b) Debtor must be insolvent at time of transaction**

**(i) Tests for insolvency:**

**(1) Cash flow test**

**(2) Balance sheet test**

**(c) Transaction must have effect of giving creditor a preference**

**(i) Debtor’s intention irrelevant**

**(d) During period beginning 12 months before date of initial bankruptcy event, and ending on date of bankruptcy**

* + - * + **(2) To prove parties acting at non-arm’s length:**

**(a) Factually prove parties not acting independently of one another; or**

**(i) Court considers all relevant circumstances to determine if parties transacted at arm’s length, including:** (*Pikkani Nation*)

**(1) Whether a common mind directed bargaining for both parties to transaction**

**(2) Whether parties acting in concert, without separate interests; and**

Company paying employee more than owner until brink of insolvency amounts to a dealing at non-arm’s length (*National Telecommunications*)

**(3) Whether there was *de facto* control**

**(ii) Director of a company can be acting at arm’s length within the company** (*Pikkani Nation*)

**(1) Determine whether director directed the fraudulent payment, or had other role in transaction** (*Pikkani Nation*)

**(b) Show parties are ‘related persons’ under s. 4**

* + - **(b) Transfers at Undervalue: asset transferred out of bankrupt estate, prejudicing all creditors by reducing total assets available to satisfy their claims** (*BIA*, s. 96)
* **Determining if transaction is at ‘arm’s length’:**
	+ **(1) It is a question of fact whether persons not related to each other were, at particular time, dealing with each other at arm’s length** (*BIA*, s. 4(4))
		- **(a) Arm’s Length: parties are independent, or at ‘arm’s length’ from each other**
	+ **(2) Related Persons: related persons deemed not to deal with each at arm’s length, while so related** (*BIA*, s. 4(5))
		- **(a) Creditor may rebut presumption** (*BIA*, s. 4(5))
		- **(b) ‘Related persons’ includes:**
			* **(i) Individuals connected by blood relationship, marriage, common-law partnership, or adoption** (*BIA*, s. 4(2))
				+ **(1) Connected by blood relationship if parent/child, or brother/sister** (*BIA*, s. 4(3)(e))
				+ **(2) Connected by marriage if married, or married to person connected by blood/adoption to the other** (*BIA*, s. 4(3)(f))

Husband/wife related by blood to parent-in-laws

* + - * **(ii) An ‘entity’ and…** (*BIA*, s. 4(2))
				+ **(1) Person who controls entity, if controlled by one person only**

**(a) Person must be controlling shareholder**

**(i) Corporation is related to shareholder, if shareholder has over 50% of shares**

* + - * + **(2) Person who is member of related group that controls entity; or**

**(a) Corporation is related to brother and sister if:**

**(i) Brother owns 30% of shares and sister owns 25% of shares**

**(ii) The related group (brother/sister) controls the entity**

* + - * + **(3) Any person connected in manner set out in paragraph (a) to person described in subparagraph (i) or (ii)**

**(a) Corporation related to husband of sister if:**

**(i) Brother owns 30% of shares and husband-sister owns 25% of shares**

* + - * **(iii) Two entities…** (*BIA*, s. 4(2)(c))
				+ **(1) Both of which are controlled by same person or group of persons**

**(a) One person has controlling interest (over 50% of shares) in both entities**

* + - * + **(2) Each of which controlled by one person, and person who controls one of entities is related to person who controls other entity**

**(a) Brother owns over 50% of shares in Corporation A, and Sister owns over 50% of shares in Corporation B**

## Preferences

* **It is a question of fact whether persons not related to each other were, at particular time, dealing with each other at arm’s length** (*BIA*, s. 4(4))
	+ **(1) Arm’s Length Dealing: commercial dealing between parties acting in their separate interests, so no bonds of dependence, control, or influence exist** (*Piikani Energy Corporation*)
	+ **(2) Court considers all relevant circumstances to determine if parties transacted at arm’s length, including:** (*Pikkani Nation*)
		- **(a) Whether a common mind directed bargaining for both parties to transaction**
		- **(b) Whether parties acting in concert, without separate interests; and**
		- **(c) Whether there was *de facto* control**
	+ **(3) Director of a company can be acting at arm’s length within the company** (*Pikkani Nation*)
		- **(a) Determine whether director directed the fraudulent payment, or had other role in transaction** (*Pikkani Nation*)
* **Persons related to each other are deemed not to deal with each other arm’s length while so related** (*BIA*, s. 4(5))
	+ **Rebuttable presumption that parties dealing at non-arm’s length**
	+ **(1) Persons are related to each other and are ‘related persons’ if they are:** (*BIA*, s. 4(2))
		- **(a) Individuals connected by blood, marriage, common-law partnership, or adoption**
			* **(i) Connected by blood if: child, descendant, brother, sister** (*BIA*, s. 4(3))
			* **(ii) Connected by marriage if: married to each other, or to person who is connected by blood relationship or adoption to other** (*BIA*, s. 4(3))
			* **(iii) Connected by common-law partnership if: in common-law partnership with the other, or with person who is connected by blood relationship or adoption to other** (*BIA*, s. 4(3))
			* **(iv) Connected by adoption if: adopted, legally or in fact, as child of the other, or as child of person who is connected by blood relationship, except as brother or sister to other** (*BIA*, s. 4(3))
		- **(b) An entity and…**
			* Entity: person other than an individual (*BIA*, s. 4(1))
			* **(i) Person who controls entity, if controlled by one person**
			* **(ii) Person who is member of related group that controls entity; or**
				+ **(1) Related Group: group of persons, each member of which related to every other member of group** (*BIA*, s. 4(1))
			* **(iii) Person connected in subsection (1), to person in (a) or (b)**
		- **(c) Two entities, where…**
			* **(i) Both entities controlled by same person or group of persons**
			* **(ii) Both entities controlled by one person, and person who controls one of entities is related to person who controls the other entity**
			* **(iii) One entity controlled by one person, and that person is related to a member of related group that controls other entity**
			* **(iv) One entity is controlled by one person, and that person is related to each member of unrelated group that controls the other entity**
			* **(v) One entity is controlled by related group, a member of which is related to each member of unrelated group that controls other entity; or**
			* **(vi) One entity is controlled by unrelated group, each member of which is related to at least one member of unrelated group that controls other entity**
		- **(d) If two entities related to same entity, deemed to be related to each other** (*BIA*, s. 4(3))
		- **(e) If related group is in position to control an entity, deemed to be related group that controls entity, whether or not it is part of larger group by whom entity is in fact controlled** (*BIA*, s. 4(3))
		- **(f) Person with right under contract to acquire ownership interests or voting rights in entity, deemed to have same position in relation to control of entity as if person owned ownership interests** (*BIA*, s. 4(3))
			* **(i) Except when contract provides that right not exercisable until death of individual designated in the contract**
			* **(ii) Does not apply to:** (*BIA*, s. 95(2.1))
				+ Margin deposit made by clearing member with clearing house; or

Margin Deposit: payment, deposit, or transfer to a clearing house under its rules, to ensure performance of obligations of a clearing member in connection with security transactions (*BIA*, s. 95(3))

Clearing House: body acting as intermediary for clearing members in effecting securities transactions (*BIA*, s. 95(3))

Clearing Member: person engaged in business of effecting securities transactions (*BIA*, s. 95(3))

* + - * + Transfer, charge, payment made in connection with financial collateral and in accordance with provisions of eligible financial contract
* **Transfer of property, provision of services, charge on property, payment made, obligation incurred, or judicial proceeding taken or suffered by insolvent person:** (*BIA*, s. 95(1))
	+ **(1) In favor of creditor who is dealing at arm’s length with the insolvent person, or person in trust for that creditor, with view to giving creditor a preference over another creditor, is void as against…the trustee if made, incurred, taken or suffered, during period beginning on day that is three months before date of initial bankruptcy event and ending on date of bankruptcy**
		- **(a) Preference Presumed: if transfer, charge, payment, obligation, or judicial proceeding has effect of giving creditor a preference, presumed to have been made to give creditor preference, unless evidence to contrary** (*BIA*, s. 95(2))
			* **(i) Even if made, incurred, taken or suffered, under pressure** (*BIA*, s. 95(2))
				+ **(1) Evidence of pressure not admissible to validate preferential payment** (*Orion Industries*)
				+ **(2) Consider whether pressure existed, separate from an analysis of rebutting presumption** (*Orion Industries*)
				+ **(3) Whether evidence of pressure exists depends on how evidence is characterized** (*Orion Industries*)
			* **(ii) Onus of rebutting presumption is on creditor receiving preferential payment** (*Orion Industries*)
				+ **(1) Must show debtor’s intention was not to prefer creditor**
			* **(iii) If preferential payment made in ordinary course of bankrupt’s business, presumption rebutted** (*Orion Industries*)
				+ **Fact-dependent** (*Orion Industries*)
				+ **(1) Payments made to purchase goods/services required for ongoing conduct of bankrupt’s business** (*Orion Industries*)
				+ **(2) Payments made to honour contractual obligations allowing insolvent to carry on business** (*Orion Industries*)
				+ **(3) Payment made by insolvent company when financial collapse is inevitable, if payment made with view to generating income or liquidating assets to satisfy creditors** (*St. Anne-Nackawaci Pulp Co*)
				+ **(4) Payment made because creditor preventing access to, and sale of, equipment the insolvent was trying to sell to avoid bankruptcy** (*Orion Industries*)
				+ **(5) Evidence of pressure cannot be used to rebut presumption of preference** (*BIA*, s. 95(2))
				+ **(6) Whether debtor paid rent to landlord for one month’s rent, or had three-month debt**
	+ **(2) In favor of creditor who is not dealing at arm’s length with insolvent person, or person in trust for that creditor, that has effect of giving that creditor a preference over another creditor is void as against…the trustee if made, incurred, taken or suffered, during period beginning on day 12 months before date of initial bankruptcy event and ending on date of bankruptcy**
* **If person has acquired property of bankrupt under transaction that is void or voidable and set aside, and has sold or disposed of property or any part of it, money or proceeds deemed to be property of trustee** (*BIA*, s. 98(1))
	+ **(1) Even if money was further disposed of** (*BIA*, s. 98(1))
	+ **(2) Trustee may recover the property or its value, or the proceeds, from person who acquired it from bankrupt, or other person whom he may have resold, transferred, or paid over proceeds to** (*BIA*, s. 98(2))
	+ **(3) Does not apply if buyer of property gave adequate valuable consideration in good faith** (*BIA*, s. 98(3))
		- **(a) Trustee may only recover from the buyer the consideration he paid, or value thereof**
	+ **(4) Where consideration for sale or resale of property, or any part thereof, remains unsatisfied, trustee subrogated to rights of vendor to compel payment or satisfaction** (*BIA*, s. 98(4))

### *Hudson v Bennallack*

**Ratio**

* **Any conveyance/transfer of property, or payment, made by insolvent person in favor of a creditor, with view to giving the creditor a preference over other creditors, is void as against trustee in bankruptcy if:**
	+ **(1) Insolvent person becomes bankrupt within 3 months; or**
	+ **(2) Insolvent person becomes bankrupt within 12 months, where insolvent person and preferred creditor are related persons**
* **Whether a conveyance or payment is a ‘preference’ depends on debtor’s intention**
	+ **(1) Creditor’s intention to be preferred is irrelevant**
		- **(a) Object of bankruptcy law is to ensure division of debtor’s property among all creditors in event of bankruptcy – Act intended to put all creditors on equal footing**

**Facts:** Construction company borrowed money from Bennallack. Construction company sold interest in land to Bennallack to satisfy debt, within the 12 month period.  **Issue:** Whether intention of creditor, as well as debtor, to effect a preference is necessary?

### *Orion Industries*

**Facts:** Neil dismantled equipment owned by Orion. Orion planned to sell equipment to generate revenue and avoid bankruptcy. Orion paid Neil to release equipment. Within 3 months of payment, Orion went bankrupt.  **Issue:** Whether presumption of debtor’s intention to prefer creditor is rebutted?

## Transfer at Undervalue

* **Trustee may apply for declaration that transfer at undervalue is void as against trustee, or an order that party to transfer pay to bankrupt’s estate the difference between value of consideration received by debtor and value of consideration given by debtor, if:** (*BIA*, s. 96(1))
	+ Directed at transfers by insolvent persons for consideration materially or significantly less than fair market value of property (*National Telecommunications*)
	+ **(1) Must be disposition of property, or provision of services, for which:** (*BIA*, s. 2)
		- **(a) Debtor receives no consideration;** or
		- **(b) Consideration received by debtor is conspicuously less than fair market value of consideration given by debtor**
			* **(i) Debtor makes gift of asset**
			* **(ii) Debtor sells asset at price less than fair market value**
			* **(iii) Debtor buys asset at price greater than fair market value**
			* **(iv) Debtor supplies services for less than fair market value**
			* **(v) Debtor pays for services at greater than market value**
	+ **(2) In making application, trustee states what it believes was:** (*BIA*, s. 96(2))
		- **(a) Fair market value of property/services; and**
		- **(b) Value of actual consideration given/received by debtor (ie. what was paid and given/done in return)**
		- **(c) Creates rebuttable presumption that values represent actual values**
			* **(i) Presumption vanishes if credible evidence as to value is put forth by recipient of transfer**
			* **(ii) Presumption is fairly easily displaced**
	+ **(3) If party was dealing at arm’s length with debtor, and…; or** (*BIA*, s. 96(1)(a))
		- **(a) Transfer occurred during period, beginning on day that is one year before date of initial bankruptcy event, and ending on date of bankruptcy**
			* **(a) Date of initial bankruptcy event: date application made**
			* **(b) Date of bankruptcy: date Court makes order**
		- **(b) Debtor was insolvent at time of transfer, or was rendered insolvent by transfer; and**
			* **(i) Cash Flow test or balance sheet test**
		- **(c) Proof of fraudulent intent: debtor intended to defraud, defeat, or delay creditor, including any ‘badges of fraud’:**
			* **(i) Retention of benefit by debtor**
			* **(ii) Transfer of substantially all assets**
			* **(iii) Secrecy**
			* **(iv) Action or legal process is pending**
			* **(v) Transfer to related party**
	+ **(4) If party dealing at non-arm’s length with debtor, and…** (*BIA*, s. 96(1)(b))
		- Situation in which there is no incentive for transferor to maximize consideration for property being transferred (*National Telecommunications*)
			* Economic self-interest of transferor displaced by non-economic considerations
		- **Parties not dealing at arm’s length if relationship has no normal commercial characteristics, like maximizing one’s own value and preserving one’s going concern** (*National Telecommunications*)
		- **(a) One Year Rule: transfer occurred within one year of date of initial bankruptcy event, and ending on date of bankruptcy; or**
			* **(i) No need to prove intent to defraud creditors**
			* **(ii) No need to prove insolvency of debtor**
		- **(b) Five Year Rule: transfer occurred outside of one year period prior to initial bankruptcy event, but within five years of initial bankruptcy event – trustee must prove:**
			* **(i) Debtor insolvent at time of transfer, or was rendered insolvent by transfer; or**
				+ **(1) Cash Flow test or balance sheet test**
			* **(ii) Proof of fraudulent intent: debtor intended to defraud, defeat, or delay creditor**
				+ **(1) ‘Badges of Fraud’**

**(a) Retention of benefit by debtor**

Consideration for transfer was grossly inadequate (*Goldfinger*)

**(b) Transfer of substantially all assets**

**(c) Secrecy**

**(d) Action or legal process is pending**

**(e) Transfer to related party**

**(f) Transferor insolvent at time of transfer** (*Goldfinger*)

* + - * + **(2) If ‘badges of fraud’ create inference of intent to defraud, burden on those defending transaction to show evidence of absence of fraudulent intent** (*National Telecommunications*)
	+ **(5) If trustee establishes required elements, court may declare:**
		- **(a) Avoidance of transaction; or**
			* **(i) Property transfers to trustee**
		- **(b) Judgment for the difference in value against:**
			* **(i) Party to transaction; or**
			* **(ii) Any person privy to transaction**
				+ **(1) Person who is privy: person not dealing at arm’s length with party to a transfer and, by reason of transfer, directly or indirectly receives benefit or causes benefit to be received by another person** (*BIA*, s. 96(3))

Ex. Debtor transferred to corporation controlled by single shareholder – corporation makes dividend payment to shareholder after receiving transfer

* + - **(c) Even where required elements satisfied, Court not obliged to grant judgment** (*Price Waterhouse*)
			* **(i) Court takes contextual approach that considers:** (*Price Waterhouse*)
				+ **(1) Good faith of parties**
				+ **(2) Intention with which transaction took place; and**
				+ **(3) Whether fair value given and received in transaction, including:**

**(a) Fair market value**

**(b) Investment value**

**(c) Value to owner**

**(d) Liquidation value**

**(e) Whether transaction took place in regulatory context**

* + - * **(ii) Onus of raising equitable considerations and proving them lies on party asserting them** (*Price Waterhouse*)



### *Re: National Telecommunications Inc*

**Facts:** Payments made by National Telecommunications to Coones. Coones and controlling shareholder of National Telecommunications were friends. Appeared Mr. Coones was being paid for doing nothing.

### *Price Waterhouse Ltd v Standard Trust Co*

**Facts:** Trustco injected money into related company and received shares in exchange. Within one year of transaction, Trustco went bankrupt.  **Issue:** Whether court has discretion to refuse to make order for transfer at undervalue?

# Proof, Valuation, and Payment of Claims

* **Eligible Claims**
	+ **(1) Who may prove a claim?**
	+ **(2) How is a claim valued?**

## Provable Claims

* **If claim is not a ‘provable claim’:**
	+ **(1) Creditor not eligible to share in division of assets of bankrupt’s estate**
	+ **(2) Stay of proceedings not applicable – automatic ‘stay of proceedings’ only applies to provable claims**
		- **(a) Creditor can commence action against bankrupt**
			* **(i) If creditor obtains judgment against debtor, cannot seize or sell equipment**
				+ Legal title of debtor’s property vests in trustee
				+ **(1) After debtor is discharged, creditor may go after property**
	+ **(3) Claim still exists after bankrupt’s discharge – only provable claims terminated upon discharge**
* **Provable claims deemed to include:** (*BIA*, s. 121(1))
	+ **(1) All present and future debts/liabilities of bankrupt on day he becomes bankrupt; and**
		- **(a) Liability or future liability must exist at date of bankruptcy** (*BIA*, s. 121(1))
			* **(i) Debts/liabilities occurring after bankruptcy are not provable claims**
			* **(ii) Bankruptcy does not terminate personal guarantees** (*Jiordan Homes*)
		- **(b) Creditor may prove debt payable at a future time and receive dividends equally with other creditors** (*BIA*, s. 121(3))
			* **(i) Deduction of interest at 5% per annum, computed from declaration of dividend to time when debt would have become payable, according to contractual terms**
		- **(c) Family support claims are provable claims** (*BIA*, s. 121(4))
			* **(i) Where debt/liability payable under order or agreement made before date of initial bankruptcy event and when spouse or former spouse, common-law-partner, or child was living apart from bankrupt, provable claim exists** (*BIA*, s. 121(4))
				+ **(1) Obligation must have been incurred when parties were living apart**
			* **(ii) Irrelevant if order or agreement provides for periodic amounts or lump sum amounts**
			* **(iii) Family support claims not released on bankruptcy discharge** (*BIA*, s. 178(1)(b),(c))
			* **(iv) Family support claims not subject to stay of proceedings** (*BIA*, s. 69(4.1))
				+ **(1) Claimant may proceed against bankrupt’s exempt assets or bankrupt’s share after surplus income calculation**
		- **(d) Claim against debtor for costs of remedying environmental damage affecting real property is provable claim** (*BIA*, s. 14.06(8))
			* Sometimes impossible to determine when environmental damage occurred
			* **(i) Irrelevant whether damage occurred before or after date of bankruptcy or date of filing proposal**
			* **(ii) Only provable claim if sufficient certainty that province or regulatory body will, or has already completed, clean-up itself and seek to redeem costs** (*Orphan Well Association*)
				+ **(1) If regulatory body merely orders another to clean-up site for public good, not a provable claim** (*Orphan Well Association*)
				+ **(2) If regulatory body expropriated property, or makes it impossible for another to do clean-up, sufficiently clear that it is a provable claim** (*Abitibi*)
	+ **(2) Debts/liabilities bankrupt may become subject to before discharge, because of obligation incurred before bankruptcy**
		- **(a) Liability or future liability must exist at date of bankruptcy** (*Jiordan Homes*)
			* **(i) Debts/liabilities occurring after bankruptcy are not provable claims**
			* **(ii) Bankruptcy does not terminate personal guarantees** (*Jiordan Homes*)
		- **(b) Includes ‘executory contracts’: obligation incurred before date of bankruptcy, but do not know if provable claim until trustee affirms or disclaims the obligation**
			* **(i)** If trustee affirms contract, not a provable claim
			* **(ii)** If trustee disclaims contract, provable claim
		- **(c) Contingent Claim: claim which may or may not turn into debt, depending on if future event occurs – whether contingent or unliquidated claim is provable claim, and its valuation, made under s. 135** (*BIA*, s. 121(2))
			* **(i) Trustee determines whether contingent or unliquidated claim is provable claim** (*BIA*, s. 135(1.1))
				+ **(1) If provable claim, trustee values it and deemed a provable claim at that amount**
				+ **(2) For contingent or unliquidated claim to be provable claim, must be capable of valuation and not be too remote or speculative** (*Claude Resources*)

**(a) Must be sufficiently certain contingency will occur**

**(i) Court cannot assess merits of an alleged contingent liability** (*Claude Resources*)

**(ii) Creditor must prove more than he has been sued and he has indemnity agreement from bankrupt** (*Claude Resources*)

**(iii) Bankrupt incurring liability because he might leave employment is not remote or speculative – can be provable claim** (*Re Wiebe*)

Valuation is at 10% of value of claim (ie. 10% chance it will occur)

* + **(3) Disallowance of Claims:**
		- **(a) Trustee examines every proof of claim or security and its grounds, and may require further evidence** (*BIA*, s. 135(1))
		- **(b) Trustee may disallow, in whole or in part, any claim, security, or right to priority under the applicable order of priority set out in this Act** (*BIA*, s. 135(2))
			* **(i) If trustee disallows claim, must provide notice to claimant setting out reasons for disallowance** (*BIA*, s. 135(3))
			* **(ii) Disallowance is final and conclusive, unless within 30 days of notice person to whom notice was given appeals trustee’s decision to Court** (*BIA*, s. 135(4))
				+ **Court may extend this time period**
				+ **(1) Court may expunge or reduce proof of claim/security upon application by creditor or debtor, if trustee declines to interfere in matter** (*BIA*, s. 135(5))

### *Ontario New Home Warranty Program v Jiordan Homes Ltd* (ONSC)

**Facts:** D agreed to indemnify P if it had to make good any obligations of D under sale agreement. D made assignment in bankruptcy and P had to pay out. P claims money from D under personal guarantee. **Issue:** Whether bankruptcy terminated guarantee? Is claim barred because of D’s bankruptcy? **Analysis:** When D went bankrupt, claim was future liability, to which D might become subject before discharge due to obligation incurred before date of bankruptcy.

### *Newfoundland and Labrador v AbitibiBowater Inc* (SCC)

**Ratio**

* **Orders issued by regulatory bodies for environmental remediation work may be provable claims**
	+ **(1) Province cannot disturb priority scheme of federal insolvency legislation** (*Husky Oil Operations*)
		- **(a) End-of-life obligations for abandonment of oil wells not claim provable in bankruptcy, so do not conflict with *BIA*** (*Orphan Well Association*)
	+ **(2) For environmental order of regulatory body to be provable claim:**
		- **(a) Must be debt, liability, or obligation to a creditor**
			* **(i) Regulator is not necessarily a creditor when exercising enforcement powers against a debtor**
				+ **(1) Environmental clean-up order is not a debt or liability** (*Orphan Well Association*)
			* **(ii) To determine whether regulatory body is ‘creditor’, consider substance of provincial regulation** (*Orphan Well Association*)
				+ **(1) Regulatory body is not a creditor if acting in *bona fide* regulatory agency role** (*Orphan Well Association*)

**(a) Whether regulatory body merely acting to benefit public or third-party, rather than benefiting financially** (*Orphan Well Association*)

**(i) Public obligations are not provable claims**

**(b) Regulatory body enforcing public duty through non-monetary order is not a creditor** (*Northern Badger*)

* + - **(b) Debt, liability, or obligation must be incurred before debtor becomes bankrupt; and**
			* Polluting activities that continue after bankruptcy not included in insolvency process
			* **(i) Exceptions:**
				+ **(1) Executory Contracts**
				+ **(2) Claim against debtor for costs of remedying environmental damage affecting real property is provable claim** (*BIA*, s. 14.06(8))

Sometimes impossible to determine when environmental damage occurred

**(a) Irrelevant whether damage occurred before or after date of bankruptcy or date of filing proposal**

* + - **(c) Sufficient Certainty Step: must be possible to attach monetary value to debt, liability, or obligation**
			* **(i) Determine whether an order not expressed in monetary terms can be translated into monetary terms**
				+ **(1) Court looks at substance of order**
				+ **(2) Whether an order is intrinsically financial is irrelevant** (*Orphan Well Association*)

Order merely requiring expenditure of funds not sufficient (*Nortel*)

Fact that regulatory requirements cost money does not transform them into debt collection schemes (*Orphan Well Association*)

* + - * **(ii) Environmental order may be treated as contingent claim**
				+ **(1) For contingent claim to be included in insolvency process, must be sufficiently certain the contingency will occur – that regulator will enforce obligation by performing the environmental work and seek reimbursement** (*Orphan Well Association*)

Earmarking money is indicator province will perform remediation work

Commencing work is first steps towards creation of a debt

Regulatory body merely issuing environmental remediation order does not guarantee the regulatory body will perform the work itself and seek reimbursement (*Orphan Well Association*)

Regulatory body delegating clean-up to another agency is not sufficient (*Orphan Well Association*)

Regulatory body’s refusal to transfer licenses until requirements met does not amount to monetary claim (*Orphan Well Association*)

If company no longer in possession of land, may be clear regulatory body intends to complete clean-up (*Abitibi*)

* + - * + **(1) If activities ongoing, order may not be included because activities and damages will continue after reorganization is completed**
				+ **(2) If regulatory body has no alternative to performing remediation work itself, but delays framing order as claim to avoid insolvency regime, Court may order this action is inconsistent with insolvency regime and is subject to claims process**
				+ **(3) If property in debtor’s control and debtor has no means to perform remediation work, Court may find it is sufficiently certain regulatory body will perform work**

**Facts:** D applied for closure of mill and made assignment in bankruptcy. Regulatory body required D to submit environmental remediation plans.  **Issue:** Whether orders issued by regulatory body for environmental remediation work are provable claims? **Analysis:** Province had not done any clean-up. **Holding:** Appeal dismissed.

### *Orphan Well Association v Grant Thornton Ltd* (SCC)

**Ratio**

* **Where genuine conflict between federal and provincial laws, federal law prevails** (*BIA*, s. 72(1))
	+ Burden of proof on party alleging conflict
	+ **(1) Operational Conflict: compliance with both valid federal law and provincial law impossible** (*Lemare Lake Logging*)
	+ **(2) Frustration of Purpose: effect of provincial law frustrates purpose of federal law** (*Canadian Western Bank*)
* **Regulator may order ‘abandonment’, or remediation, if necessary to protect public or environment**
	+ **Regulatory body may authorize any person to perform remedial work, or do so itself**
	+ **Cost of performing work is debt payable to regulatory body**
	+ **Trustee not personally liable for environmental damage arising:** (*BIA*, s. 14.06(2))
		- Encourages trustee to undertake position as trustee – will not be personally liable for the damage
		- Protects trustees, regardless of whether trustee disclaims property affected by environmental damage
		- **(1) Before trustee’s appointment; or**
		- **(2) After trustee’s appointment, unless trustee was grossly negligent or engaged in willful misconduct**
	+ **If clean-up order made for trustee to remedy environmental damage, trustee not personally liable for failure to comply with order, or for costs incurred by a person carrying out order, if:** (*BIA*, s. 14.06(4))
		- Notwithstanding any provincial or federal legislation
		- **(1) Within time specified in order, or within 10 days if no time specified, trustee:**
			* **(a) Complies with order; or**
			* **(b) On notice to issuer of order, trustee abandons, disposes, or releases interest in the real property affected by damage**
		- **(2) During ‘stay period’, application made by trustee to Court to contest order, or have Court assess economic viability of complying with order; or**
		- **(3) If trustee abandoned, renounced, or divested interest in real property before order was made**
		- **(4) If trustee disclaims property on which environmental remediation order made, trustee not personally liable, but bankrupt’s estate remains liable** (*Orphan Well Association*)
			* **(a) Trustee cannot simply ‘walk away’ from disclaimed assets**
	+ **Environmental clean-up order is not a provable claim unless sufficiently clear that regulator will do, or has done, clean-up** (*Orphan Well Association*)
		- **(1) If regulator has done clean-up, provable claim exists**
			* **(a) Crown has security interest on contaminated land and any adjacent land, for remedial costs of environmental damage** (*BIA*, s. 14.06(7))
			* **(b) Security interest given super-priority status over any other claim or security against property**

**Facts:** Oil company experienced financial difficulties and went bankrupt. Receiver disclaimed most of company’s property. Regulatory body issued remedial order to clean sites the Receiver disclaimed. Trustee indicated it would not comply with environmental remediation orders. Regulatory body advised it would not permit transfer of company’s licenses, unless sites cleaned. **Issue:** Does s. 14.06(4) give trustee right to abandon property? Whether environmental order is provable claim? **Analysis:** Company’s environmental liability is not a provable claim.  **Holding:**

## Bankruptcy Scheme of Distribution

* **Proceeds of liquidation of bankrupt’s estate are distributed as follows:**
	+ **(1) Preferred Creditors**
		- **\*Subject to claims of secured creditors – secured creditors get paid first, as entitled to interest in property outside of bankrupt’s estate\***
			* **If deficiency, secured creditor may claim deficiency as part of bankrupt’s estate**
		- **(a) Payment made as soon as funds available for the purpose** (*BIA*, s. 136(2))
		- **(b) If creditor’s rights restricted in this section (ie. he gets less), he may rank as unsecured creditor for any balance of claim due to him** (*BIA*, s. 136(3))
		- **(c) Preferred creditors receive proceeds in following order** (*BIA*, s. 136(1))
			* **(i) If bankrupt deceased, reasonable funeral and testamentary expenses incurred by legal representative** (*BIA*, s. 136(1)(a))
			* **(ii) Costs of administration, in following order:** (*BIA*, s. 136(1)(b))
				+ **(1) Expenses/fees of person acting under direction made under paragraph 14.03(1)(a)**

Person directed to deal with estate’s property by Superintendent (*BIA*, s. 14.03(1)(a))

* + - * + **(2) Expenses/fees of trustee**
				+ **(3) Legal costs**
			* **(iii) Levy payable under s. 147** (*BIA*, s. 136(1)(c))
				+ **Tax on those using bankruptcy system to reduce expenses of Superintendent’s supervision** (*BIA*, s. 147(1))
			* **(iv) Wages, salaries, commissions, compensation in s. 81.3-81.4 that was not paid** (*BIA*, s. 136(1)(d))
				+ **(1) Only applies if employee did not receive full wage-earner charge ($2000 security)**

If company did not have sufficient inventory to meet all employees’ claims

* + - * + **(2) If corporation goes bankrupt, officers and directors don’t have preferred claim for any work or services done for the corporation** (*BIA*, s. 140)
			* **(v) Amount equal to difference a secured creditor would have received if s. 81.3-81.4 did not apply, and amount actually received by secured creditor** (*BIA*, s. 136(1)(d.01))
			* **(vi) Amount equal to difference secured creditor would have received if s. 81.5-81.6 did not apply, and amount actually received by secured creditor** (*BIA*, s. 136(1)(d.02))
			* **(vii) Family Support Claims: debts/liabilities in s. 178(1)(b),(c) for periodic amounts accrued in year before date of bankruptcy, plus any lump sum amount** (*BIA*, s. 136(1)(d.1))
				+ **(1) Only if provable claim under s. 121(4)**
				+ **(2) If owed money beyond just in the past year, may claim as general creditor for balance remaining**
			* **(viii) Municipal taxes assessed/levied against bankrupt, within two years immediately preceding bankruptcy** (*BIA*, s. 136(1)(e))
				+ **(a) Only if taxes do not constitute secured claim against real property of bankrupt**
				+ **(b) Cannot exceed value of the interest**
			* **(viiii) Lessor/landlord for arrears/missing rent in three months immediately preceding bankruptcy, and accelerated rent for three months following bankruptcy (if entitled to accelerated rent under lease)** (*BIA*, s. 136(1)(f))
				+ **\*Lessor can only get 3 months of arrears, plus three months of accelerated/future rent\***

**But, total cannot be more than value of debtor’s property on premises**

**If lessor owed more, can claim balance as general creditor, but cannot exceed three months rent – due to provincial law (*Landlord’s Rights On Bankruptcy*)**

* + - * + **(a) Total amount must not exceed realization from property on premises under lease**

**(i) Landlord loses right of distress upon bankruptcy – to go onto property and sell lessee’s property**

* + - * + **(b) Any payment made on accelerated rent credited against amount payable by trustee for occupation rent**
			* **(x) Fees and costs in s. 70(2), but only to extent of realization from property** (*BIA*, s. 136(1)(g))
				+ **(a) Fees of first/initiating creditor who first filed against debtor**
			* **(xi) Claims resulting from injuries to employees of bankrupt, if workers’ compensation does not apply** (*BIA*, s. 136(1)(i))
				+ **(a) Only to extent of monies received from persons guaranteeing bankrupt against damages resulting from those injuries**
	+ **(2) General Creditors**
		- **(a) Subject to this Act, all claims proved in bankruptcy paid rateably -- distributed *pari passu*** (*BIA*, s. 141)
	+ **(3) Postponed Creditors: do not receive any proceeds until general creditors paid (usually, postponed creditors will get nothing)**
		- **(a) Non-Arm’s Length Transaction: creditor who, any time before debtor’s bankruptcy, entered into non-arm’s length transaction with debtor, not entitled to claim dividend for claim arising from that transaction until all other creditors have been satisfied** (*BIA*, s. 137(1))
			* **(i) Unless, in trustee’s opinion, it was a proper transaction**
			* Situation where two parties are related, or otherwise not at arm’s length
				+ Where one party overcharged
		- **(b) If lender lends money in trade or business contract where lender receives rate of interest that varies with profits, or share of profits from carrying on the trade or business, and borrower subsequently goes bankrupt, lender not entitled to recover anything for loan until all other creditor’s claims satisfied** (*BIA*, s. 139)
		- **(c) Creditor not entitled to dividend for equity claim, until all claims that are not equity claims are satisfied** (*BIA*, s. 140.1)
			* **(i) Equity Claim: claim in respect of equity interest, including claim for…** (*BIA*, s. 2)
				+ **(1) If company declares dividend to shareholder, right to dividend is a debt claim owed by corporation to shareholder**

**(a) Shareholder becomes postponed creditor if they don’t receive the dividend**

Dividend or similar payment

Return of capital

Redemption or retraction obligation

* + - * + **(2) Shareholder received shares, but argues misrepresentation or fraud by company induced the purchase**

Monetary loss resulting from ownership, purchase, or sale of equity interest

Rescission of purchase or sale of equity interest

* + - * + Contribution or indemnity in respect of claim for any of the above
			* **(ii) Equity Interest:**
				+ **(1) In case of corporation other than income trust, a share in the corporation**

Or option/right to acquire a share in the corporation, other than convertible debt

* + - * + **(2) In case of income trust, a unit in the income trust**

Or option/right to acquire a unit in income trust, other than convertible debt

* + If partners become bankrupt, joint property applies to joint debts, and each partner’s separate property applies to separate debts (*BIA*, s. 142(1))
		- (a) If surplus of separate properties, surplus is dealt with as part of joint property (*BIA*, s. 142(2))
		- (b) If surplus of joint properties, surplus dealt with as part of respective separate properties, in proportion to right and interest of each partner in joint property (*BIA*, s. 142(3))
	+ **(4) Bankrupt, or legal representative or heirs, entitled to any surplus remaining (with interest) after creditors paid in full and any costs or expenses of bankruptcy proceedings** (*BIA*, s. 144)
		- (a) Interest is 5% per annum from date of bankruptcy (*BIA*, s. 143)
* **Fraud upon the Bankruptcy Law Principle**
	+ **(1) Anti-Deprivation Rule**
	+ **(2) *Pari Passu* Rule**
		- **(a) Contractual provisions that interfere with distribution scheme of bankruptcy are ineffective** (*Greenview (Municipal District*))
			* **(i) Contract that allows one party to pay other party’s creditors directly, if that party goes bankrupt, violates *pari passu* rule – gives some creditors preference over others** (*Greenview (Municipal District*))

### *Greenview (Municipal District No 16) v Bank of Nova Scotia* (ABCA)

**Facts:** City hired Horizon under construction contract. Horizon had number of subcontractors. Horizon goes bankrupt. Contract between City and Horizon said, if Horizon failed to pay subcontractors, City may pay directly to subcontractors, paying Horizon any extra left over.
**Issue:** Whether contractual provision interferes with *pari passu* rule?

# Discharge of the Bankrupt

* **Legal Effect of Bankruptcy Discharge**
	+ **(1) Post-bankruptcy property continues to vest in trustee until debtor obtains discharge** (*BIA*, s. 67(1)(c))
		- **(a) Property acquired after discharge not available to satisfy claims of creditors**
	+ **(2) Discharge releases debtor from claims provable in bankruptcy** (*BIA*, s. 178(2))
		- **(a) Purpose is to promote debtor’s financial rehabilitation** (*Moloney*)
* **Eligibility for Discharge**
	+ **(1) Only individual bankrupt obtains benefit of bankruptcy discharge**
	+ **(2) Bankrupt corporation cannot apply for discharge until satisfying creditors’ claims in full** (*BIA*, s. 169(4))
* **Automatic Discharge** (*BIA*, s. 168.1)
	+ **(1) First-Time Individual Bankrupt** (*BIA*, s. 168.1(a))
		- **(a) If bankrupt not required to make surplus income payments to estate, automatic discharge after 9 months from date of bankruptcy**
			* **(i) Unless opposition to discharge filed**
		- **(b) If bankrupt required to make surplus income payments to estate, automatic discharge after 21 months from date of bankruptcy**
			* **(i) Unless opposition to discharge filed**
		- Surplus income: portion of bankrupt’s total income that exceed that necessary to maintain reasonable standard of living (*BIA*, s. 68(2))
			* Superintendent establishes standards for determining surplus income and, if so, amount bankrupt must pay to estate (*BIA*, s. 68(1))
	+ **(2) Second-Time Individual Bankrupt** (*BIA*, s. 168.1(b))
		- **(a) If bankrupt not required to make surplus income payments to estate, automatic discharge after 24 months from date of bankruptcy**
			* **(i) Unless opposition to discharge filed**
		- **(b) If bankrupt required to make surplus income payments to estate, automatic discharge after 36 months from date of bankruptcy**
			* **(i) Unless opposition to discharge filed**
	+ **(3) Bankrupt may apply to Court for discharge prior to automatic discharge** (*BIA*, s. 168.1(2))
	+ **(4) Notice of Impending Discharge: trustee must give notice of impending discharge to Superintendent, bankrupt, and every creditor who has proven a claim** (*BIA*, s. 169(6))
		- **(a) Notice must be given at least 15 days before date of automatic discharge**
	+ **(5) Situations where individual will not receive automatic discharge – hearing before judge required:**
		- **(a) First or second-time bankrupt, but somebody opposed discharge**
		- **(b) Repeat Bankrupt: individual has been bankrupt three times or more**
		- **(c) Excessive Income Tax: bankrupt cannot obtain automatic discharge if he has $200,000 or more of personal income tax debt** (*BIA*, s. 172.1(1))
			* **(i) Only if debt is 75% or more of bankrupt’s total unsecured proven claims**
			* **(ii) Judicial officer not permitted to make order of absolute discharge – judicial officer may refuse discharge, suspend discharge, or order conditional discharge, considering:** (*BIA*, s. 172.1(4))
				+ **(1) Bankrupt’s circumstances at time personal income tax debt incurred**
				+ **(2) Bankrupt’s efforts to pay personal income tax debt**
				+ **(3) Whether bankrupt made payments in respect of other debts, while failing to make reasonable efforts to pay personal income tax debt; and**
				+ **(4) Bankrupt’s future financial prospects**
	+ **(6) Opposing Discharge: Superintendent, trustee, or creditor may oppose a discharge** (*BIA*, s. 168.2)
		- **(a) Opposition usually arises due to bankrupt’s post-bankruptcy conduct**
			* Failure to cooperate with trustee by disclosing assets or being truthful, or failed to make surplus income payments
		- **(b) Notice of opposition must occur before automatic discharge takes effect**
		- **(c) Upon opposition, trustee applies to Court for appointment of hearing, held within 30 days or later time fixed by Court** (*BIA*, s. 168.2(2))
		- **(d) Party most likely to oppose discharge is someone with personal relationship with debtor**
	+ **(7) Powers of Court: where bankrupt does not receive automatic discharge, Court may…** (*BIA*, s. 172(1))
		- **In determining appropriate course of action, Court considers interests of bankrupt, creditors, and public** (*McAfee*)
			* Court reluctant to grant absolute discharge for bankrupt who engaged in fraudulent conduct or commercial immorality – amounts to attack on credit system (*McAfee*)
			* Undesirable for bankrupt to be so weighed down by debts he is unable to participate in ordinary citizenship (*McAfee*)
			* Bankruptcy system should not be seen as clearing-house for all debts – different debts treated differently (*McAfee*)
			* Whether individual is a multiple bankrupt
			* **(a) Enhancement of Future Earning Capacity: whether bankrupt has benefit of law degree, etc. that enables him to earn high income in future**
				+ But, Court considers context – whether circumstance prevent individual from taking advantage of this enhancement
				+ Whether bankrupt continues to live lavish lifestyle post-bankruptcy (*McAfee*)
			* **(b) Involuntary Creditors: tort victim or individual who did not voluntarily extend credit to bankrupt**
			* **(c) Recovery of amounts justly due in bankruptcy**
				+ Prior to bankruptcy, bankrupt transferred assets out of country
				+ Prior to bankruptcy, converted non-exempt assets to exempt assets
			* **(d) Programs for Benefit of Public**
				+ Responsibility to pay taxes
			* **(e) Exempt Property: provincial law provides for many exemptions**
				+ But, Courts should not undermine exemption policy under s. 67 of *BIA*
			* **(f) Gambling and Substance Abuse**
				+ Whether bankrupt was honest and unfortunate debtor, or bankruptcy was by choice
				+ Views on this differ based on judge hearing case
		- **(1) Grant Absolute Discharge** (*BIA*, s. 172(1))
			* **(a) Court cannot grant absolute discharge if factual scenario in s. 173 is proven by party alleging the scenario applies, including:**
				+ **(i) Bankrupt’s assets not of value equal to fifty cents on dollar of bankrupt’s unsecured liabilities**

**(1) Unless bankrupt proves he is not justly responsible for such circumstances**

* + - * + **(ii) Bankrupt omitted to keep ‘books of account’ as are usual and proper in business, to sufficiently disclose business transactions and financial position, within 3 years of date of initial bankruptcy event and ending on date of bankruptcy**
				+ **(iii) Bankrupt continued to trade after becoming aware of being insolvent**
				+ **(iv) Bankrupt failed to satisfactorily account for any loss or deficiency of assets to meet his liabilities**
				+ **(v) Bankrupt caused, or contributed to bankruptcy through rash and hazardous speculations, unjustifiable extravagance in living, gambling, or culpable neglect of business affairs**
				+ **(vi) Bankrupt caused his creditors to have unnecessary expenses through frivolous or vexatious defence to action properly brought against him**
				+ **(vii) Bankrupt incurred unjustifiable expense by bringing frivolous or vexatious action, within three months of initial bankruptcy event and ending on date of bankruptcy**
				+ **(viii) Bankrupt gave undue preference to any creditor when unable to pay debts as they became due, within period three months before date of bankruptcy event and ending on date of bankruptcy**
				+ **(viiii) Bankrupt incurred liabilities to make assets equal to fifty cents on dollar on amount of unsecured liabilities, within three months before date of initial bankruptcy event and ending on date of bankruptcy**
				+ **(x) On previous occasion, bankrupt went bankrupt or made proposal to creditors**
				+ **(xi) Bankrupt guilty of fraud or fraudulent breach of trust**
				+ **(xii) Bankrupt committed offence under *BIA*, or other statute in connection with his property**
				+ **(xiii) Bankrupt failed to comply with requirement to pay under s. 68**
				+ **(xiiii) Bankrupt chose bankruptcy, rather than proposal to creditors, if he could have made viable proposal**
				+ **(xv) Bankrupt failed to perform duties under *BIA*, or to comply with Court order**
		- **(2) Suspend operation of automatic discharge for specified time** (*BIA*, s. 172(1))
		- **(3) Conditional Discharge: discharge with conditions on bankrupt’s earnings/income that may afterwards become due to bankrupt, or respecting bankrupt’s after-acquired property** (*BIA*, s. 172(1))
			* **(a) If no scenario in s. 173 proven, Court’s conditions can only include conditions relating to earnings or income that may afterwards become due to bankrupt**
			* **(b) If scenario in s. 173 proven, Court may make conditional order, including:** (*BIA*, s. 172(2))
				+ **(i) bankrupt pay periodic or lump-sum payment to trustee**
				+ **(ii) bankrupt consents to judgment against him by trustee, to be satisfied after discharge**
				+ **(iii) bankrupt must perform some act: addiction treatment, proof of paying income tax**
		- **(4) Refuse Discharge** (*BIA*, s. 172(1))
			* **(a) No reasonable prospect of debtor’s economic rehabilitation**
	+ **(8) Non-Dischargeable Claims: discharge does not release bankrupt from debt/liability, or interest attached thereto, arising from** (*BIA*, s. 178(1))
		- Claimant may obtain bankruptcy dividend if proving claim in bankruptcy
		- Claimant has right to pursue claim against debtor’s assets after discharge
		- **(a) Fine, penalty, or similar order imposed by Court for an offence**
		- **Including debt from recognizance or bail**
		- **(a.1) Award of damages by Court for: bodily harm intentionally afflicted, sexual assault, or wrongful death resulting therefrom**
		- **(b) Alimony**
		- **(c) Family support payment**
		- **(d) Fraud, embezzlement, misappropriation, or defalcation, while acting as a fiduciary, trustee, or administrator of property**
		- **(e) obtaining property or services by false pretenses, or fraudulent misrepresentation**
		- **(f) dividend creditor would have been entitled to receive on any provable claim not disclosed to trustee**
			* **(i) Unless creditor had notice or knowledge of bankruptcy and failed to take reasonable action to prove claim**
		- **(g) Federal/provincial government student loans, where date of bankruptcy occurred:**
			* **(i) Before date on which bankrupt ceased to be full or part-time student; or**
			* **(ii) Within seven years after date on which bankrupt ceased to be full or part-time student**
			* **If five years have passed since bankrupt ceased to be full or part-time student, Court may order this section does not apply if: (BIA, s. 178(1.1))**
			* **(a) bankrupt acted in good faith in connection with his liabilities under the debt; and**
			* **(b) Bankrupt has, and will continue to experience, financial difficulty to such an extent that bankrupt will be unable to pay debt**
		- **(g.1) Loan under Apprentice Loans Act, where date of bankruptcy occurred:**
			* **(i) Before date on which bankrupt ceased to be eligible apprentice under that Act; or**
			* **(ii) Within seven years after date on which bankrupt ceased to be eligible apprentice**
	+ **(9) Annulment of Discharge: Court may annul an order for discharge if obtained by fraud, or bankrupt failed to discharge duties under Act** (*BIA*, s. 180)
	+ **(10) Reaffirmation of Contract:** secured creditor chooses not to enforce claim. Debtor goes through bankruptcy and is discharged. Debtor continues to pay secured creditor on debt, then defaults. Secured creditor enforces claim, but deficiency exists.
		- Debtor reaffirmed contract by paying post-bankruptcy, so secured creditor may sue for deficiency – was not a provable claim, and only provable claims are discharged.

### *Moloney v Alberta (Administrator Motor Vehicle Accident Claim)*

**Ratio**

* **One purpose of bankruptcy is to enable debtor’s economic rehabilitation by:**
	+ **(1) Discharge
	(2) Exclusion of exempt property from distribution to creditors**
	+ **(3) Surplus Income Provisions**
	+ **(4) Mandatory credit counselling**
	+ **(5) Automatic stay of proceedings**
		- **(a) Ensures creditors cannot seize property exempt from distribution**
* **Federal Paramountcy Doctrine: if operational effects of provincial legislation incompatible with federal legislation, federal law prevails – to determine whether conflict exists:**
	+ Burden of proof on party alleging the conflict
	+ Court favors interpretation of federal legislation that allows concurrent operation of both laws, unless genuine inconsistency exists (*Western Bank*)
	+ **(1) Ensure federal and provincial laws are independently valid** (*Western Bank*)
		- **(a) Identify true purpose of each provision**
	+ **(2) If both laws independently valid, determine whether concurrent operation results in a conflict**
		- **(a) Operational Conflict: impossible to comply with both laws; or**
			* **(i) Compliance with one law amounts to defiance of the other law** (*Multiple Access*)
			* **(ii) Whether citizens can comply with both laws at the same time, without violating the other** (*Western Bank*)
		- **(b) Frustration of Purpose: provincial law frustrates purpose of federal law**
			* **(i) Intention of province to interfere irrelevant**
			* **(ii) Duplicate law does not frustrate purpose** (*Marcotte*)
			* **(iii) If provincial law more restrictive, does not frustrate purpose**
				+ **(1) May frustrate purpose if provincial law provides for positive entitlement** (*HRSD*)
			* Purpose of *BIA*, s. 178 to enable bankrupt’s fresh start
				+ Discharge releases bankrupt from all claims provable in bankruptcy (*BIA*, s. 178(2))

Province cannot compel payment of provable claim that was released under *BIA* by withholding privileges

Creditors precluded from compelling payment of provable claim, through civil or administrative processes

Province may compel bankrupt to make payments after discharge for property that would not, in any event, be distributed to creditors as part of bankrupt process

Does not conflict with purpose of *BIA*

* + - * Purpose of *BIA*, s. 178 is not to enable equitable distribution of assets
	+ **(3) If conflict exists, provincial law inoperative to extent of conflict** (*Western Bank*)

**Facts:** Bankrupt discharged from all debts. Under provincial law, province suspended vehicle license until paying full amount of damages for pre-bankruptcy car accident. **Issue:** Whether provincial legislation in conflict with federal legislation? **Holding:** Appeal dismissed. Provincial legislation inoperative to extent of conflict.

# Consumer Proposals

* **Consumer Proposal: deal made with creditors as means of settling debts, as alternative to bankruptcy**
	+ Benefits both debtor and creditors
		- Creditors get equal or more than what they would get in bankruptcy (usually 30% of what they are owed)
		- Debtor gets to keep assets
	+ **(1) Insolvency proceeding can only be initiated by debtor – debtor must be:**
		- **(a) An individual**
			* **(i) Usually must have reliable source of income – otherwise, how would he make payments**
		- **(b) Bankrupt or insolvent; and**
		- **(c) Have aggregate debts less than $250,000, not including debtor’s principal residence**
	+ **(2) Debtor’s property does not vest in licensed trustee/administrator**
	+ **(3) Insolvency proceeding does not involve liquidation of debtor’s assets**
		- **(a) Instead, payments to creditors made from debtor’s future income for specified time**
			* **(i) Usually, 3-5 years**
			* **(ii) No interest added to payments**
			* **(iii) Payments should usually be equal or more than what creditors would expect in bankruptcy – target is usually 30% of what they are owed**
			* **(iv) Payments may be made more quickly than stipulated if debtor’s financial situation improves**
			* **(v) Note of consumer proposal on credit report for 3 years**
			* **(vi) Tax debts may be included**
		- **(b) After payments made, remaining liabilities are released**
	+ **(4) Automatic stay in effect upon filing of consumer proposal with official receiver**
		- **(a) Automatic stay does not apply to secured creditors**
	+ **(5) Consumer proposal must be approved by creditors**
		- **(a) Voting rules structured to make it easier to obtain creditor acceptance**
		- **(b) Meeting of Creditors: meeting convened only if creditors holding 25% of claims, or more, request a meeting; or, official receiver requests a meeting**
			* **(i) If no meeting called, or one called and no quorum, proposal deemed to be accepted by creditors**
		- **(c) If meeting of creditors called, each creditor entitled to one vote for each dollar of claim**
			* **(i) Simple majority needed to accept consumer proposal**
		- **(d) If proposal accepted by creditors, becomes binding if no party request Court review within 15 days of acceptance or deemed acceptance**

# Commercial Restructuring

* **Commercial Restructuring Law: mechanism by which corporation can avoid liquidation by bankruptcy or receivership**
	+ **(1) Two sources of restructuring law:**
		- **(a) *Companies’ Creditors Arrangement Act* (*CCAA*)**
			* Generally used for larger corporations
			* Benefits
				+ Longer period of time available to complete process
				+ Greater flexibility – Courts have authority to grant exceptional orders not available in *BIA* restructurings
				+ Special statutory powers governing critical suppliers
				+ Extensive case law
			* Downsides
				+ More expensive due to greater court involvement throughout process
				+ Process initiated by court order, making it more time-consuming to commence proceedings

Much work ahead of time to prepare for hearing (affidavits, etc.)

Don’t receive ‘stay of proceedings’ until court grants it

Templates now used (per ‘online practice notes’) to make process more efficient

* + - **(b) *BIA*, Division I, s. 50-66**
			* Generally used for smaller or mid-sized corporations
			* Enacted in 1992 – anticipated *CCAA* would fade away and distressed corporations would choose to use these provisions instead
			* Benefits
				+ Faster and cheaper – must be completed within 6 months
				+ Well-suited to proceedings not requiring highly specialized court orders
				+ Easier to commence proceedings – court application not required and automatic ‘stay of proceedings’ immediately comes into effect

Merely need to file ‘notice of intention’ to file proposal

* + - * Downsides
				+ Not suitable for lengthy restructurings due to 6-month limit
				+ Not suitable if critical supplier order or other exceptional court order needed
				+ Less extensive case law
				+ Easier for creditors to terminate proceedings, if creditor believes restructuring not possible

If proceedings terminated, automatic bankruptcy

* + **(2) Objectives**
		- **(a) Rescuing financially distressed firms**
			* **(i) Allows corporation to pay creditors less than what they are owed, allowing corporation to continue as going concern**
		- **(b) Maximizing value of assets for creditors**
			* **(i) *CCAA* may provide higher return to creditors**
			* **(ii) Corporation may be sold, but to another corporation – allows employees to retain jobs**
		- **(c) Protecting public interest**
			* **(i) Existence of corporation may be important to public**
	+ **(3) Restructuring law is necessary – cannot merely rely on contract law, due to…**
		- **(a) No stay of proceedings – nothing preventing creditor from moving in to enforce obligations**
		- **(b) Agreement binds only those creditors who consent to contract**
		- **(c) Concerns over accuracy of information**
			* **(i) Creditors want to be sure deal is beneficial – provisions ensure information is accurate**
	+ **(4) Fundamental Principles**
		- **(a) Debtor retains both ownership and control of assets**
		- **(b) Debtor attempts to negotiate compromise of pre-filing claims, including claims of secured creditors**
			* **(i) No attempts made to negotiate compromise of claims arising after filing**
		- **(c) Governance structures ensure Court and creditors provided with reliable information**
			* **(i) Use of Court officers: monitors obligated to make sure reliable information presented**
		- **(d) Affected creditors must approve compromise or arrangement of claims by vote**
		- **(e) Court plays unique supervisory role in balancing interests and maintaining status quo**
	+ **(5) Recent rise in restructurings that result in sale of business or liquidation of assets**
		- **(a) Typically, no plan or proposal developed, with no voting by creditors**

## *Companies’ Creditors Arrangements Act* (*CCAA*)

* *BIA* had provisions regarding commercial proposals, but proposal did not bind secured creditors
	+ Purpose of restructuring to keep business alive, rather than dissolving it
	+ If secured creditor not bound by commercial proposal, may seize equipment
* *CCAA* originally had narrow purpose, but interpreted by Courts in broad manner to become restructuring system
	+ Banks not normally involved in long-term commercial lending
	+ To raise money, corporations would issue bonds – issue when company defaulted on payment of bonds and many creditors with security interest
		- To solve issue, trust deed appointed trustee that would act on behalf of secured bondholders
			* ‘Majority provision’ binds dissenting bondholders to majority’s decisions
	+ Corporate reorganizations could therefore be undertaken privately, without federal restructuring systems
	+ ***CCAA* stayed remedies of secured creditors by binding all secured creditors, if majority approved of arrangement**
	+ In 1980’s, Courts repurposed *CCAA* to provide general restructuring system for insolvent corporations
* ***CCAA* now used for large company restructurings**
	+ **(1) Stay of proceedings binds secured and unsecured creditors**
	+ **(2) Majority vote of secured creditor class binds secured creditors; majority vote of unsecured creditor class binds unsecured creditors**
		- **(a) Majority of creditors in each class, who vote, must vote in favor of restructuring; and**
		- **(b) Of those creditors who voted, those who vote in favor of restructuring must represent at least 2/3 of value in total amount claimed against debtor**

## Foundations of Commercial Restructuring Law

* **Source of Judicial Powers:**
	+ *CCAA* considered to be bare bones statute, but judges resorted to using court’s inherent jurisdiction to find authority to make orders (*Yukon Zinc*)
		- Over time, recognized that judges actually were exercising statutory discretion, not granting exceptional orders from inherent jurisdiction
	+ *CCAA* amended to confer broad powers on Court (*CCAA*, s. 11)
		- No equivalent to s. 11 in *BIA*
		- In exercising judicial power, supervising judge must be satisfied that: (*Century Services*)
			* Applicant acted in good faith
			* Applicant acted with due diligence; and
			* Order is appropriate: would advance policy and remedial objectives of *CCAA*
				+ Remedial objectives include: (*Callidus* *Capital*)

Maximize creditor recovery

Preserve going-concern value

Preserve jobs and communities affected by corporation’s financial distress

* + - In pursuit of policy and remedial objectives, *CCAA* proceedings evolved to permit: (*Callidus Capital*)
			* Emergence of pre-filing debtor company in restructured state; or
			* Liquidating CCAAs: liquidation of debtor’s assets under Act itself

### *Century Services Inc v Canada (Attorney General)* (SCC)

**Ratio**

* ***BIA* available to insolvent debtors owing $1000 or more**
	+ **Available to natural persons and corporations**
	+ **Contains mechanisms for debtors to make proposals to creditors for adjustments of debts**
* ***CCAA* only available to companies with liabilities in excess of $5M**
	+ **No provisions for liquidation of debtor’s assets if reorganization fails**
	+ **Three ways of exiting *CCAA* proceedings:**
		- **(a) Stay of proceedings allows debtor to restore solvency – no reorganization required**
		- **(b) Compromise/arrangement accepted by creditors – reorganized company emerges as going concern**
		- **(c) Compromise/arrangement fails**
			* **(i) Company or creditors seek to have debtor’s assets liquidated under *BIA*; or**
			* **(ii) Debtor placed into receivership**
* **Purpose of *CCAA* to permit debtor to carry on business and, where possible, avoid social and economic costs of liquidating assets**
	+ **Where reorganization impossible, *BIA* used to provide orderly distribution of debtor’s assets and satisfy creditors’ claims according to predetermined priority rules**
* **Both *CCAA* and *BIA* use ‘single proceeding model’: creditors’ remedies collectivized to prevent free-for-all and rush to grab assets**
	+ **Allows Court to order all actions against debtor to be stayed**
* **Supervising judge must provide conditions under which debtor can attempt to reorganize:**
	+ **(1) Staying enforcement actions of creditors to allow debtor’s business to continue**
	+ **(2) Preserving status quo while debtor plans compromise/arrangement to be presented to creditors**
	+ **(3) Supervising process and advancing it to point where it can be determined whether it will succeed**
* **Court must be cognizant of various interests at stake in reorganization, including:**
	+ **Employees, directors, shareholders, parties doing business with insolvent company, public interest**
* **Court may, subject to restrictions in *CCAA*, make any order it considers appropriate in circumstances** (*CCAA*, s. 11)
	+ **(1) Supervising judges may sanction measures for which there is no explicit authority in *CCAA***
		- **(1) Hierarchical approach taken in determining whether judge has jurisdiction:**
			* **(a) Court relies on interpretation of provisions in *CCAA*; and**
				+ **(i) In most cases, purposive and liberal interpretation sufficient**
			* **(b) If no clear interpretation available, relies on inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding**
		- **(2) Supervising judge has jurisdiction under *CCAA*, s. 11 to prevent creditor from voting on plan of arrangement or compromise, if creditor is acting for improper purpose** (*Callidus Capital Corp*)
			* **(a) Creditor seeking to exercise voting rights in manner that frustrates, undermines, or runs counter appropriateness, good faith, or due diligence**
		- **(3) Court may authorize post-filing security for debtor**
		- **(4) Court may authorize super-priority charges on debtor’s assets, if necessary for continuation of debtor’s business during reorganization**
		- **(5) Court may temporarily lift ‘stay of proceedings’ to allow debtor to make assignment in bankruptcy**
			* **(a) Allows for transition from *CCAA* to *BIA***
			* **(b) In short time between termination of *CCAA* proceedings and commencement of bankruptcy proceedings, deemed trust in favor of Crown cannot be imposed**
				+ **(i) Ensures creditors not disadvantaged by attempted reorganization under *CCAA***
		- **(6) Court may stay Crown enforcement of GST claim, to ensure creditors not disadvantaged by attempted reorganization under *CCAA***
	+ **(2) In determining whether to exercise its authority, Court must be satisfied applicant acted with…**
		- **(a) Appropriateness: order sought is appropriate in circumstances**
			* **(i) Whether order sought advances policy objectives of *CCAA*, including:** (*Callidus Capital*)
				+ **(1) Maximizing creditor recovery**
				+ **(2) Preserving going-concern value**
				+ **(3) Preserving jobs and communities affected by corporation’s financial distress**
				+ **(4) Public interest in have company emerge reorganized**
			* **(ii) Purpose of order and the means used to employ order must both be appropriate in circumstances**
		- **(b) Good Faith: applicant has been acting in good faith** (*CCAA*, s. 18.6(1))**; and**
		- **(c) Due Diligence: applicant has been acting with due diligence**
			* Failing to participate in *CCAA* proceedings in diligent and timely fashion undermines negotiation and compromise
			* **(i) Discourages parties from sitting on their rights** (*Callidus Capital Corp*)
			* **(ii) Ensures creditors do not strategically position themselves to gain advantage** (*Callidus Capital Corp*)
* **Reorganization under *CCAA* can be terminated and ‘stay of proceedings’ lifted if reorganization ‘doomed to fail’**
* **If *CCAA* reorganization fails, Crown may immediately assert its claim for unremitted source deduction**
	+ **Regardless of whether reorganization commenced under *CCAA* or *BIA*, creditors’ claims subject to priority of Crown’s source deductions deemed trust**
* **If *CCAA* reorganization fails, orderly transition to *BIA* required**
	+ **Court may partially lift *CCAA* stay of proceedings to commence proceedings under *BIA***
		- **Prevents race to obtain priority unavailable under *BIA***
* **Conflict between *CCAA* and *Excise Tax Act* regarding**
	+ **Interpretive Principles**
		- **(1) Implied Repeal: where there is inconsistency, Parliament must have intended the later provision should govern over earlier provision**
		- **(2) General provision gives way to the specific**
		- **(3) Expression of one is exclusion of others**
			* *Excise Tax Act* expressly mentioned being subject to *BIA*
	+ **Trend to move away from asserting priority in insolvency law, other than for source deductions**
	+ **Internal logic of *CCAA* supports view that deemed trust for GST invalidated – stay of proceedings applies to enforcement of source deductions, but statute silent as to enforcement of GST**
		- Strange asymmetry if Crown maintained priority over GST in *CCAA*, but deemed trust invalidated under bankruptcy proceedings – would encourage statute shopping

**Facts:** Bank demanded immediate repayment of loans from trucking company, after trucking company defaulted. Company applied for restructuring under *CCAA*, staying enforcement remedies of all creditors. **Issue:** Do provisions in *Excise Tax Act* or *CCAA* apply? Did Court exceed its authority under *CCAA* by lifting stay to allow debtor to make assignment in bankruptcy?  **Holding:** Appeal allowed.

### *9354-9186 Quebec v Callidus Capital Corp.* (SCC)

**Ratio**

* **Arrangement: scheme for reorganizing affairs of debtor** (*Re Guardian Assur. Co.*)
* **Compromise: dispute about rights and settling of that dispute on terms acceptable to debtor and creditors**
	+ **(1) Must be some compromise of creditors’ rights**
* **Liquidating CCAAs: liquidation of debtor’s assets taking place under *CCAA***
	+ **(1) May take form of:**
		- **Sale of debtor company as going concern**
		- **Sale of assets capable of being used by buyer in operations**
		- **Partial liquidation or downsizing of business operations**
		- **Piecemeal sale of assets**
	+ **(2) Commercial outcomes of liquidating CCAAs:**
		- **Continued operation of debtor’s business under different going concern entity**
		- **Sale of assets and inventory, with no new entity emerging**
		- **Sale of most of debtor’s assets, with residual assets to be dealt with by debtor and stakeholders**
* **Supervising Judge: each CCAA proceeding overseen by a supervising judge, who acquires extensive knowledge into stakeholder dynamics and business realities** (*Callidus Capital*)
	+ **(1) Supervising judge may make any order he considers appropriate in circumstances** (*CCAA*, s. 11)
		- **(a) Judge has broad discretion to meet business/social needs and respond to circumstances of case**
	+ **(2) Judge’s discretion must be exercised by considering:**
		- **(a) Objectives of *CCAA***
			* Weight of each objective differs depending on: circumstances, stage of proceedings, and proposed solutions
			* **(i) *CCAA* prioritizes reorganization and survival of pre-filing debtor company in operational state to avoid social/economic losses resulting from liquidation of insolvent company**
				+ **Where reorganization not possible, alternative is liquidation through *BIA* or receivership**
				+ **Where reorganization or liquidation complete and Court dealing with residual assets, objective is to maximize creditor recovery from those assets**
			* **(ii) Timely, efficient, and impartial resolution of debtor’s insolvency**
			* **(iii) Preserving and maximizing value of debtor’s assets**
				+ **(1) Maximizing creditor recovery**
			* **(iv) Ensuring fair and equitable treatment of claims against a debtor**
			* **(v) Protecting public interest**
				+ **(1) Protection of credit system**
			* **(vi) In commercial insolvencies, balancing costs and benefits of restricting or liquidating the company**
				+ **(1) Preservation of company as going-concern where possible**
				+ **(2) Preservation of jobs and communities affected by company’s financial distress**
	+ **(3) Judge assisted by Court-appointed monitor:**
		- **(a) Independent and impartial expert**
		- **(b) Provides advisory opinion to Court regarding fairness of proposed plan or compromise, and advice on orders sought by parties**
			* Including sale of assets and requests for interim financing
	+ **(4) Deference to Supervising Judge: appellate courts must exercise caution before interfering with supervising judge’s order**
		- **(a) Refers to supervising judge’s exercise of discretion**
		- **(b) Judge engaged in balancing act of conflicting and changing interests, in restructuring process that is constantly evolving and in which judge was assisted by independent and impartial experts**
* **Where plan proposed, application may be made to supervising judge to order creditors’ meeting to vote on proposed plan** (*CCAA*, s. 4,5)
	+ **Supervising judge has discretion to determine whether to order meeting**
	+ **For purposes of voting at creditors’ meeting, debtor company may divide creditors into classes, subject to Court approval** (*CCAA*, s. 22(1))
		- **Creditors may be included in same class if interests or rights sufficiently similar to give them commonality of interest** (*CCAA*, s. 22(2))
	+ **Supervising judge may sanction plan if ‘double majority’ in each class of creditors votes in favor of plan**
		- **(a) Majority in number of class members, which also, which also represents two-third in value of the class members’ claims**
	+ **Supervising judge conducts ‘fairness hearing’ to determine whether plan is fair and reasonable**
	+ **Once sanctioned by supervising judge, plan is binding on each class of creditors that participated in vote** (*CCAA*, s. 6(1))
	+ **Creditors with provable claim against debtor usually entitled to vote on plans of arrangement, if creditor’s interests affected by proposed plan**
	+ **Creditor who is related to company cannot vote for compromise or arrangement relating to company** (*CCAA*, s. 22(3))
		- **But, permitted to vote against arrangement**
		- **Reduces ability of debtor company to organize restructuring plan that confers additional benefits to related parties**
* **Supervising judge has discretion to approve interim financing – make order declaring all or part of company’s property subject to security or charge, in favor of person who agrees to lend company amount approved by Court** (*CCAA*, s. 11.2(1))
	+ Reduce lenders’ risks, incentivizing them to assist insolvent companies
	+ **(1) Security or charge cannot secure already existing obligation**
	+ **(2) Supervising judge may grant lender a ‘super-priority charge’ that ranks in priority over claims of any secured creditors** (*CCAA*, s. 11.2(2))
	+ **(3) In deciding whether to grant interim financing, supervising judge considers:** (*CCAA*, s. 11.2(4))
		- **(a) Period during which company expected to be subject to *CCAA* proceedings**
		- **(b) How company’s business and financial affairs to be managed during proceedings**
		- **(c) Whether company’s management has confidence of its major creditors**
		- **(d) Whether loan would enhance prospects of viable compromise or arrangement being made in respect of the company**
		- **(e) Nature and value of company’s property**
		- **(f) Whether any creditor would be materially prejudiced as result of security or charge; and**
		- **(g) Monitor’s report**
	+ **(4) Supervising judge may approve third-party litigation funding as interim financing**
		- **(a) Third-party litigation: third-party, unconnected to the litigation, agrees to pay some or all of a party’s litigation costs, in exchange for portion of that party’s recovery in damages or costs**
		- **(b) Supervising judge determines if third-party litigation funding agreement has terms that convert it into plan of arrangement**
		- **(c) May be approved if supervising judge determines it is fair and appropriate, having regard to all circumstances and objectives of *CCAA*, including:**
			* **(a) Period during which company expected to be subject to *CCAA* proceedings**
			* **(b) How company’s business and financial affairs to be managed during proceedings**
			* **(c) Whether company’s management has confidence of its major creditors**
			* **(d) Whether loan would enhance prospects of viable compromise or arrangement being made in respect of the company**
			* **(e) Nature and value of company’s property**
			* **(f) Whether any creditor would be materially prejudiced as result of security or charge; and**
			* **(g) Monitor’s report**

**Facts:** Bluberi obtained loans from Callidus. Callidus continued to loan money, even after Bluberi lost a lot. Proceedings began under *CCAA* and most of debtor’s assets liquidated.  **Issue:** Whether supervising judge has discretion to bar creditor from voting on plan, if creditor found to be acting for improper purpose?

## Commencing Restructuring Proceedings

* **Commencing Restructuring Proceedings Under *CCAA***
	+ **(1) Eligibility**
		- **(a) Debtor must fall within definition of ‘debtor company’; and**
			* **(i) ‘Company’:** (*CCAA*, s. 2)
				+ **Any company, corporation, or legal person incorporated under federal or provincial law**
				+ **Any incorporated company having assets or doing business in Canada, wherever incorporated**
				+ **Any income trust**
				+ **Does not include banks, telegraph companies, insurance companies**
			* **(ii) ‘Debtor company’ is any company that:** (*CCAA*, s. 2)
				+ **(1) is bankrupt or insolvent**

Company insolvent if reasonably expected to run out of liquidity within reasonable proximity of time, as compared with the time reasonably required to implement a restructuring (*Re Stelco*)

* + - * + **(2) has committed act of bankruptcy within meaning of BIA, or deemed insolvent under Winding-up and Restructuring Act, whether or not proceedings taken under those Acts**
				+ **(3) has made authorized assignment, or bankruptcy order made, under BIA**
				+ **(4) is in course of being wound up under *Winding-up and Restructuring Act* because company is insolvent**
		- **(b) Total claims against debtor company, or affiliated company, must exceed $5M** (*CCAA*, s. 3)
			* **(i) Company is affiliated if a subsidiary of same company, or each controlled by same person** (*CCAA*, s. 3(2))
				+ Two companies affiliated with same company at same time are affiliated with each other (*CCAA*, s. 3(2))
			* **(ii) Company controlled by person if:** (*CCAA*, s. 3(3))
				+ **Person holds more than 50% of shares; and**
				+ **Votes attached to those share sufficient to elect majority of company’s directors**
	+ **(2) Application: two-part application under s. 11.02**
		- Several provinces developed ‘templates’, ensuring courts aware of any non-standard terms being requested by applicant
		- **(a) Initial Application: court grants ‘initial order’ that contains the following…**
			* **(i) Declaration that debtor eligible to apply under *CCAA***
			* **(ii) Stay of Proceedings – cannot last more than 10 days**
			* **(iii) Authorization to carry on operations**
			* **(iv) Power to borrow – may contain priority provisions**
			* **(v) Appointment of Monitor** (*CCAA*, s. 11.7(1))
				+ **(1) Monitor shall:** (*CCAA*, s. 23)

**(a) Publish notice containing prescribed information in newspaper, one a week for two consecutive weeks**

**(b) Review company’s cash-flow statement as to its reasonableness and file report**

**(c) Make appraisal or investigation it considers necessary to determine company’s business and financial affairs with reasonable accuracy, and cause of its financial difficulties or insolvency**

**(i) File report with Court**

**(d) Advise court on reasonableness or fairness of compromise or arrangement**

**(e) Advise court if proceedings better taken under *BIA***

* + - * + **(2) Monitor not liable for loss or damage to any person relying on report, if monitor acted in good faith and took reasonable care in preparing report (CCAA, s. 23(2))**
				+ **(3) Debtor company must provide any assistance necessary to enable monitor to carry out its functions** (*CCAA*, s. 35(1))
		- **(b) Subsequent Application: made within 10-day ‘stay of proceedings’ period**
			* **(i) Notice to all known creditors must be given**
	+ **(3) Stay of Proceedings**
		- **(a) ‘Stay of proceedings’ not effective until Court order granting ‘stay’ is granted**
			* **(i) Court shall not make ‘stay of application’ order unless applicant proves it is appropriate in circumstances** (*CCAA*, s. 11.02(3))
		- **(b) ‘Stay of proceedings’ effective against:**
			* **(i) Secured creditors (CCAA, s. 11.02)**
			* **(ii) Directors** (*CCAA*, s. 11.03)
		- **(c) ‘Stay of proceedings’ may be granted under ‘additional powers’ provision** (*CCAA*, s. 11)
			* **‘Stay of proceedings’ may be granted against additional third-parties**
			* **Order must be appropriate in circumstances, and applicant acted in good faith and with due diligence** (*CCAA*, s. 11.02(3))
		- **(d) Staying Regulatory Bodies: ‘stay’ does not affect regulatory bodies unless its proceedings enforce a right of payment** (*CCAA*, s. 11.1)
			* **(i) Court may grant stay if viable plan cannot be made in absence of order, and not contrary to public interest to make order** (*CCAA*, s. 11.1)
* **Commencing Restructuring Proceedings Under *BIA***
	+ **(1) Eligibility**
		- **(a) Proceedings may be commenced by: insolvent person, bankrupt, receiver, trustee** (*BIA*, s. 50(1))
			* **(i) Individuals and partnerships eligible**
	+ **(2) Application**
		- **(a) Filing of Proposal** (*BIA*, s. 50(2))
			* Less common – most companies won’t have fully developed proposal by this point
		- **(b) Notice of Intention: notice of company’s intention to file proposal in future** (*BIA*, s. 50.4(1))
			* **(i) Insolvent person may file ‘notice of intention’** (*BIA*, s. 50.4(1))
			* **(ii) Within 10 days after filing ‘notice of intention’, must file** (*BIA*, s. 50.4(2)
				+ **Cash-flow statement, and report on reasonableness of statement**
				+ **Court may order statement not released to some or all creditors if it would unduly prejudice insolvent person and non-release would not unduly prejudice creditors** (*BIA*, s. 50.4(4))
			* **(iii) Proposal must be filed within 30 days after filing** (*BIA*, s. 50.4(8))
				+ Court may extend period for up to 45 days – but, extensions cannot exceed 5 months (*BIA*, s. 50.4(9))
			* **(iv) Deemed assignment in bankruptcy if proposal not filed in period** (*BIA*, s. 50.4(8))
			* **(v) Time period may be terminated by Court – terminates restructuring attempt, if:** (*BIA*, s. 50.4(11))
				+ Application must be brought by creditor, trustee, or interim receiver
				+ **(1) Insolvent person not acting in good faith and with due diligence**
				+ **(2) Insolvent person not likely to make viable proposal before expiration of period**
				+ **(3) Insolvent person not likely to make proposal, before period’s expiration, that will be accepted by creditors; or**
				+ **(4) Creditors as a whole would be materially prejudiced**
	+ **(3) Stay of Proceedings**
		- **(a) ‘Stay of proceedings’ effective automatically upon filing of ‘notice of intention’** (*BIA*, s. 69(1))
		- **(b) ‘Stay of proceedings’ effective against:**
			* **(i) Secured creditors** (*BIA*, s. 69(2))
				+ **Stay not effective if secured creditor has already seized property, or 10 day period under s. 244 *BIA* notice of intention has expired** (*BIA*, s. 69.1(2))
			* **(ii) Directors** (*BIA*, s. 69.31)
		- **(c) ‘Stay’ does not apply if company defaults on payment due to Crown after filing of ‘notice of intention’ and claim is demand under Income Tax Act, s. 224, CPP, EI** (*BIA*, s. 69(3))
		- **(d) Creditor may apply to court for declaration that ‘stay of proceedings’ ineffective against it, if:** (*BIA*, s. 69.4)
			* **(i) Creditor or person likely to be materially prejudice by continued operation of those provisions; or**
			* **(ii) Equitable on other grounds to make such a declaration**
		- **(e) Staying Regulatory Bodies: ‘stay’ does not affect regulatory bodies unless its proceedings enforce a right of payment** (*BIA*, s. 69.6)
			* **(i) Court may grant stay if viable plan cannot be made in absence of order, and not contrary to public interest to make order** (*BIA*, s. 69.6)
* **Where compromise or arrangement proposed between debtor company and unsecured creditors, Court may, upon application by company, such creditor, or trustee/liquidator, order meeting of creditors** (*CCAA*, s. 4)
* **Where compromise or arrangement proposed between debtor company and secured creditors, Court may, on application by company, such creditor, or trustee/liquidator, order meeting of creditors** (*CCAA*, s. 5)
* **If application made by debtor company, Court may…make any order it considers appropriate in circumstances** (*CCAA*, s. 11)
	+ **(1) Order cannot:** (*CCAA*, s. 11.01)
		- **(a) Prohibit person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after order is made; or**
		- **(b) Require further advance of money or credit**
* **Proposal may be made to creditors generally, together or separated into classes, or to secured creditors** (*BIA*, s. 50(1.2))
	+ **(1) Secured claims may be included in same class if interests or rights of creditors sufficiently similar to give them commonality of interest, considering:** (*BIA*, s. 50(1.4))
		- Nature of debts
		- Nature and rank of security
		- Remedies available to creditors if proposal weren’t made
		- Extent to which claims would be paid under proposal
	+ **(2) Court may determine classes of secured claims appropriate to proposal, and class into which any secured claim falls** (*BIA*, s. 50(1.5))

## Terminating Restructuring Proceedings

### *Bargain Harold’s Discount Ltd v Paribus Bank of Canada*

**Ratio**

* **Generally, creditors stating they will vote against any plan proposed by debtor will not cause court to terminate *CCAA* proceedings** (*Bargain Harold’s Discount*)
	+ **(1) Court will terminate *CCAA* proceedings if it is obvious the plan is ‘doomed to failure’, or no ‘reasonable chance’ plan will be accepted by creditors** (*Bargain Harold’s Discount*)
		- **Onus on creditors to show why order should not be granted**
		- **All parties must be considered: secured/preferred/unsecured creditors, employees, landlords, shareholders, public** (*Icor Oil & Gas Co*)
		- **(a) In considering whether plan has ‘reasonable chance’ of being accepted by creditors, court determines whether:**
			* **(i) Knows precise nature of problem causing its financial distress and how to fix it**
			* **(ii) Has idea how its operation can be salvaged**
			* **(iii) Whether applicant has plan for interim financing, or would still need to borrow money to continue its operations**
			* **(iv) Creditors have lost trust in company management**
	+ **(2) Once termination occurs, the stay is lifted and creditors may exercise enforcement remedies**
* **If applicant continues to operate at a loss if order granted under *CCAA*, eroding creditors’ security interests, creditor is unduly prejudiced** (*Bargain Harold’s Discount*)

**Facts:** P applied for restructuring under *CCAA*, proposing to downsize its business operations, proceed with orderly liquidation of assets, terminate employees. Secured creditors indicated they would vote down any proposal made by P.  **Issue:** Whether secured creditor would be prejudiced by delay in appointing receiver? **Analysis:** No reasonable chance of applicant devising plan creditors would find acceptable.

### *Re Cumberland Trading Inc*

**Ratio**

* **Secured creditor cannot enforce its security interest until expiry of ten days after giving notice to debtor** (*BIA*, s. 244)
	+ **Unless debtor consents**
* **Under *BIA*, proposal could be voted down by secured creditor class, but approved by unsecured creditor class** (*Re Cumberland Trading*)
	+ **Secured creditor class would be able to enforce its security**
* **Court may terminate 30-day ‘stay of proceedings’ if:** (*BIA*, s. 50.4(11)
	+ Application may be brought by trustee, interim receiver, or creditor
	+ **(1) Insolvent person not acting in good faith and with due diligence**
	+ **(2) Insolvent person unlikely to be able to make viable proposal before expiration of period**
	+ **(3) Insolvent period unlikely to be able to make proposal, before expiration of period, that will be accepted by creditors**
		- **(i) Situation where no proposal has been tabled – no requirement creditors must wait and see what proposal is before indicating they will vote it down** (*Re Cumberland Trading*)
	+ **(4) Creditors as a whole would be materially prejudiced**
* **Creditor affected by ‘stay of proceedings’ may apply to court for declaration that ‘stay’ no longer operates if:** (*BIA*, s. 69.4)
	+ **(1) Creditor likely to be materially prejudiced by continued operation of ‘stay’; or**
		- **(a) Objective prejudice, as opposed to subjective prejudice** (*Re Cumberland Trading*)
			* **(i) Degree of prejudice suffered regarding creditor’s security interest, not to creditor himself**
		- **(b) Creditor must indicate extent of such prejudice, so court may determine magnitude of material prejudice** (*Re Cumberland Trading*)
			* Simply stating security interest will be eroded, without indicating amount, insufficient
	+ **(2) Equitable on other grounds to make such a declaration**

**Facts:** Skyview brought motion for declaration that stay provisions under *BIA* no longer operate, allowing Skyview to take steps to enforce its security against Cumberland.  **Analysis:** Skyview has nearly all of Cumberland’s secured creditor claims and unsecured creditor claims – would have veto on any proposal.

## Operating the Business

* **Payment obligations to pre-filing creditors are suspended during re-structuring**
	+ **(1) Dealt with in plan of arrangement or commercial proposal**
	+ Debts owed on or before date on which restructuring proceedings commenced
* **Post-filing creditors generally reluctant to extend credit – not required to do so** (*CCAA*, s. 11.01) (*BIA*, s. 65.1(4))
* **Post-filing creditor may continue to require immediate payment for goods/services or leased property, or other valuable consideration** (*CCAA*, s. 11.01)
* **Interim Financing: debtor often needs interim financing to carry on business during restructuring**
	+ May need to pay suppliers, lawyers, etc.
	+ **(1) Court may authorize creation of a charge to secure interim financing** (*CCAA*, s. 11.2, *BIA*, s. 50.6)
		- **(a) Secured creditor receiving charge must be given notice of application** (*CCAA*, s. 11.2, *BIA*, s. 50.6)
		- **(b) Secured charge only secures interim financing -- cannot secure obligation existing before order is made** (*CCAA*, s. 11.2, *BIA*, s. 50.6)
		- **(c) Court may order security or charge rank in priority over claim of any secured creditor** (*CCAA*, s. 11.2(2))
			* **(i) Court may order security or charge rank in priority over any security or charge arising from previous order made under this section, only with consent of person in whose favor previous order was made** (*CCAA*, s. 11.2(3))
		- **(d) Factors considered by Court when determining whether to grant charge:** (*CCAA*, s. 11.2(4), *BIA*, s. 50.6(5))
			* **(i) Period during which company expected to be subject to Act’s proceedings**
			* **(ii) How company’s business/financial affairs to be managed during proceedings**
			* **(iii) Whether company’s management has confidence of major creditors**
			* **(iv) Whether loan enhances prospects of viable compromise or arrangement**
			* **(v) Nature and value of company’s property**
			* **(vi) Whether any creditor materially prejudiced as result of security or charge; and**
			* **(vii) Monitor/Trustee report, if any**
		- **(e) Does not prohibit person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after order is made** (*CCAA*, s. 11)
* **Critical Supplier: critical suppliers may have leverage to threaten to cut off post-filing supplies**
	+ Threaten to cut off supplies to company unless pre-filing claims paid
		- Upsets other creditors, because critical supplier gets preference in payment
	+ **(1) On application by debtor company, Court may make ‘critical supplier order’ requiring a critical supplier to supply** (*CCAA*, s. 11.4)
		- No counterpart provision in *BIA*
		- **(a) Notice to secured creditors affected by security or charge required** (*CCAA*, s. 11.4(1))
		- **(b) Court may compel critical supplier to supply on credit – but, critical supplier must be granted priority secured charge on debtor’s assets** (*CCAA*, s. 11.4(3)-(4))
		- **(c) Does not preclude Court from authorizing payment of pre-filing claims under s. 11**
			* **(i) Circumstances supporting payments toward pre-filing debt:** (*Soccer Express*)
				+ Debtor has sufficient cash flow for payment
				+ Support of debtor
				+ Support of monitor
				+ Likely payment of some amount to unsecured creditor in any event under a plan
				+ Supplier’s need
				+ Authorization to make such payments only as required and with ongoing approval/oversight of Monitor
				+ Payment will secure ongoing cooperation of supplier for continued supply of goods and services

### *Soccer Express Trading Corp. (Re)* (BCSC)

**Ratio**

* **To determine whether declaration of ‘critical supplier’ may be made under s. 11.4, Court determines:** (*Soccer Express*)
	+ **(1) If person is ‘supplier’ and if goods/services supplied are critical to debtor’s continued operations** (*CCAA*, s. 11.4(1))
		- **(a) Whether products integral to business – whether company depends on continued supply of products to remain in operation** (*Soccer Express*)
		- **(b) Whether supplier is the largest supplier to company** (*Soccer Express*)
		- **(c) Whether supplier’s goods/services integrated into sales and purchasing process** (*Soccer Express*)
		- **(d) Whether supplier provides unique branded goods** (*Soccer Express*)
		- **(e) Whether relationship between parties is beyond repair** (*Soccer Express*)
		- **(f) Whether company has ability to pivot away from supplier’s products/services** (*Soccer Express*)
		- **(g) Whether disruption in supply would have serious and negative repercussions to business operations and would cause irreparable harm to business** (*Soccer Express*)
		- **(h) If disruption to supply occurs, jeopardizes other company’s support of restructuring proceedings and significant risk the entire process might fail** (*Soccer Express*)
	+ **(2) If person declared to be ‘critical supplier’, Court has discretion to order continued supply of goods/services on certain terms; and** (*CCAA*, s. 11.4(2))
		- **(a) Terms might be informed by existing contract between parties** (*Soccer Express*)
	+ **(3) If Court declares critical supplier must continue to supply goods/services, Court must also grant security or charge in favor of supplier** (*CCAA*, s. 11.4(3))
		- **(a) Court has discretion to determine priority of security or charge – may rank in priority over claim of any secured creditor** (*CCAA*, s. 11.4(4))

**Facts:** Adidas supplies products to Soccer Express. Soccer express goes into restructuring proceedings. **Issue:** Whether Adidas is critical supplier?

## Developing and Approving the Plan

* **Plan of arrangement (*CCAA*)**
	+ **Can leave some creditors outside of the plan – unaffected by plan or arrangement**
* **Commercial proposal (*BIA*)**
* **Developing the Plan**
	+ **(1) Debtor primarily responsible for proposing plan of arrangement**
		- **(a) Other parties participate in formulation of plan through negotiations with debtor**
	+ **(2) Plan includes:**
		- **(a) Classification of Claims: debtor company may divide creditors into classes – must apply to Court for approval of division before meeting of creditors held** (*CCAA*, s. 22(1))
			* Single class of creditors vs. multiple classes of creditors
			* **(i) Creditors included in same class if interests or rights sufficiently similar to give them commonality of interest, considering:** (*CCAA*, s. 22(2))
				+ If creditors’ interests not aligned, secured creditors, or other creditors, may lose value
				+ **(1) Nature of debts, liabilities, obligations giving rise to claims**
				+ **(2) Nature and rank of any security in respect of claims**
				+ **(3) Remedies available to creditors in absence of compromise or arrangement being sanctioned, and extent to which creditors would recover claims by exercising those remedies; and**
				+ **(4) Any further criteria consistent with those above**
			* **(ii) Creditor who is related to company may vote against, but not for, compromise/arrangement** (*CCAA*, s. 22(3))
			* **(iii) Creditors with equity claims must be in same class of creditors in relation to those claims – cannot, as members of that class, vote at any meeting unless Court orders otherwise** (*CCAA*, s. 22.1)
		- **(b) Specification of rights of class**
			* Unsecured creditors may be offered 20 cents on dollar
			* Secured creditors may receive appraised value of collateral
		- **(c) Mechanism for Valuation of Claims**
	+ **(3) Each class must approve of plan by ‘dual majority’:** (*CCAA*, s. 6(1))
		- May vote in person or by proxy
		- **(a) Majority in number of creditors; and**
		- **(b) That majority holds 2/3 of value of the claims**
		- **Calculation done for each class**
		- **Creditors within a class not bound, unless class votes in favor of plan by ‘dual majority’** (*CCAA*, s. 6(1)(a))
		- **Dissenting creditors within a class are bound by the plan**
		- **Creditor who is related to company may vote against, but not for, compromise/arrangement** (*CCAA*, s. 22(3))
* **Court Approval of Plan**
	+ **(1) Must be strict compliance with statutory requirements**
		- **(a) All materials filed and procedures examined to determine if anything unauthorized by *CCAA***
		- **(b) Court does not approve compromise/arrangement if providing for payment of equity claim, unless providing that all claims that are not equity claims are paid in full before equity claim is paid** (*CCAA*, s. 6(8))
			* Equity claim: claim for dividend payment from company
	+ **(2) Plan must be fair and reasonable -- Court refuses to approve commercial proposal if:** (*BIA*, s. 59(2))
		- **(a) Terms of proposal unreasonable; or**
		- **(b) Terms not calculated to benefit general body of creditors**
* **Third-Party Releases**
	+ **Most plans provide for release of directors of corporation**
	+ **Affected creditors may release claims against other third-parties not directly connected with debtor or restructuring**
		- **Courts approve plans containing third-party releases if reasonable connection between third-party claim being released and restructuring achieved by plan so as to warrant inclusion of third-party release in plan**
* **If creditors refuse insolvent person’s proposal, insolvent person deemed to have made assignment in bankruptcy** (*BIA*, s. 57)
	+ **(1) Trustee files report of deemed assignment with official receiver, who issues certification of assignment**
* **If creditors accept proposal, trustee shall** (*BIA*, s. 58)
	+ **(1) Apply to Court for appointment for hearing of application for Court’s approval, within 5 days**
		- **(a) Court hears trustee’s report regarding debtor’s conduct and oppositions by creditors, before approving proposal** (*BIA*, s. 59(1))
	+ **(2) Send notice of hearing to debtor and every creditor who proved a claim, to person making proposal, and official receiver, within 15 days**
	+ **(3) Forward copy of report to official receiver at least 10 days before hearing date; and**
	+ **(4) File report on proposal with Court at least 2 days before date of hearing**
* **If any facts in s. 173 proved against debtor, Court will not approve proposal unless debtor provides reasonable security for payment of not less than 50 cents on dollar for all provable unsecured claims** (*BIA*, s. 59(3))
* **Court cannot approve proposal if it does not provide for payment in priority to other claims, or proper fees and expenses of trustee** (*BIA*, s. 60(1))
* **Unless Crown consents, Court cannot approve proposal that does not provide for payment in full to Crown, within 6 months of Court approval, of all outstanding amounts at time of filing notice of intention of proposal, or proposal itself, if Crown’s claim is:** (*BIA*, s. 60(1.1))
	+ **(1) *Income Tax Act*, s. 224(1.2)**
	+ **(2) Provision of *CPP* or *EIA* that refers to *ITA*, s. 224(1.2) and provides for collection of contribution of employee or employer’s premium under *EIA***
	+ **(3) Provision of provincial legislation that is similar in purpose to *ITA*, s. 224(1.2)**
	+ **Court cannot approve proposal if Crown satisfies Court hat debtor is in default of any amount in this section that became due after filing of notice of intention, or of proposal itself** (*BIA*, s. 60(1.2))
* **Employer’s proposal cannot be approved by Court, unless:** (*BIA*, s. 60(1.3)
	+ **(1) Provides for payment to employees and former employees, immediately after Court approval of proposal, of amounts at least qual to amounts they would be qualified to receiver under s. 136(1)(d) if employer became bankrupt on date of filing of notice of intention, as well as wages, salaries, commissions, or compensation for services rendered after that date; and**
	+ **(2) Court satisfied that employer can and will make payments as required in subsection (1)**
* **Employer’s proposal cannot be approved by Court, unless:** (*BIA*, s. 60(1.5))
	+ **(1) Proposal provides for payment of following unpaid pension plan amounts; and**
		- **(a) Amount equal to sum of all amounts deducted from employees’ remuneration for payment to the fund**
	+ **(2) Court satisfied employer can and will make such payments as required**
	+ **Court may approve plan that does not contain such provision, if relevant parties entered agreement approved by relevant pension regulator regarding payment of those amounts** (*BIA*, 60(1.6))
* **Court cannot approve proposal that provides for payment of equity claim, unless proposal provides that all claims that are not equity claims are to be paid in full before equity claim paid** (*BIA*, s. 60(1.7))
	+ Equity claim: company owes dividend payment
* **All moneys payable under proposal shall be paid to trustee – after trustee receives payment of all proper fees/expenses, trustee distributes moneys payable to creditors** (*BIA*, s. 60(2))
* **Approval of proposal by Court after bankruptcy annuls the bankruptcy** (*BIA*, s. 61(1))
	+ **(1) Revests right, title, interests of trustee in debtor’s property back to the debtor**
* **Where Court refuses proposal, insolvent person deemed to make assignment in bankruptcy:** (*BIA*, s. 61(2))
	+ **(1) No costs incurred by debtor relating to proposal, other than costs incurred by trustee, allowed out of debtor’s estate**
* **Filing of Proposal: if proposal made by insolvent person, trustee files copy of proposal with official receiver** (*BIA*, s. 62(1))
	+ **(1) Time in which creditors’ claims determined is time of filing of notice of intention, or the proposal if no notice of intention filed** (*BIA*, s. 62(1.1))
* **If creditors and Court accept proposal, proposal is binding on creditors in respect of:** (*BIA*, s. 62(2))
	+ **(1) All unsecured claims; and**
	+ **(2) Secured claims in respect of which proposal was made, and that were classes voted on**

### *Woodward’s*

**Ratio**

* **Creditors grouped into single class if they have sufficient commonality of interest** (*Woodward’s*)
	+ **(1) Non-Fragmentation Approach: avoids multiplicity of classes by including creditors with different legal rights in same class as long as their legal rights not so dissimilar that they cannot possibly vote with common interest** (*Woodward’s*)
		- Generally, secured creditors and unsecured creditors do not have commonality of interests
		- **(a) Creditors’ legal rights must be considered – external matters influencing interests of a creditor not considered**
		- **(b) Creditors’ legal rights must be considered in context with provisions of reorganization plan** (*Woodward’s*)
			* **(i) Appropriate to separate creditors with similar legal interests into different classes, if plan treats them differently**
				+ Holders of guarantees treated differently than regular creditors – could have guarantees confiscated by vote of majority of creditors in class, which would disregard unique legal rights they hold

If clear that no money available to unsecured creditors upon liquidation, legal rights of guarantees would have no practical value and holders could be included in general class of creditors

* + - * **(ii) Appropriate to include creditors with different legal interests in same class, if plan treats them in fashion giving them sufficient commonality of interest**
				+ Differences between contracts of employment and commercial contracts irrelevant

Legal rights of terminated employees same as legal rights of trade suppliers – both creditors with unsecured claims

* + - * + Rights of equipment lessor and debentureholder with charge on financed equipment are the same

Lessor entitled to retake possession of leased goods upon default and prove as unsecured creditor for damages – debentureholder has right to cause charged assets to be sold and prove as unsecured creditor

* + - * + Landlords have sufficient commonality of interests if:

Different consequences to different landlords does not result from different legal rights

Landlords whose leases being repudiated also lease premises to new leases at market rent – landlords with continuing leases will not have any advantage over other landlords

* + - **(c) Creditors’ legal rights must be considered in context of potential failure of reorganization plan**
			* **(i) Consider rights each creditor has if plan fails and bankruptcy or liquidation occurs**

# Receiverships

* Sources of Receivership Law
	+ Equity and common law
	+ *BIA*, Part XI
	+ *Business Corporations Acts*
	+ *Personal Property Security Acts*
* **Objectives of Receivership**
	+ **(1) Replace inefficient management of corporation**
		- Directors of corporation lose power of supervision
	+ **(2) Enforce secured creditor’s security interest**
	+ **(3) Facilitate efficient sale of business or business assets**
		- Sell business as going concern if possible
* **Fundamental Principles of Receivership**
	+ **(1) Title to assets does not vest in receiver**
	+ **(2) Control over management transferred to receiver**
		- **(a) Former managers of business cease to have power of management**
	+ **(3) Receiver has power to dispose of assets**
		- **(a) May simply sell goods in ordinary course of business**
		- **(b) May sell all, or part, of business**
	+ **(4) Receiver does not act as creditors’ representative**
		- **(a) Receiver simply sells assets and distributes proceeds to secured creditor**
			* **(i) If any surplus remaining, must appoint trustee in bankruptcy to distribute to other creditors**
	+ **(5) Court has general supervisory power over receiverships**
* **Types of Receiverships**
	+ Larger debtors usually involve court-appointed receiver
		- Privately-appointed receivers typically used for small, independent corporations
	+ **(1) Court-Appointed Receiver**
		- **(a) Receiver’s power derived from Court order**
		- **(b) Receiver is ‘officer of Court’ and acts in fiduciary capacity for benefit of all creditors**
			* **(i) Must be fair and impartial and act in interests of all creditors**
			* **(ii) Must give same degree of care that reasonable person would give to his own personal affairs**
		- **(c) Applications usually made through ‘commercial list’**
			* **(i) Template orders provided – applicants blackline any changes, deletions, additions to order**
	+ **(2) Privately-Appointed Receiver**
		- **(a) Receiver’s power contractually derived from secured party and debtor**
		- **(b) Primary duty is to protect interests of secured creditor for whom receiver was appointed**
			* **(i) Not required to delay sale, even if producing greater return for all creditors**
		- **(c) Must act in good faith and ensure fair sale conducted**
	+ In past, secured party would demand payment of its demand loan, then appoint privately-appointed receiver within hours to take over control of business
		- Led to reasonable notice doctrine (*Lister*)
		- Statutory response: notice of intention to enforce security (*BIA*, s. 244)
	+ Issues with privately-appointed receiver
		- Standard of care required was lower
		- No requirement for any level of knowledge or training
		- Receiver only needed to consider interests of secured creditor who appointed receiver
		- Other creditors had no access to information concerning the receivership
		- Courts did not perform supervisory role
* **Stay of Proceedings: Court typically grants ‘stay’ in same order that appoints court-appointed receiver**
	+ **(1) No ‘stay of proceedings’ if receiver is privately-appointed**
		- Secured party who appoints privately-appointed receiver still has priority, so no race to grab assets
* **Regulation of Receiverships**
	+ **(1) Qualification of Receivers: only licensed trustee may be appointed as receiver** (*BIA*, s. 243(4))
	+ **(2) Regulation of Enforcement**
		- **(a) Pre-Seizure Notice: secured creditor must give debtor notice if intending to enforce security on all or substantially all of inventory/accounts/other property** (*BIA*, s. 244)
			* **(i) Secured creditor cannot enforce security until expiry of 10 days after sending notice, unless insolvent person consents to earlier enforcement of security after default**
	+ **(3) Duties of Receivers**
		- **(a) Receiver required to act in commercially reasonable manner** (*BIA*, s. 247) (*CBCA*, s. 99) (*PPSA*, s. 66(1))
			* Merely acting honestly not sufficient
	+ **(4) Court Supervision of Receivers**
		- **(a) Court has power to supervise privately-appointed receiver** (*CBCA*, s. 100) (*PPSA*, s. 65(7))
	+ **(5) Disclosure of Information**
		- **(a) Disclosure of information by receiver to debtor and other creditors** (*CBCA*, s. 101) (*BIA*, s. 245-246)
* **Appointment of Interim Receiver**
	+ **(1) If court satisfied notice sent, or about to be sent, under s. 244**
		- **(a) May appoint trustee as interim receiver of all or part of debtor’s property that is subject to security, until earliest of:** (*BIA*, s. 47(1))
			* Pre-Seizure Notice: secured creditor must give debtor 10-day notice if intending to enforce security on all or substantially all of inventory/accounts/other property(*BIA*, s. 244)
				+ Gives debtor time to institute restructuring proceedings, if it chooses – if notice of intention filed, stay of proceedings initiated
			* **(i) Taking of possession by receiver, within meaning of s. 243(2), of debtor’s property over which interim receiver was appointed**
			* **(ii) Taking of possession by trustee of debtor’s property over which interim receiver was appointed**
			* **(iii) Expiry of 30 days after day on which interim receiver was appointed, or any period specified by Court**
		- **(b) Appointment made if Court believes necessary for protection of** (*BIA*, s. 47(3))
			* **(i) Debtor’s estate; or**
			* **(ii) Interests of creditor who sent s. 244 notice**
		- **(c) Court may direct interim receiver to:** (*BIA*, s. 47(2))
			* **(i) Take possession of all or part of debtor’s property mentioned in appointment**
			* **(ii) Exercise such control over that property and debtor’s business as Court considers advisable**
			* **(iii) Take conservatory measures; and**
			* **(iv) Summarily dispose of property that is perishable or likely to depreciate in value**
	+ **(2) If insolvent person filing notice of intention under s. 50.4, or proposal filed under s. 62(1))**
		- **(1) Court may appoint as interim receiver of all or part of debtor’s property:** (*BIA*, s. 47.1(1))
			* **(a) Trustee under notice of intention or proposal**
			* **(b) Another trustee; or**
			* **(c) Trustee under notice of intention or proposal, and another trustee jointly**
		- **(2) Appointment may be made if Court believes necessary for protection of** (*BIA*, s. 47.1(3))
			* **(a) debtor’s estate; or**
			* **(b) Interests of one or more creditors, or of creditors generally**
		- **(2) Appointment expires on earliest of** (*BIA*, s. 47.1(2))
			* **(a) Taking of possession by receiver, within meaning of s. 243(2), of debtor’s property over which interim receiver appointed**
			* **(b) Taking of possession by trustee of debtor’s property over which interim receiver was appointed**
			* **(c) Court approval of proposal**
		- **(3) Court may direct interim receiver to do following** (*BIA*, s. 47.1(2))
			* **(a) Carry out duties in s. 50(10) or s. 50.4(7), in substitution for trustee or jointly with trustee**
			* **(b) Take possession of all or part of debtor’s property mentioned in order of Court**
			* **(c) Exercise such control over that property and debtor’s business as Court considers advisable**
			* **(d) Take conservatory measures; and**
			* **(e) Summarily dispose of property that is perishable or likely to depreciate in value**
		- **(4) Appointment expires on earliest of…** (*BIA*, s. 47(1.1))
			* **(a) Taking of possession by receiver, within meaning of s. 243(2), of debtor’s property over which interim receiver was appointed**
			* **(b) Taking of possession by trustee of debtor’s property over which interim receiver was appointed**
			* **(c) Court approval of proposal**
	+ **(3) If appointment of interim receiver made, Court may make order respecting payment of fees and disbursements of interim receiver that it considers proper** (*BIA*, s. 47.2(1))
		- **(a) Including order giving interim receiver security, ranking ahead of all secured creditors, over any of debtor’s assets**
		- **(b) Court only makes order if secured creditors materially affected given reasonable advance notification and have opportunity to make representations to Court**
		- **(c) “disbursements” does not include payments made in operating debtor’s business** (*BIA*, s. 47.2(2))
* **On application by secured creditor, Court may appoint receiver to:** (*BIA*, s. 243(1))
	+ Court-appointed receiver is a nationally-appointed receiver
	+ **(1) Take possession of all or most of insolvent person or bankrupt’s inventory/accounts receivable/other property that was acquired for, or used in relation to, business carried on by insolvent person or bankrupt**
	+ **(2) Exercise any control Court considers advisable over that property and business; or**
	+ **(3) Take any other action court considers advisable**
* **If notice sent under s. 244, Court may not appoint receiver before expiry of 10 days, unless Court considers it appropriate, or insolvent person consents to earlier enforcement** (*BIA*, s. 243(1.1))
* **Receiver: person who…** (*BIA*, s. 243(2))
	+ **(1) Is appointed to be a receiver; or**
		- **(a) If receiver appointed, Court may make any order respecting payment of fees and disbursements of receiver, including giving charge ranking ahead of all secured creditors over all or part of property** (*BIA*, s. 243(6))
			* **(i) Court must be satisfied secured creditors materially affected given reasonable notice and opportunity to make representations**
			* **(ii) ‘disbursements’ does not include payments made in operation of business of insolvent person or bankrupt** (*BIA*, s. 243(7))
	+ **(2) Is appointed to take or takes possession or control of all or substantially of insolvent person or bankrupt’s inventory/accounts receivable/other property, acquired or used in relation to business carried on, under…**
		- Receivership provisions apply to privately-appointed receivers
		- **(a) Agreement under which property becomes subject to a security; or**
		- **(b) Court order made under another Act that authorizes appointment of receiver**
* **Advance Notice: secured creditor who intends to enforce security on all or substantially all of inventory/accounts receivable/other property of insolvent person, that was acquired for or used in relation to a business carried on, shall send to insolvent person a notice of that intention** (*BIA*, s. 244(1))
	+ **(1) Secured creditor cannot enforce security until expiry of 10 days after sending notice, unless insolvent person consents to earlier enforcement** (*BIA*, s. 244(2))
		- **(i) Secured creditor cannot obtain advance consent – must be after sending notice** (*BIA*, s. 244(2.1))
* **Receiver shall give notice of being a receiver, not later than 10 days after becoming receiver, to Superintendent and…** (*BIA*, s. 245(1))
	+ **(1) If bankrupt, to the trustee**
	+ **(2) If insolvent person, to insolvent person and all creditors of insolvent person that receiver has ascertained, using reasonable efforts**
		- **(a) Insolvent person shall provide names/addresses of all creditors to receiver** (*BIA*, s. 245(3))
* **Receiver shall prepare interim reports relating to receivership and provide them to Superintendent and…** (*BIA*, s. 246(2))
	+ **(1) To insolvent person, or trustee if bankrupt; and**
	+ **(2) To any creditor requesting copy up to 6 months after end of receivership**
* **After completing duties as receiver, receiver prepares final report and statement of accounts and provides them to Superintendent and…** (*BIA*, s. 246(3))
	+ **(1) To insolvent person, or trustee if bankrupt; and**
	+ **(2) To any creditor requesting copy up to 6 months after end of receivership**
* **Receiver shall:** (*BIA*, s. 247)
	+ **(1) Act honestly and in good faith;** **and**
	+ **(2) Deal with property of insolvent person or bankrupt in commercially reasonable manner**
* **If court believes secured creditor, receiver, or insolvent person is failing to carry out any duty imposed on it in s. 244-47, upon application by Superintendent/insolvent person/trustee (if bankrupt)/receiver/creditor, Court may order, on any terms it considers proper:** (*BIA*, s. 248(1))
	+ Court may order both
	+ **(1) Directing secured creditor, receiver, or insolvent person to carry out that duty;** **or**
	+ **(2) Restraining secured creditor or receiver from realizing or dealing with property of insolvent person until duty is carried out**
* **Receiver may apply to Court for directions** (*BIA*, s. 249)
* **No action may be brought against receiver for loss or damage arising from s. 245-246, if done in good faith compliance or intended compliance** (*BIA*, s. 251)
* **If alleged secured creditor or receiver contravened a provision, defence available that at time of failure to comply, he had reasonable grounds to believe debtor was not insolvent** (*BIA*, s. 252)
* **Nationally-Appointed Receiver: in 2009, *BIA* amended to permit appointment of national receiver** (*BIA*, s. 243(1)
	+ Previously, receiver appointed under provincial law – court assistance needed to enforce in other jurisdictions
	+ Courts had effectively created national receiver by appointing ‘interim receiver’ under *BIA* – but, stretched provisions beyond 10-day waiting period after s. 244 notice of intention to enforce security given to debtor
		- S. 243(1) ended this practice in favor of nationally-appointed receiver
	+ **Privately-appointed receiver is not a national receiver**
		- **Court may appoint a national receiver under s. 243(1)**
		- **But, provisions relating to *BIA* receivers apply**

## *Personal Property Security Act (Alta.)*

* **Where debtor is in default under security agreement** (*PPSA*, s. 56(1))
	+ **(1) Secured party has, as against debtor:**
		- **(a) Rights and remedies in security agreement**
		- **(b) Rights, remedies, and obligations provided in s. 36, 37, 38; and**
			* S. 36: Security interest in fixtures
			* S. 37: Security interest in crops
			* S. 37: Security interest in accessions
		- **(c) If secured party in possession or control, rights, remedies and obligations in s. 17 or 17.1**
			* **(i) Secured party must use reasonable care in custody and preservation of collateral** (*PPSA*, s. 17(1))
				+ **(1) If chattel paper or instrument, must take reasonable steps to preserve rights against other persons, unless parties otherwise agree**
				+ **(2) Secured party may use collateral:** (*PPSA*, s. 17(3))

**(a) In manner and to extent provided for in security agreement**

**(b) For purpose of preserving collateral or its value; or**

**(c) Pursuant to order of the Court**

* + - * **(ii) Unless parties to security agreement otherwise agree, if collateral in possession of secured party:** (*PPSA*, s. 17(2))
				+ **(1) Reasonable expenses, including insurance costs and taxes in obtaining and maintaining possession and preservation of collateral, chargeable to debtor and are secured by collateral**
				+ **(2) Risk of loss or damage is on debtor to extent of any deficiency in insurance coverage, except if caused by negligence of secured party**
				+ **(3) Secured party may hold as additional security, any increase or profits resulting from collateral, except money**

**(a) If money received, unless remitted to debtor, shall be applied in reduction of obligation secured; and**

* + - * + **(4) Secured party must keep collateral identifiable, but fungible collateral may be commingled**
			* **(iii) If collateral held by secured party is ‘investment property’** (*PPSA*, s. 17.1(1))
				+ **(1) May hold any proceeds received from collateral as additional security**
				+ **(2) Must apply money or funds received from collateral to reduce secured obligation, or remit money or funds to debtor; and**
				+ **(3) May create security interest in collateral**
				+ **Secured party may sell, transfer, use, or deal with collateral in manner and to extent provided for in security agreement** (*PPSA*, s. 17.1(2))
	+ **(2) Debtor has, as against secured party, rights and remedies in:**
		- **(a) Security agreement**
		- **(b) Any other Act not inconsistent with this Act; and**
		- **(c) In s. 17 and 17.1**
	+ **(3) Except as provided in s. 17, 17.1, no provision can be waived or varied by agreement, to extent it gives rights to debtor or imposes obligations on secured party** (*PPSA*, s. 56(2))
* **Security agreement may provide for appointment of receiver and receiver’s rights and duties:** (*PPSA*, s. 65(1))
	+ **(1) Receiver shall:** **(***PPSA*, s. 65(2))
		- **(a) Take collateral into receiver’s custody and control in accordance with security agreement, or order under which receiver is appointed**
			* **(i) Receiver cannot carry on business of debtor, unless appointed receiver-manager or Court orders so**
		- **(b) If debtor is corporation, immediately notify Registrar of Corporations of receiver’s appointment or discharge**
		- **(c) Open and maintain bank account in receiver’s name as receiver, for deposit of all money**
		- **(d) Keep detailed records of all receipts, expenditures, transactions involving collateral or other property of debtor**
			* **(i) Debtor may demand inspection of records during regular business hours** (*PPSA*, s. 65(3))
		- **(e) Prepare financial statements at least once every 6 months**
			* **(i) Debtor or authorized representative by demand copies** (*PPSA*, s. 65(4))
		- **(f) On completion of receiver’s duties, render final account of receiver’s administration**
	+ **(2) Receiver must comply with any demands in subsection 1 within 10 days** (*PPSA*, s. 65(5))
		- **(a) Receiver may require payment in advance for any fees** (*PPSA*, s. 65(6))
	+ **(3) On application by any interested person, Court may:** (*PPSA*, s. 65(7))
		- **(a) Appoint receiver**
		- **(b) Remove, replace, discharge receiver**
		- **(c) Give directions on any matter relating to duties of receiver**
		- **(d) Approve accounts and fix remuneration of receiver**
		- **(e) Exercise with respect to receiver appointed under a security agreement, the jurisdiction it has with respect to receiver appointed by the Court**
		- **(f) Make order requiring receiver to make good any default in connection with receiver’s custody, management, or disposition of debtor’s collateral, or to relieve that person from any default or failure to comply**

## *Canada Business Corporations Act*

* **Receiver or receiver-manager will:** (*CBCA*, s. 101)
	+ **(1) Immediately notify Director of appointment or discharge**
	+ **(2) Take into custody and control the corporation’s property, in accordance with court order or instrument or act under which they were appointed**
	+ **(3) Open and maintain bank account in their name as receiver or receiver-manager for moneys of corporation coming under their control**
	+ **(4) Keep detailed accounts of all transactions carried out as receiver or receiver-manager**
	+ **(5) Keep accounts of administration, available for inspection by corporation’s directors during usual business hours**
	+ **(6) Prepare financial statements regarding their administration, at least once every 6 months; and**
	+ **(7) Render final account of their administration upon completion of their duties**
* **Receiver of any property of corporation may, subject to rights of secured creditors:** (*CBCA*, s. 94)
	+ **(1) Receive income from property**
	+ **(2) Pay liabilities connected with property**
	+ **(3) Realize security interest of those on behalf of whom receiver is appointed**
* **Receiver not permitted to carry on business of corporation, except to extent permitted by Court** (*CBCA*, s. 94)
* **Receiver-manager of corporation may carry on business of corporation to protect security interest of those on behalf of whom receiver-manager is appointed** (*CBCA*, s. 95)
* **If receiver-manager appointed by Court, corporation’s directors lose ability to exercise their power until receiver-manager is discharged** (*CBCA*, s. 96)
* **Receiver-manager appointed by Court must act in accordance with Court’s directions** (*CBCA*, s. 97)
* **Receiver or receiver-manager appointed under instrument or act must act in accordance with that act and any direction of Court made under s. 100** (*CBCA*, s. 98)
* **Receiver or receiver-manager appointed under instrument or act must:** (*CBCA*, s. 99)
	+ **(1) Act honestly and in good faith;** and
	+ **(2) Deal with property of corporation in their possession or control in commercially reasonable manner**
* **Court may make any order it thinks fit upon application by receiver or receiver-manager, including:** (*CBCA*, s. 100)
	+ **(1) Appointing, replacing, or discharging receiver or receiver-manager and approving their accounts**
	+ **(2) Determining notice to be given to any person, or dispensing with such notice**
	+ **(3) Fix remuneration of receiver or receiver-manager**
	+ **(4) Require receiver or receiver-manager, or person on behalf of whom they are appointed, to make good any default in connection with the custody or management of property and business to corporation, or to relieve such person from such default, or confirm any act of the receiver or receiver-manager**
	+ **(5) Giving directions on any matter relating to duties of receiver or receiver-manager**

## *Lemare Lake Logging Ltd v 3L Cattle Company Ltd* (SCC)

**Ratio**

* **Federal Paramountcy: where there is inconsistency between validly enacted but overlapping provincial and federal legislation, provincial legislation inoperative to extent of inconsistency**
	+ **Paramountcy must be narrowly construed – favor harmonious interpretations of legislation over interpretations that result in incompatibility**
	+ **(1) Determine whether federal and provincial laws validly enacted**
		- **(a) Look at pith and substance of legislation to determine whether matter comes within jurisdiction of enacting legislature**
		- **(b) Whether overlap between two laws constitutes conflict sufficient to render provincial law inoperative, to extent it conflicts with federal law**
			* **(i) Operational Conflict: compliance with both laws impossible – one says ‘yes’ and other says ‘no’, such that compliance with one is defiance of the other; or**
			* **(ii) Frustration of Purpose: provincial law thwarts purpose of federal law**
				+ **(1) To prove frustration of purpose, must establish purpose of relevant federal statute and prove provincial legislation incompatible with this purpose**

**(a) Clear proof of purpose is required**

* + - * + Provisions of *BIA* deemed not to abrogate or supersede provisions of any law or statute relating to property and civil rights that are not in conflict with *BIA* (*BIA*, s. 72(1))
				+ Purpose of *BIA,* s. 243’s 10-day waiting period is to provide for appointment of national receiver, avoiding need for multiple receivers in different jurisdictions

Sets minimum waiting period, but does not preclude longer waiting period that may exist in provincial law

**Facts:** P, secured creditor, sought appointment of receiver over D’s assets. Provincial legislation required waiting longer than 10-day waiting period in s. 243 of *BIA*. **Issue:** Whether conflict between federal and provincial legislation?