Delna Contractor

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Bankruptcy and Insolvency in the Time of COVID-19: Court Extends Timelines and Grants Relief of Deemed Annulment Threshold under the BIA

The COVID-19 pandemic has significantly impacted the ability of professionals, debtors and insolvency stakeholders to meet the timelines and requirements under the *Bankruptcy and Insolvency Act* as amended ("BIA") and the *Bankruptcy and Insolvency General Rules* ("BIGR").
To alleviate some of the hardships and to allow for flexibility in the administration of Ontario insolvency estates for the duration of the COVID-19 emergency, the Superintendent of Bankruptcy (the "Superintendent") brought a motion under its broad powers of intervention under s 5(4)(a) of the BIA to:

- Increase the number of payment defaults or time required to cause a deemed annulment of a consumer proposal; and
- Extend the timelines set out in specific sections in the BIA and BIGR.

Specifically, the Superintendent sought the following relief:

- Increase the amount of payment defaults and increase the time required to cause a deemed annulment of a consumer proposal, as per ss 66.31(1) of the BIA;
- Extend the time for holding the meeting of creditors provided by ss 51, 66.15, and 102 of the BIA;
- Extend the time for holding mediation as required by paragraphs 105(4) and (10) of the BIG;
- Extend the time for referring a matter to court, as required by ss 170.1(3) of the BIA;
- Declare that the Order applies to all active bankruptcies, active Division I proposals, active Division II proposals, as well as all bankruptcies and proposals to be filed with the Superintendent up to June 30, 2020; and
- Dispense with notice of the motion, as permitted by ss 187(12) of the BIA.

The Superintendent argued that the Order was necessary for two reasons.

First, COVID-19 related disruptions have increased financial pressures on consumer debtors and made complying with statutory requirements for creditor protection more difficult.

The consequences of failing to comply with a consumer proposal are significant for the 288,939 Canadians who have active consumer proposals.

When a consumer debtor fails to make payments in accordance with their proposal, it can be deemed annulled by operation of law. As a result, the debtor loses the protection of a stay of proceeding, creditor rights are revived for the amount of their claim (less any dividend received), and the debtor is prohibited from filing another proposal without Court approval.

Second, the Superintendent argued that BIA timelines around creditor meetings and mediations were causing difficulties for debtors, creditors, and Licensed Insolvency Trustees (“LIT”). An extension of these timelines for active insolvency files would allow for more flexibility for all stakeholders and avoid unintended harm or prejudice in these unprecedented times.

The Superintendent also identified practical challenges with respect to identification during teleconference meetings (where videoconference is unavailable) and establishing quorum where creditors are working remotely and do not receive notice of the meeting.

The Superintendent urged the Court to take action as the BIA itself does not provide a direct mechanism to deal with the mounting problems resulting from the COVID-19 pandemic.

The Court’s Order

Chief Justice Morawetz granted the relief sought by the Superintendent and issued an Endorsement and Order, dated April 27, 2020 (the “Order”). A copy of the Order and endorsement can be found here and here.

This Order has significant impacts on the administration of insolvency estates in Ontario and has critical information for debtors, creditors, and insolvency stakeholders.

Chief Justice Morawetz noted that the Order is subject to any action that Parliament, the Governor-in-Council, or the provincial legislature might take to address issues affecting the insolvency system.

Applicability

The Court relied on its inherent jurisdiction to regularize and protect the administration of justice in taking the unusual step of

applying the Order not only to all active insolvency filings, but all future filings with the Superintendent up to June 30, 2020.

While noting that inherent jurisdiction should be used "sparingly," the Court determined that it could be exercised in order to provide "just and practical" responses to the unusual circumstances created by the COVID-19 crisis.

The Order applies to the following:

- "Active Commercial Proposals" (Division I proposals), defined as all Division I proposals filed with the Office of the Superintendent of Bankruptcy ("OSB") up to June 30, 2020;
- "Active Consumer Proposals" (Division II proposals), defined as all Division II proposals filed with the OSB or revived pursuant to the BIA up to June 30, 2020, but excluding Division II proposals deemed annulled, annulled, or fully performed on or before April 27, 2020; and
- "Active Bankruptcy Files," defined as all bankruptcies filed with the OSB up to June 30, 2020, but excluding bankruptcies where the bankrupt received a discharge on or before April 27, 2020.

Scope

Deemed Annulment Threshold for Consumer Debtors

Relying on its powers under s 66.31)(1)(a) and (b) of the BIA, the Court raised the thresholds for deemed annulments of consumer proposals in the following way:

- Where payments are made monthly or more frequently, the proposal shall be deemed annulled on the day on which the debtor is in default for the value of three or more payments, plus an additional amount equivalent to three payments occurring during the period of March 13, 2020 to December 31, 2020;
- Where payments are made less frequently than monthly, the proposal shall be deemed in default on the day that is three months after the day on which the consumer debtor is in default of a payment, except for payments due between March 13, 2020 to December 31, 2020 it shall be the day that is six months after the day on which the consumer debtor is in default.

The Court accepted the Superintendent's submissions that the other options provided to consumer debtors in the BIA, such as amending an active consumer proposal or filing a notice of revival for a consumer proposal deemed annulled, are

insufficient or impractical in the exceptional circumstances created by COVID-19. Amended proposals must be viable, such that they can be performed as amended. In the uncertain economy created by COVID-19, it may be impossible to know when or whether debtors will earn sufficient income to pay for their proposals. Similarly, notices of revival fail if a single creditor objects. Moreover, revivals do not cure payment defaults or change the terms of the original proposal.

Creditor Meetings

The Order provides that the time for holding creditor meetings to take place during the "Period of the Emergency" (defined as March 13, 2020, to June 30, 2020) is extended by the time of the "Suspension Period" (defined as April 27, 2020, to June 30, 2020), whether the meeting is mandated by:

- Section 51 of the BIA, relating to commercial proposals;
- Section 66.15 of the BIA, relating to consumer proposals; or
- Section 102 of the BIA, relating to active bankruptcy files.

Mediations and Court Referrals

The Order extended by the time of the Suspension period:

- The time for scheduling mediations in all active insolvency files under s 105 of the BIA during the Period of the Emergency; and
- LIT obligations under s 170.1(3) of the BIA to apply for court hearings following bankrupts' failures to comply with mediated surplus agreements and/or failures of mediation to resolve issues.

Chief Justice Morawetz discussed at length the Court's jurisdiction to extend timelines under s 187(11) of the BIA and the Court's inherent jurisdiction, ultimately concluding that given the circumstances outlined by the Superintendent giving rise to the motion, that it was appropriate to grant the requested relief concerning the extension of time limits.

Terminating Relief

Pursuant to section 13 of the Order, any interested person may apply to the Court to terminate relief provided therein in respect of any proceeding on providing five days' notice to the LIT, the OSB, and any person likely to be affected by the order sought.

Procedural Requirements

Under the usual course, the Superintendent would be required to serve the Motion Record on each interested party and file it with each individual court file.

As this would have required the Superintendent to provide notice of the motion to 451,536 open insolvency files, the Court determined this requirement was unreasonable in the circumstances. It accordingly dispensed with the standard notice requirements and instead ordered the Superintendent to publish the Order on its website.