

Subject: **BANKRUPTCY**

## **BACKGROUND**

Under the federal Bankruptcy and Insolvency Act ("Act"), a Superintendent of Bankruptcy is appointed to supervise the administration of the Act. (1) Each of the provinces of Canada constitutes one bankruptcy district. Each district may be divided into two or more bankruptcy divisions. (2) Alberta currently has two divisions. One or more official receivers are appointed for each bankruptcy division and are deemed to be officers of the court. They have and perform the duties and responsibilities specified by the Bankruptcy and Insolvency Act and its General Rules. (3) The Superintendent of Bankruptcy is responsible for licensing trustees. (4) The trustees are persons charged with the day to day workings under the Act through the administration of the estates of bankrupts. Orders in bankruptcy proceedings are granted by justices of the Court of Queen's Bench of Alberta (5) or duly appointed registrars in bankruptcy (6) who may exercise the powers granted to them pursuant to section 192 of the Act.

A bankruptcy will occur when either:

- a) a person's creditors petition the court for a receiving order declaring the person bankrupt and appointing a trustee of an insolvent person or his estate, or
- b) an insolvent person or, if deceased, his Personal Representative voluntarily makes an assignment in bankruptcy whereby he assigns all his property to a trustee for the general benefit of his creditors. (7)

In order for a petition to be made, the person must have committed an act of bankruptcy as defined in the Act, such as becoming insolvent or ceasing to meet his liabilities generally as they become due. (8)

Once a bankruptcy receiving order ("order") has been made or an assignment in bankruptcy ("assignment") has been filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property. The property vests in the trustee named in the order or assignment and passes to him without any conveyance, assignment or transfer. If the trustee changes, the property passes from trustee to trustee without any conveyance, assignment or transfer. (9) Every order and every assignment may be registered by the trustee with respect to any real property of the bankrupt (10) and operates to transfer the land to the trustee free of certain encumbrances hereafter mentioned. (11)

The Act provides that the orders or assignments take precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, certificates of judgment, judgments operating as hypothecs, executions or other process against the property of the bankrupt except those which have been completely paid or the rights of a secured creditor. (12) A secured creditor is one who has a mortgage, encumbrance

or lien registered against the land. (13) Section 136 of the Act establishes a scheme of repayment of creditors. Secured creditors are the highest ranking of the creditors and it is subject to their rights that payments are made by the trustee.

The property of the bankrupt which is to be divided among the creditors includes:

- a) all property of the bankrupt at the date of his/her bankruptcy or that will devolve on the bankrupt before his/her discharge from bankruptcy, and
- b) such powers in or over or in respect of any property as might have been exercised by the bankrupt for his/her own benefit.

It does not include:

- a) property held by the bankrupt in trust for any other person, or
- b) any property that is exempt from seizure under the applicable provincial laws (14)

The trustee may:

- a) sell or otherwise dispose of part or all of the property of the bankrupt, (15) and lease any real property. (16)

The Act provides that the trustee may perform these functions with the permission of the inspectors of the estate of the bankrupt who are appointed by the creditors pursuant to the provision of section 116 of the Act. It is established practice to assume that the trustees are acting within their mandate and therefore no verification is made as to whether or not the inspectors have granted their permission to the transaction. All sales of property made by the trustee vest in the purchaser all the legal and equitable estate of the bankrupt therein. (17)

**Interim Receiver** - The Act makes provision for the appointment of a licensed trustee to act as an interim receiver in the following situations:

- a) after the time of the filing of the petition but prior to the making of the receiving order, (18) and
- b) after the filing of a proposal of a person to his creditors. (19) In these circumstances, the court may grant the trustee acting as an interim receiver such powers as are necessary (20) but the order does not automatically vest the debtor's property in the trustee. (21) The appointment of an interim receiver does not constitute a "receiving order" as that term is used in section 70. A certified copy of an order appointing an interim receiver may be presented for registration if It expressly grants any powers to deal with registered property interests.

## **REGISTRATION PROCEDURE**

1. An order appointing a trustee in bankruptcy (FORM 91) must be certified under seal by the registrar in bankruptcy or other officer (e.g., clerk) of the court that made it. (Federal assignments of bankruptcy may not have a seal on their certification.) Court orders granted in any Queen's Bench, Supreme, Superior or Territorial Court in Canada are recognized. (22)

2. An assignment to a trustee ([FORM 21](#) or [FORM 22](#)) is acceptable for registration provided it is endorsed with the seal of the official receiver. (23) An official receiver's certificate of assignment which is endorsed with the official receiver's seal ([FORM 35](#), [FORM 39](#), [FORM 42](#), [FORM 44](#), [FORM 55](#)) can also be registered and has the same effect as an assignment.

All assignments that are certified a true copy according to the records of the official receiver or that is a certified copy according to the records of the superintendent of bankruptcy are also acceptable.

A bankruptcy trustee is not required to comply with either section 27 or section 191 of the Land Titles Act, R.S.A. 2000, c. L-4.

A full mailing address is required for the bankruptcy trustee.

3. A certificate of the official receiver certifying the appointment of a trustee in bankruptcy is not an acceptable substitute for an assignment or a receiving order.

4. The order or assignment must be registered against specific land. The trustee may subsequently request that it be registered against additional parcels by referring to the Land Titles registration number of the order or assignment. The subsequent request is given a separate registration number which is recorded in the memorandum endorsed on title.

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Bankruptcy

The code used for registration at Land Titles is: BANE

5. The name of a bankrupt individual in an order or assignment should be consistent with the name of the registered owner or the owner of a registered interest. A corporate name must be identical. If the bankrupt's name is not consistent as stated above, then an original letter from the bankruptcy trustee stating what interest the bankrupt has in the land, must accompany the order or assignment. (24)

6. When an order or an assignment is submitted for registration, the trustee may request either of (a) or (b) below:

a) Transmission of the title or registered interest into his name. (25) The official name of the trustee acting in bankruptcy proceedings is "The Trustee of the Estate of (*name of bankrupt*), a bankrupt". (26) However, pursuant to section 128 of the Land Titles Act, the trustee is deemed to be the absolute owner of the land or interest and he is shown as owner without reference to his official title.

b) A trustee in bankruptcy may transmit the title or interest to his name at a later date by request on a letter or Document Registration Request Form which is given a registration number. (25) [Tariff item 11\(4\)](#) is charged for the registration. Compliance with Foreign Ownership of Land is not required.

7. When title is issued to a trustee in bankruptcy, it is issued free of all writs of enforcement, federal writs of seizure and sale and extent, Workers' Compensation Board certified statements or orders, orders under the Employment Standards Code, decrees nisi of divorce, orders pursuant to the Domestic Relations Act and orders and agreements pursuant to the Maintenance and Recovery Act and the Maintenance and Enforcement Act against the bankrupt. (27) All other instruments and caveats are carried forward.

Tariff item 11(4) is charged for the registration.

8. **Substitution of Trustee** - The trustee may be substituted by the creditors. (28) If an order or assignment has been registered, the trustee may be substituted by registration of a notice of the substitute trustee's appointment.

9. **Effect on Joint Tenancy** - An assignment by, or order against, one joint tenant operates to sever the joint tenancy. (29) The designation of joint tenancy on the certificate of title is deleted in respect of the bankrupt by registration of a BANT. The designation of the co-ownership is altered such that if there are two joint tenants, each become owners of an undivided one-half interest as tenants in common. If A, B and C are joint tenants and A is bankrupt, A becomes the owner of an undivided 1/3 interest and B and C remain joint tenants as to an undivided 2/3 interest. If the bankruptcy is discharged, the tenancy does not revert back.

10. **Caveat Or Caution** - The trustee may register a caveat or caution where the order or assignment has not been registered. (30) However, the order or assignment must be registered before the trustee can transfer the property.

11. **Transfer by Trustee** - If the title has not been transmitted, a transfer signed by the trustee can be registered without creating a title in the name of the trustee. The bankruptcy endorsement of the order or assignment merges on issuance of a new title to the transferee. The new title also issues free of those interests which would not carry forward to a title issued to the trustee.

12. **Dower** - As land owned by a bankrupt statutorily vests in the trustee and the Dower Act, R.S.A. 2000, c. D-15 must be complied with on a disposition by the owner of land, dower evidence is required in respect of the trustee whether or not the title has been transmitted to him. Where a spouse with dower rights is bankrupt, a consent and acknowledgment can be accepted from the trustee. A Release of Dower Rights by the trustee is also acceptable for registration. (31)

13. **Divesting by Trustee** - The trustee is empowered to divest himself of his interest in the real property of the bankrupt by notice of quit claim or disclaimer. This disclaimer must meet attestation requirements. Such notice operates as a discharge of any documents previously registered. (32)

14. **Discharge of Bankrupt** - A certificate of discharge ([FORM 84](#) or [FORM 85](#)) or an absolute order of discharge of bankrupt ([FORM A](#)), executed by the bankruptcy trustee may be registered. The discharge of bankrupt is a court order ([33](#)) and has the effect of releasing the bankrupt from all claims provable in bankruptcy except, amongst others, any debt or liability for alimony, maintenance or any agreement for spousal or child support. ([34](#)) The bankruptcy endorsement is discharged under the registration number of the discharge order. Compliance with section 191 of the Land Titles Act is not required. If the title is in the name of the trustee, a properly executed transfer should be provided.

15. **Consumer Proposals** - Where a consumer proposal is approved or deemed approved by the court, the administrator may where he believes on reasonable grounds that the debtor owns land issue a certificate in respect of the proposal. The certificate operates as a writ of enforcement until the proposal is fully performed. ([35](#)) The Consumer Proposal must set out an amount, if not; an Affidavit of Value is required pursuant to [tariff item 4](#).

## **REGISTRATION PROCEDURES - CONSUMER PROPOSALS**

1. The document submitted by the administrator must be labelled "Certificate pursuant to section 66.29 of the Bankruptcy and Insolvency Act".
2. It must identify the administrator and provide their address.
3. It must identify consumer debtor and provide their address.
4. It must state that the consumer proposal is approved or deemed approved by the court.
5. It must be signed under seal of the administrator.
6. It must be accompanied by a Creditor's Statement of Debtor's Land ([FORM S](#)).

An endorsement with the following particulars is included:

"Consumer Proposal Certificate pursuant to the Bankruptcy and Insolvency Act"

The SPIN2 document type to be used when creating a Document Registration Request (DRR) form is: Writ of Enforcement

The code used for registration at Land Titles is: WRIT

## STATUTE AND CASE REFERENCES

Statute references are to the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended by S.C. 1992, c. 27.

1. s. 5
2. s. 12(1)
3. s. 12(2)
4. s. 13
5. s. 183(1)(d)
6. s. 184
7. s. 43-44, bankruptcy receiving order; s. 49, assignment in bankruptcy
8. s. 42
9. s. 71(2)
10. s. 74(1)
11. s. 74(2)
12. s. 70(1)

NOTE: execution creditors do not fall within the meaning of secured creditors:

*Re Sklar and Sklar; Seiberling Rubber Company of Canada v. Canadian Credit Men's Trust Association* (1958), 26 W.W.R. 529 (Sask. C.A.)

13. s. 2(1)
14. s. 67
15. s. 30(1)(a)
16. s. 30(1)(b)
17. s. 84
18. s. 46(1)
19. s. 47(1)
20. s. 46(2) and 47(2)
21. In *Price Waterhouse Ltd. v. Marathon Realty Co. Ltd.*, [1979] 6 W.W.R. 382 (Man. Q.B.) Hamilton, J. stated at p. 383: "The interim receiver may be authorized to take possession of the property of the debtor but I can find nothing in the Act to suggest that the property of the debtor automatically vests in the interim receiver."
22. s. 188
23. s. 74(1)
24. s. 74(1)
25. s. 74(2)
26. s. 15
27. s. 74(2) and 70(1), *Deloitte Haskins and Sells Limited v. Workers' Compensation Board et al.* (1985), 38 Alta. L.R. (2d) 169 (S.C.C.); *Re Sutton* (1967) 10 C.B.R. 285 (Alta. S.C. In Bankruptcy)
28. s. 36
29. *In Re White* (1928), 33 O.W.N. 255
30. s. 74(3)

31. Although the effect of the case law is that a trustee takes title to land subject to a spouse's dower rights, there does not appear to be any statutory mechanism for reflecting this interest on title. It is presumed that the trustee has taken appropriate action to deal with the dower interest of a bankrupt's spouse. *In Re Gates and Gates*, [1974] 1 W.W.R. 618 (Alta. S.C.) Cullen, J held: When the husband made an assignment in bankruptcy, his interest as owner of land, which was the homestead, was diminished by his wife's dower interest. Her interest was not one where she ranked in priority as a creditor but rather was an interest that did not pass to the trustee when the husband went bankrupt. However, when the wife also went bankrupt, her dower right passed to the trustee and the trustee could, as of the date of the assignment, deal with her rights in the same manner that she could have. See also: *Re Chisick*, (1968), 62 W.W.R. 586 (Man. C.A.)
32. s. 20(1) and 20(2)
33. s. 172
34. s. 178
35. s. 66.29(1)