

# Enhancing Security of Pensions in Insolvency Proceedings: Amendments to BIA and CCAA to Take Effect in November

October 29, 2019

By Philip Cho

On November 1, 2019, several amendments to the *Bankruptcy and Insolvency Act* (the BIA) and the *Companies Creditors' Arrangement Act* (the CCAA) will take effect. Previously, our colleagues [reported](#) on the amendments codifying and clarifying IP rights during an insolvency proceeding and granting broader protection to IP licence-holders introduced in Bill C-86. In this article, we examine the measures included in Bill C-97 aimed at making insolvency proceedings fairer.

The changes respond to concerns that pensioners' rights are not adequately protected in corporate insolvency proceedings, especially in the wake of Sears Canada's CCAA insolvency proceeding and leaving behind significant underfunded pension liabilities.[\[1\]](#)

## Duty of Good Faith – Section 4.2 of the BIA, Section 18.6 of the CCAA

Both the BIA and the CCAA will now explicitly require any interested person involved in insolvency proceedings to act in good faith. On application by an interested person, the court may make any order that it considers appropriate in the circumstances if the court is satisfied that an interested person fails to act in good faith.[\[2\]](#)

Codifying a duty of good faith aligns Canada's insolvency laws with recognized international best practices as the United States, United Kingdom and Japan all have established a duty to act in good faith in insolvency proceedings.[\[3\]](#) Further, imposing a duty of good faith is intended to give the courts another tool to ensure fairness in insolvency negotiations and prevent parties from abusing the restructuring process to obtain advantages.[\[4\]](#) The extent of the good faith requirement is not defined which may lead to a flexible standard that could vary depending on the circumstances.[\[5\]](#)

## Liability of Directors for Severance Pay, Termination Pay and Other Benefits – Section 101 of the BIA

The amendments expand the courts' ability to examine certain offending payments made in the period beginning one year before the initial bankruptcy event and ending on the date of bankruptcy and to impose liability on corporate directors for such payments. The change is to the BIA, however it is incorporated in the CCAA as well by virtue of section 36.1(1) of the CCAA.

Trustees were already able to obtain recovery from directors for dividend payments in the "look-back" period, but this power has been broadened to include "termination pay, severance pay or incentive benefits or other benefits to a director, an officer or any person who manages or supervises the management of business and affairs of the corporation."[\[6\]](#) Directors can be held liable if this type of payment was made when the corporation was insolvent or rendered the corporation insolvent, was conspicuously over fair market value, was made outside the ordinary course of business, and the directors did not have reasonable grounds to believe the items listed above. The onus is on the directors to show that any of these elements are not true. Directors can also escape liability if they

protested against the payment.

This change was made to deter executives from taking decisions that are contrary to the interests of employees and pensioners and places the standard of “prudent and diligent person” on the directors.<sup>[7]</sup> Given that the payment must be “outside the ordinary course of business” courts have some flexibility when examining whether or not a given transaction was appropriate.<sup>[8]</sup>

### **Applications for Court-Ordered Disclosure of Economic Interests – Section 11.9 of the CCAA**

A new mechanism in the CCAA allows an interested party to apply for court-ordered disclosure of another interested party’s economic interest in the debtor company on any terms that the court considers appropriate.<sup>[9]</sup> In deciding whether to make an order, the court is to consider whether the monitor approved the proposed disclosure, whether the disclosed information would enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company, and whether any interested person would be materially prejudiced as a result of the disclosure. For the purposes of the section, economic interest includes a claim, an eligible financial contract, an option or a mortgage, hypothec, pledge, charge, lien or any other security interest and the consideration paid for any right or interest, and any other prescribed right or interest.

The disclosure of economic interests is meant to preserve fairness during a restructuring by addressing informational asymmetries among the parties.<sup>[10]</sup> This increased transparency is intended to make insolvency proceedings more accessible for pensioners and workers.<sup>[11]</sup>

### **Limit the Length of the Stay On an Initial Application and the Scope of the Orders Available – Sections 11.001 and 11.02 of the CCAA**

The maximum time period for the initial stay of proceedings granted on the first day under the CCAA has been reduced from 30 days to ten days.<sup>[12]</sup> Further, the relief provided on initial orders has been limited to what is reasonably necessary for the continued operations of the company.<sup>[13]</sup>

By narrowing the scope of initial court orders, these amendments are designed to reduce the chance of extraordinary relief, such as the suspension of pension contributions, being ordered early on.<sup>[14]</sup> This new process gives courts more time to hear all parties’ views before making consequential orders and is aimed at increasing the ability of pensioners to participate in insolvency proceedings from the outset.<sup>[15]</sup>

### **Parting Remarks**

Although these amendments were generally aimed at enhancing the rights of pensioners and employees, it is likely that other stakeholders will find these amendments may benefit their own interests as well. It remains to be seen how effective these amendments will be and the creative ways that lawyers may use these new provisions in upcoming cases.

<sup>[1]</sup> Bill C-97, An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures, 2nd reading, *House of Commons Debates*, 42-1, No 406 (30 April 2019) at 1325 (Linda Lapointe), online at: <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-406/hansard>; House of Commons, Standing Committee on Finance, *Evidence*, 42-1, No 207 (2 May 2019) at 13:35 (Mark Schaan), online at: <https://www.ourcommons.ca/DocumentViewer/en/42-1/FINA/meeting-207/evidence>; Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 58 (29 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/58ev-54827-e>.

[2] *Budget Implementation Act, 2019, No 1*, SC 2019, c 29, ss 134, 140.

[3] House of Commons, Standing Committee on Finance, *Evidence*, 42-1, No 208 (6 May 2019) at 15:35 (Mark Schaan), online at: <https://www.ourcommons.ca/DocumentViewer/en/42-1/FINA/meeting-208/evidence>.

[4] Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 56 (8 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>; Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 58 (29 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/58ev-54827-e>.

[5] Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 58 (29 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/58ev-54827-e>.

[6] *Budget Implementation Act, 2019, No 1*, SC 2019, c 29, s 135.

[7] Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 56 (8 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>.

[8] Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 56 (8 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>.

[9] *Budget Implementation Act, 2019, No 1*, SC 2019, c 29, s 139.

[10] Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 58 (29 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/58ev-54827-e>.

[11] Innovation, Science and Economic Development Canada, *Enhancing Retirement Security for Canadians* (Consultation Document), 22 November 2018, online at: <http://www.ic.gc.ca/eic/site/116.nsf/eng/00001.html>; Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 56 (8 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>.

[12] *Budget Implementation Act, 2019, No 1*, SC 2019, c 29, s 137.

[13] *Budget Implementation Act, 2019, No 1*, SC 2019, c 29, s 138.

[14] Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 56 (8 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>

[15] Innovation, Science and Economic Development Canada, *Enhancing Retirement Security for Canadians* (Consultation Document), 22 November 2018, online at: <http://www.ic.gc.ca/eic/site/116.nsf/eng/00001.html>; Senate, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 42-1, No 56 (8 May 2019) (Mark Schaan), online at: <https://sencanada.ca/en/Content/Sen/Committee/421/BANC/56ev-54778-e>.

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