Alberta Justice and Solicitor General

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Paul Halucha
Director-General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor, East Tower
Ottawa, Ontario K1A 0H5

Dear Mr. Halucha:

Subject: Written Submissions on Insolvency Legislation

Thank you for providing the opportunity to comment on Canada's review of insolvency legislation. The discussion paper issued by your office has been instructive in considering the numerous issues identified. The Government of Alberta has taken a keen interest in the policies presented and has prepared the following submissions for your consideration.

Comments regarding Commercial Issues

Submissions of Alberta Treasury Board and Finance, Tax and Revenue Administration (**TRA**)

Licence Denial Regimes

We agree that amendments are required to the *Bankruptcy and Insolvency Act* (**BIA**) to address the apparent conflict between the "fresh start" principle and the objectives of licence denial regimes, as further collection of released debts may be hindered if a debtor is unable to continue business operations due to the denial of a licence.

Reaffirmation Agreements

We agree that reaffirmation agreements should be regulated under the BIA. As TRA is an unsecured creditor, reaffirmation agreements may impact a debtor's ability to remain current with tax debts arising subsequent to the insolvency or bankruptcy. While TRA generally would prefer that reaffirmation agreements not be permitted at all, regulations providing for certain limited circumstances under which reaffirmation agreements are permitted would provide transparency and fairness to unsecured creditors.

Federal Exemption Lists

We suggest that the introduction of a federal list of exemptions is unnecessary. Rather, due to the different economic conditions that exist from province to province, it seems more beneficial to

maintain the current system in which exemptions are determined by the specific provincial legislation where the debtor is situated. We agree that introducing a federal list is likely to cause uncertainty for creditors and increased administrative burden for all.

Initial Orders and the Claims Process

We agree that an automatic stay period followed by an initial court appearance may streamline the process, and in particular, provide stakeholders with additional time to review the situation and respond as necessary. Further, we agree that a default mechanism in respect of the claims process may streamline the process. It has been TRA's experience that notices under the *Companies' Creditors Arrangement Act* (**CCAA**) have not been provided to TRA on a timely basis, resulting in TRA (as an unsecured creditor) being unable to participate, respond or submit a claim.

Eligible Financial Contracts

TRA would prefer that eligible financial contracts not be exempted from the existing deemed trust and super-priority provisions, as doing so hinders collection activity and is inconsistent with policies that prevent debtors from using for operating purposes, certain funds deemed to be held in trust.

Liquidating CCAA Proceedings

We support the codification of protections for stakeholders, and principles for the courts to consider, in liquidating CCAA proceedings. The majority of proceedings affecting TRA involve liquidation rather than corporate restructuring. Consequently, TRA welcomes provisions designed to better protect unsecured creditors, making the overall process more fair and transparent.

Key Employee Retention Bonuses

We support the imposition of terms and conditions in respect of employee bonuses in insolvency situations, including parameters as to the circumstances under which bonuses may be provided, and the ability for creditor objections and court review prior to the bonuses being paid. Such bonuses may be significant and may have a serious impact on debt recovery by unsecured creditors. Similarly, we would support the imposition of director and officer liability for bonus programs created during an insolvency proceeding.

Director Disqualification

We agree that a director of an insolvent corporation should be disqualified from acting as a director due to misconduct. TRA deals with many corporations that have the same director, some of whom are also bankrupt. However, such directors often continue to operate businesses without any consequences.

Related Party Subordination and Set-Off

We agree that debts of related parties should be allowed to be subordinated, and that set-off amongst related parties should be expressly prohibited. It is a reasonable assumption that related parties know when one of their corporations is becoming insolvent, and it may be related party dealings that cause or contribute to the insolvency (e.g., inter-corporate lending and securing of interests of over-extending on credit). *Bona fide* third party (secured or unsecured)

creditors should not bear the burden of poor related party financial dealings that cause or contribute to insolvency.

Tax Issues

We do not believe that a restructured tax debtor with prior tax obligations should be entitled to "fresh start accounting" for tax purposes. Accordingly, we would support amendments that provide for no debt forgiveness for pre-filing (CCAA) claims.

We also do not believe that tax authorities should be required to send a notice in accordance with section 244 of the BIA before issuing enhanced requirements to pay. For example, the Canada Revenue Agency (**CRA**) issues enhanced requirements to pay to accounts receivable, and if the debtor subsequently becomes insolvent or bankrupt, the CRA still is entitled to the monies and has a priority claim to those monies of the third party (receivable) as a result of the enhanced requirement to pay issued. Tax collection work is challenging enough without eliminating or further restricting various abilities to collect.

Similarly, accounts receivable that are the object of pre-filing enhanced requirements to pay should not re-vest in the estate of the debtor, but rather we would prefer that those monies continue to be payable to the CRA.

Finally, we would prefer that tax debt forgiveness rules not apply in consumer proposals. Alberta taxes are paid for the benefit of all Albertans and tax debts should form a part of the proposal process and be repaid by way of the proposal process as much as any other debt. Tax authorities are involuntary creditors and payment of taxes are the requirement of everyone who owes tax under the pertinent legislation. If voluntary creditors benefit from payments by way of the proposal process, then involuntary creditors should also benefit.

Comments Regarding Student Loans

Submissions of Alberta Innovation and Advanced Education as to whether the current provisions regarding the release of student loans debts should be amended.

Alberta does not have any concerns with the proposed change of having the student loan discharged 5 years after completion instead of 7 years. In the case of hardship, we recommend keeping the 5 year limit for a borrower to make a request to the court to have their debt discharged. Alberta has processes and policies in place as well as authority within our legislation that allow borrowers to compromise and prefer to have this done at the program level, not through the courts.

We do however have serious concerns regarding the the lack of a timeline for the bankruptcy trustees to become discharged after the bankrupt is discharged. The legislation currently provides that a creditor whose debt survives the bankruptcy (such as student loan debts) cannot take collection proceedings until after the trustee is discharged. In Alberta's experience, trustees have been known to take many months, and even years, to proceed to discharge, even with prompting by the creditor.

This delay erodes the time left in the limitation period and collection proceedings have been greatly impaired. This is especially problematic in cases where the debtor has been discharged without any conditions. In those cases the student is often willing to begin making payments on their loan however the creditor is unable to proceed with those collection proceedings because the trustee has not yet been discharged.

Comments Regarding Protecting Families

Equalization Claims

Submissions of Legislative Reform, Alberta Justice and Solicitor General, as to whether, and how, bankruptcy legislation could be amended so as to improve the status of equalization payments in bankruptcy.

It is our view that the timing of the bankruptcy in relation to the vesting of a proprietary interest in a "division of property" matrimonial property regime has the potential to create concern. The BIA should be amended to prohibit the stay or release of any claim regarding equalization or division of property in bankruptcy discharge, as against exempt assets under provincial or territorial matrimonial property legislation.

Family Support Claims and the Levy

Submissions of the Child Support Recalculation Program, Alberta Justice and Solicitor General, as to the treatment of section 178 creditors, with respect to the Superintendent's levy.

We suggest that the Superintendent's levy (l**evy**) should NOT apply to maintenance creditors. The existence of the levy puts maintenance enforcement programs in the uncomfortable position of taking an action that will end up costing the creditor money (i.e. filing a Proof of Claim).

The standard operating procedures of Alberta's Maintenance Enforcement Program (**MEP**) regarding bankruptcy confirm that the trustee in bankruptcy will deduct a levy from the amount paid to the maintenance creditor. Apparently, the levy is the greatest of five per cent (5%) of the dividend paid by the bankruptcy trustee, or $200. This means that the creditor will end up paying some amount towards the Levy out of the money they receive. The full amount, <u>including the levy</u>, needs to be reflected as "received" on MEP's statement of account, even though the maintenance creditor actually received less.

Given recent case law, MEP had to make a policy decision as to what to do when enforcing against a debtor who goes bankrupt. On the one hand, MEP could file a Proof of Claim on the creditor's behalf. The advantage of this is that the creditor is likely to get a distribution in due course from the Trustee in Bankruptcy. However, the disadvantage is that the maintenance creditor then ends up paying a levy and losing some funds.

On the other hand, if MEP did not file the claim, the maintenance debt still would survive the bankruptcy and could be collected after the debtor was discharged from bankruptcy. However, MEP could be criticized for not taking advantage of the opportunity to get funds through the Trustee and missing this collection opportunity.

MEP does in fact file Proofs of Claim for creditors but it is unfortunate that our actions then end up costing the creditor money.

We would refer you to the 2003 report of the Standing Senate Committee on Banking, Trade and Commerce entitled, "Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act". We have duplicated a portion of that report:

> *Recognizing the "special vulnerability of support claimants" and "public policy favouring the collection and payment of spousal and especially child support," Mr. Robert Klotz, of Klotz Associates, recommended that the BIA be amended to ensure that bankruptcy does*

> *not prevent support claimants from recovering the total amount of their support arrears from the bankrupt spouse. In his view, the burden of the levy should be borne by the individual paying support, rather than by the recipient of the support payments; otherwise, the support claimant "would suffer from the bankrupt's choice to declare bankruptcy." He believed that this provision should apply with respect to all Section 178 creditors, but particularly those with claims for support arrears.*

The Senate Committee agreed with Mr. Klotz and concluded that the *Bankruptcy and Insolvency Act* should be amended to ensure that bankruptcy does not prevent a maintenance creditor from recovering the total amount of support arrears from a bankrupt. As noted above, this position would be supported by Alberta MEP.

Comments Regarding Property in Licenses and Allocations

Submission of Alberta Environment and Sustainable Resource Development regarding licenses.

The Supreme Court of Canada decision in *Saulnier v RBC* (**Saulnier**) held that commercial fishing licenses constituted property within the BIA and the Nova Scotia *Personal Property Security Act*. This decision and an Alberta decision that followed have created concerns. The Ministry ensures the conservation and sustainability of fish and wildlife. The issue is that prior to the Saulnier decision the Minister's management decisions were made with the understanding that the holders did not have a proprietary interest in the license or the allocations, had no ability to pledge them as security, and had no judicial standing as personal property owners to challenge the Minister's wildlife management decisions. These are serious policy concerns and we would recommend that the issue be reviewed in this statutory review.

We thank you again for the opportunity to comment. Should you wish to discuss please feel free to contact me. As I have coordinated our response, I would be pleased to connect you to those persons who prepared submissions.

Yours truly,

Kim Graf
Barrister and Solicitor