Paul Halucha
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Dear Mr. Halucha,

In response to your invitation to raise concerns related to the 2008-2009 amendments, including any matters that were not addressed at that time, I wish to make the following comments on provisions in the BIA relating to bankruptcy proceedings that have become archaic or obsolete and are in need of reform:

1. The abolition of the medieval concept of an act of bankruptcy in Canada is long overdue. The concept has been replaced in the United Kingdom and the United States with a process that triggers bankruptcy proceedings upon proof of the insolvency of the debtor. A similar reform should be undertaken in Canada.

2. The definition of "secured creditor" should be modernized so that it uses terminology that reflects changes brought about by personal property security legislation in all of the common law provinces. The definition should make reference to an interest that in substance secures payment or performance of an obligation, including an interest in the form of a conditional sales agreement or lease that secures payment or performance of an obligation. As well, the definition of a secured creditor in ss. 224 and 227 of the Income Tax Act and similar federal provisions should be modified to use the same terminology. If it is intended that the deemed statutory trust in respect of source deductions should be subordinate to a conditional sales agreement or financing lease, this should be expressly stated and the legislation should use terminology that also makes reference to a purchase money security interest.

3. The governance provisions relating to the board of inspectors give ultimate decision-making authority to the representatives of creditors. This may have made sense at the time when there was little regulation or oversight over trustees in bankruptcy. Today, the trustee is properly regarded as the primary decision maker in estate administration, particularly given that the trustee is an officer of the court and has a fiduciary duty to act in the best interest of all creditors. The role of the inspectors should be replaced with new provisions governing committees of creditors which should make it clear that they act in an advisory capacity.

4. Section 121(1) of the BIA provides as follows:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt <u>or to which the bankrupt may become subject</u>

before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act

The underlined language should be removed as it has been misinterpreted by some courts to mean that contingent claims that are incurred before bankruptcy but that are resolved and become due after discharge are not released by a bankruptcy discharge. See *Ontario New Home Warranty Program v Jiordan Homes Ltd.* (1999), 43 O.R. (3d) 756 (Gen. Div.). Consideration should also be given to the inclusion of statutory provisions in the BIA that expressly set out the rules for the affirmation and disclaiming of contracts in bankruptcy proceedings.

5. Section 67(1) of the BIA provides that exempt property and trust property are not divisible among the creditors. Courts initially interpreted this to mean that these assets did not vest in the trustee in bankruptcy. However, the Supreme Court of Canada in *Royal Bank of Canada v. North American Life Assurance Co* [1996] 1 S.C.R. 325 held that these assets vest in the trustee and that the trustee thereafter retransfers the assets to the bankrupt. This process is wholly fictional as trustees do not effect such retransfers. The BIA should be amended to provide that non-divisible assets do not vest in the trustee in bankruptcy, or else set out a specific procedure as has been done in the United States to provide an expeditious resolution of claims to exempt assets.

6. The monetary figures in the BIA should be reviewed and either updated or removed entirely. Dead letter provisions such as section 136(1)(i) and (j) and section 98.1 should be repealed.

These matters are examined in greater detail in an article that I co-authored with David Bryan that will be published in the next volume of the Journal of the Insolvency Institute of Canada. I attach a copy of the draft version of the article in order to provide you with further background.

I wish to thank you for the opportunity to comment on these matters,

Yours sincerely,

Roderick J Wood
Estey Chair of Business Law (Sask),
F.R. (Dick) Matthews Q.C. Professor of Business Law (Alberta)