



## Novel Coronavirus (COVID-19)

### Insolvency & Restructuring

April 2020

# Insolvency Practice During the Pandemic

By Jeffrey J. Simpson

Commentators, economists and government officials are struggling to come up with sufficiently-hyperbolic language to describe the economic fallout from the shuttering of the world economy in the wake of the COVID-19 pandemic. Words such as “catastrophic” are used with disturbing frequency. Even if some of these prophecies turn out to be overwrought, it appears inevitable that an unprecedented number of businesses, large and small, will require compromises from their creditors in order to continue in business.

While it is true that it is not business as usual for the insolvency system in Canada (the physical Courts remain closed, insolvency practitioners’ offices are operating with a skeleton staff, and in-person meetings of creditors are impossible) it would not be accurate to say that the system has come to a halt. Creditors’ meetings continue to be held, urgent Court matters are being heard through online video conferencing software and the members of Torkin Manes’ insolvency group continue to be available to assist clients. In fact, most of the insolvency legal services that would be available in ordinary times remain available despite the restrictions imposed as a result of the pandemic, with the *caveat* that some accommodations are necessary and additional patience may be required from stakeholders.

We now have some guidance with respect to what is possible during the pandemic, and it is expected that further directions will be issued by the Courts, the federal Office of the Superintendent of Bankruptcy (the “OSB”) and the provincial and federal governments. In broad terms:

- it is possible to commence a restructuring under the *Bankruptcy and Insolvency Act* (the “BIA”) during the pandemic period. Proposals, Assignments in Bankruptcy and Notices of Intention can be filed electronically, and virtual creditors’ meetings are proceeding electronically;
- Applications for the appointment of a Receiver, Initial Applications under the *Companies’ Creditors Arrangements Act* (the “CCAA”), Receivership Applications, Applications for Bankruptcy Orders, and other highly-time sensitive types of proceedings will be heard by the Court electronically during the pandemic period;

- Certain additional steps are required to have any matter heard by the Court, specifically, satisfying the Court that the matter is urgent. Interestingly, the test for urgency includes an economic harm component: any matter in which “immediate and significant financial repercussions may result if there is no judicial hearing” qualifies as an urgent matter. Clearly, the Courts have been provided with considerable flexibility in determining what matters are urgent or not urgent, although some proceedings, identified below, have been specifically identified as being “urgent” by their very nature.

Below is summary of the directives issued by the Superior Court of Justice of Ontario and the OSB that address some of the issues of concern to insolvency professionals, lenders and corporate borrowers. Please note that many of the following guidelines apply exclusively to Toronto matters, and may vary from region to region.

### **Commercial List**

- All regular matters which have been scheduled and are not urgent, or time sensitive, will be adjourned to after June 1, 2020 subject to any further direction from the court.
- The judges of the Commercial List will continue to hear and decide urgent and time sensitive matters by teleconference during the COVID-19 pandemic. The court will also hear appropriate time sensitive matters in writing and encourages using this process in appropriate cases.
- Any matters that fall into the following categories will likely fall into the urgent or time sensitive matters and be heard:
  1. Initial Orders under the CCAA;
  2. CCAA stay extensions (if parties agree, a draft order on consent can be forwarded to the Judge);
  3. Receivership Applications;
  4. Plans of Arrangements;
  5. Injunctions;
  6. Approval and Vesting Orders;
  7. Urgent bankruptcy applications.
- The Commercial List scheduling office will continue to operate during the closure.
- If the Court accepts that a matter is to be heard urgently, the Commercial List office will direct counsel to communicate directly with the judge who will hear the matter by email. The matter will proceed by way of teleconference. The Court anticipates having teleconference lines available, some with recording capabilities. In the meantime courts may ask counsel to provide conference facilities.
- The Commercial List expects counsel to follow the three C’s of the Commercial List: cooperating, communicating and using common sense, particularly in terms of scheduling.
- The Court will accept unsworn affidavits prior to the hearing, provided that a sworn affidavit is provided prior to the hearing, or the affiant is available at the teleconference to swear the truth of its contents in accordance with the Notice to the Profession
- The usual process will continue to be followed for issuing new claims on the Commercial List.

### **Registrars in Bankruptcy**

- All regular matters which have been scheduled and are not urgent, or time sensitive, will be adjourned to after June 1, 2020, subject to any further direction from the court.
- Registrars in Bankruptcy will continue to hear and decide urgent and time sensitive matters by teleconference or video conference during the COVID-19 pandemic. The Registrars in Bankruptcy will also hear and decide matters where there are immediate and significant financial repercussions which

may result if there is no judicial hearing. The Registrars will use their discretion to determine whether a matter should be heard urgently.

- The Bankruptcy Court scheduling office will continue virtual operations during the suspension of the court's regular operations.
- Taxations of Statements of Receipts and Disbursement (where a clear Letter of Comment has been received) and Taxation of legal bills are considered urgent and time sensitive and will be heard in writing.

### **Temporary Guidance for LITs During the COVID-19 Pandemic**

The following guidelines respecting Licensed Insolvency Trustee ("LIT") services during the pandemic have been issued by the OSB:

- Meetings of Creditors: The Chair of a meeting of creditors should hold creditors meetings by electronic or digital means of communication. The chair of the meeting may rely on representations by attendees to confirm their identification.
- Assessments: Where video-conferencing is not feasible, assessments may be performed via a combination of telephone discussion and email for document receipt.
- Insolvency Counselling: LIT's or their registered counsellors should provide counselling via videoconference. Upcoming amendments to the Directive will also allow registered counsellors to provide counselling over the telephone, when other means are not possible.
- Signatures and Oaths: LIT's are encouraged to exchange documents that require signature via email, or other electronic means, and provide debtors the necessary support to explain the documents via videoconference or over the phone or as otherwise required. LIT's should obtain the original signed copies to add to their records as soon as practical.

Canada Revenue Agency ("**CRA**") collection activities on new debts have been suspended until further notice, and flexible payment arrangements will be available. Collections staff will address pre-existing situations on a case-by-case basis to prevent financial hardship.

If a taxpayer is prevented from making a payment when due, filing a return on time, or otherwise complying with a tax obligation because of circumstances beyond their control, they can submit a request to cancel penalties and interest.

### **How are LIT's to Treat Timelines Set Out in Insolvency Legislation?**

As of the date of writing, no formal legislative amendments are yet in force to suspend or vary the many timelines contained in the BIA and the CCAA. This situation may change, as the government has recognized that legislative amendments may be necessary to relieve the necessity of compliance with normally-inflexible, but currently-impossible, timelines. Non-governmental organizations, including the insolvency section of the Canadian Bar Association and the Canadian Association of Insolvency and Restructuring Professionals are working with the judiciary and the federal government with respect to what legislation may be required to deal with the effect of the pandemic.

That being said, for the moment, some of the deadlines contained in the BIA and the CCAA remain problematic, as certain timelines under the legislation cannot be extended pursuant to the generalized jurisdiction granted to the Courts to extend timelines where the interests of justice require. The OSB has issued a written directive encouraging LIT's to exercise their professional judgment in using as much flexibility as possible to avoid unintended harm or prejudice in the current circumstances. LIT's are encouraged to extend timelines as appropriate. Alternatively, LIT's might temporarily delay filing, where such a step may prejudice the debtor and where permissible under the BIA, for example by delaying the filing an opposition to discharge for non-payment of surplus income or voluntary fees.

### **Surplus Income Payments**

As LIT's will be aware, many creditors are choosing to forbear, provide payment relief and other flexibilities to support individuals and businesses affected by the pandemic. The Superintendent strongly urges LIT's to do the same and expects that courts will hold LIT's to high standards in this regard when matters are brought forward.

### **Sworn Documents in Bankruptcy During the Pandemic**

Parties may sign and make oaths via video conference (e.g. via a computer or smart phone) or the use of electronic signature software in provinces that have adopted such interim measures for swearing oaths.

### **How are COVID-19-Specific Income Support Payments Received by Bankrupt Individuals to be Treated?**

The OSB has issued directions regarding COVID-19 income support payments received by bankrupt individuals. The OSB has directed LIT's to keep in mind the intention of the Government of Canada in introducing the *COVID-19 Emergency Response Act*.

**Canada Emergency Response Benefit** - The *COVID-19 Emergency Response Act* authorizes the federal government to start issuing income support payments, in the form of the Canada Emergency Response Benefit to support workers who lose their income as a result of the COVID-19 pandemic. The OSB has directed that debtors are entitled to keep income support payments received pursuant to the *COVID-19 Emergency Response Act*, and these payments should not be included as property or income pursuant to the BIA.

**GST/HST credit payments** - The *COVID-19 Emergency Response Act* provides additional assistance to individuals and families with low and modest incomes with a special top-up payment under the Goods and Services Tax (GST) credit or Harmonized Sales Tax (HST) credit. The basic character of GST/HST credit payments is that they are property exempt from execution or seizure, except if they are required to satisfy the LIT's fees and disbursements. These payments also should not be considered property of the bankrupt.

**Canada Child Benefit Payments** - The *COVID-19 Emergency Response Act* gives additional assistance to families with children by providing temporary additional amounts under the Canada Child Benefit. Debtors are entitled to keep the CCB received pursuant to the *COVID-19 Emergency Response Act*, and these payments should not be included as property or income pursuant to the BIA.

During the pandemic crisis, the insolvency system has been significantly affected, but continues to function. It goes without saying that technology is a large part of the reason why that is the case, and fortunately, feedback from practitioners in this new reality has been generally positive. The real questions may be this: when the health crisis is over, how bad the wave of insolvencies may be, and what novel approaches will be required of Parliament, the Courts and practitioners in order to deal with what may be an unprecedented situation.

Please do not hesitate to contact a **member of our team** with your questions. For more information about dealing with COVID-19, please visit our **COVID-19 Resource Center**.

## **Author**

**Jeffrey J. Simpson**  
Lawyer

**Tel:** 416 777 5413  
jsimpson@torkinmanes.com

The issues raised in this publication are for information purposes only. The comments contained in this document should not be relied upon to replace specific legal advice. Readers should contact professional advisors prior to acting on the basis of material contained herein.