Duty of Good Faith and more: Changes to the BIA and CCAA via the Budget Implementation Act, 2019, No.1

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Effective November 1, 2019, amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the BIA) and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the CCAA) will, among other things, impose a requirement of good faith on all parties to proceedings (BIA and CCAA), impose an additional form of director liability (BIA), and limit the scope of relief on initial orders (CCAA).

The amending provisions received royal assent on June 21, 2019 as part of the *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29 (the Act), but their proclamation was deferred. Specifically, sections 133 to 135 of the Act amend the BIA, and sections 136 to 140 of the Act amend the CCAA. By Order in Council, PC No. 2019-1226, sections 133 to 140 of the Act will come into force on **November 1, 2019**. A summary of the key changes is set out below.

Key changes to the BIA effective November 1, 2019:

1. **Requirement of good faith.** All "interested person[s]" in any proceeding under the BIA have a statutory duty to act in good faith in respect of those proceedings (new BIA s. 4.2);
2. **Payments in year preceding bankruptcy**. The court may inquire into certain payments (including termination pay or severance pay) made to, among other persons, directors and officers of a corporation in the year preceding the initial bankruptcy event (new BIA s. 101(1)); and
3. **Director's liability for such payments**. The court may issue judgements against the directors of the corporation for such payment if the payment was (i) made when the corporation was insolvent or rendered the corporation insolvent, (ii) conspicuously over fair market value of the consideration received by the corporation, and (iii) made outside the ordinary course of business (new BIA ss. 101(2.01), (2.1), (3.1), and (5.1)).

Key changes to the CCAA effective November 1, 2019:

1. **Requirement of good faith.** All “interested person[s]” in any proceeding under the CCAA have a statutory duty to act in good faith in respect of those proceedings (new CCAA s. 18.6);
2. **Relief under initial order.** The relief provided by initial orders made pursuant to s. 11 of the CCAA is limited to what is “reasonably necessary” for the continued operations of the debtor company (new CCAA s. 11.001);
3. **Period of initial stay.** The initial stay of proceedings is limited to 10 days, rather than 30 days under the prior law (amendment to CCAA s. 11.02(1));
4. **Debtor-in-possession (DIP) charge.** In determining whether it ought to grant a priority charge in favour of a lender that provides DIP financing, the court must be satisfied that the loan is “reasonably necessary” for the continued operations of the debtor company (new CCAA s. 11.2(5)); and
5. **Disclosure of economic interest.** The court may issue orders to compel any person “likely to be affected by an order” to disclose any aspect of their economic interest in respect of the debtor company (new CCAA s. 11.9).

By

Lisa Hiebert, Randall Lau

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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