

Options for creditors in bankruptcy matters

If an insolvent business or individual owes you money, there are legal remedies available to recoup at least some of your outstanding funds, says Toronto civil litigator Sarah O'Connor.

"You're never going to recover the full amount you're owed, but you can, for example, oppose a discharge to bankruptcy, which might satisfy you in other ways," says O'Connor, who frequently represents creditors in insolvency matters.

The economic crisis brought on by the global pandemic will almost certainly cause a spike in bankruptcies in the coming months, and it's important that creditors understand their options, she says.

Even before COVID-19, Canadians were filing a record number of personal insolvencies — the highest in a decade — according to the [Office of the Superintendent of Bankruptcy Canada](#), rising almost nine per cent in October 2019 compared with the 12-month period the year before, reports [CTV News](#).

Opposing discharge from bankruptcy

When a person or business becomes insolvent, O'Connor says a trustee is appointed, and creditors are ranked to determine who gets paid back first.

"Canada Revenue Agency always has the top rank, followed by mortgage holders and then individuals," she says. "If you have a judgment that proves what the debt is worth without having to prove the debt to the trustee."

The first step for individual creditors is to file a proof of claim with the bankrupt's trustee, O'Connor says.

"What you'll be able to recover depends on the value of the bankruptcy estate, but it's going to be cents on the dollar," she explains.

Once a person files for bankruptcy, there is an automatic stay that prevents creditors from collecting money from them directly, O'Connor explains.

"During the process, creditors can file claims through the trustee to recover losses. Once the debtor receives a discharge from bankruptcy, which usually takes between nine and 21 months, it effectively wipes their debt slate clean, so it's critical to file claims within that window of opportunity," she says.

What many creditors don't know is that they can oppose a discharge from bankruptcy on several grounds set out in [section 173 of the Bankruptcy and Insolvency Act](#), meaning the bankrupt person will remain in bankruptcy until the matter is settled, O'Connor notes.

"You may oppose the discharge to get more facts on the bankrupt's financial position," she says. "If you think the person hasn't kept proper books or accurately accounted for their assets, the creditor can file the opposition with the bankruptcy court and serve it on the Superintendent of Bankruptcy and the bankrupt's trustee to allow them to get more information."

When a discharge is opposed, O'Connor says the court reviews the details of the opposition, and in some cases, the creditor and debtor, along with their lawyers, attend a hearing. The registrar considers the case and decides to grant an absolute discharge or a conditional discharge, which lays out actions that bankrupt must take — such as paying additional funds to a trustee to distribute to creditors — before being granted a discharge.

"Sometimes, it's worthwhile to go through the discharge hearing, especially if you think there are hidden assets, or you can leverage it to get a higher percentage from the estate," she says.

What are consumer proposals?

Under the *Bankruptcy and Insolvency Act*, insolvencies can take the form of bankruptcies or consumer proposals — a legally binding offer to creditors to repay a portion of the debt owed, extend the payment deadline or both.

The consumer proposal lists all of the debtor's assets and debts, and creditors who have filed a claim can vote to approve or reject the proposal, O'Connor says.

"Proposals are usually accepted, but if a creditor is owed \$100,000, and based on the consumer proposal, they're only going to receive \$10,000, they might reject it, especially if they think the bankrupt failed to include substantial assets. If the consumer proposal is rejected, the person automatically declares bankruptcy," she says.

Fighting the good fight

In a recent case O'Connor handled, she represented a client who sold his home to a real estate agent who then backed out of the agreement. During litigation, the real estate agent filed for bankruptcy, claiming his income had dropped by 75 per cent.

O'Connor says when she examined the real estate agent's inventory of assets, she discovered he was still registered as an active agent and holding open houses for several properties listed on his website. That allowed her client to negotiate better terms for the conditional discharge and receive more money than was initially offered.

"My client agreed to the real estate agent making higher payments to the estate and for a longer period before the bankruptcy was discharged," she says.

In another matter, O'Connor represented a large company whose dealer owed thousands of dollars in unpaid invoices.

"We litigated, and then the dealer declared bankruptcy, which is not an uncommon move for people looking to get out of paying a debt," she says.

While O'Connor's client didn't recover any money, he was able to purchase the dealer's customer list, web domain and telephone number for a nominal fee of \$1,000, which gave his company a substantial competitive advantage in the market.

"Filing an opposition to discharge bankruptcy is never going to make a creditor whole in terms of money, but often there are assets that can be recovered to compensate for the loss," she says.

The legal process of bankruptcy is similar to examinations for discovery in litigation. When O'Connor reviews a bankrupt's assets in these types of cases, she says it's important to look at the person's financial history in the two years preceding bankruptcy.

"Sometimes people are intentionally trying to hide money or assets to avoid repaying debts to their creditors," so if they transferred a home into their spouse's name and haven't included it in the list of assets, a lawyer can argue for the sale of those assets to satisfy some of the debt, she says.