

HOW TO SAVE A BUSINESS --(Even if it is Insolvent)!

More businesses "go under" or fail than is necessary! Very often a business can be "saved" if caught in time. Even if a company is insolvent it may be possible to save the company by using a provision under the Bankruptcy and Insolvency Act to file a Proposal, (an arrangement) with the creditors of the company.

The way a Proposal works is that a company, through a Trustee in Bankruptcy, files the Proposal ("offer"), to the company's creditors asking them to accept less than the monies they are owed in order that the company might survive.

The trustee works with the owners of the company in drafting a Proposal that presents a "win - win" situation for both the company and the creditors. Typically, the creditors are asked to give up rights to the monies they are owed in exchange for an offer by the company to pay so many cents on the dollar (say, 25 or 50 or 75 cents) over time. Sometimes the company pays back 100% of what it owes but it is granted a period of time, say 6 months or a year, in which it makes no payments.

In a successful Proposal the company wins because it survives. The creditors win because they retain a customer and also because they get some of their money whereas in a bankruptcy they probably would get nothing.

Filing a Proposal has a number of immediate advantages for a company under siege by its creditors.

- The filing of a Proposal stops all legal actions undertaken or contemplated by secured and unsecured creditors.
- The filing of a Proposal gives the company some "breathing space" so that the company can approach the creditors and explain the company's financial situation to them and ask for support for the Proposal.
- If the company has not received a notice to enforce security under the Bankruptcy and Insolvency Act then a stay of proceedings will be effective against the secured creditor.
- The filing of a proposal will create an automatic stay of proceedings against the Director of the company. This stay will not, however, affect any claim against the Director granted by way of a guarantee.

INTENTION TO FILE A PROPOSAL

If a company fears that a creditor is going to take some action to shut the company down such as getting a judgement and appointing a Sheriff or bailiff to seize assets, or a third party demand from Revenue Canada for employee remittances, GST or taxes, then the company may not have time to file a Proposal before those creditors step in to shut the

company down. In this case a company can file a Notice of Intention to File a Proposal. This is a simple document and acts as a stay of proceedings as soon as it is filed. The filing must include the following-:

1. Prescribed form stating the company's intention to make a Proposal;
2. The name and address of a licensed trustee who has consented in writing to act as the trustee under the Proposal; and
3. Names and addresses of creditors along with amount owed.

Within 10 days of filing the Intention to File a Proposal, the following must be filed with the Official Receiver-:

1. Cash Flow Statement;
2. A report on the reasonableness of the Cash Flow Statement prepared and signed by the trustee; and
3. A representation by the company in writing that the Cash Flow Statement is reasonable.

Within 5 days after the filing of the Notice of Intention the trustee must notify all of the creditors of the filing.

Within 30 days of the filing of the Notice of Intention to File a Proposal a Proposal must be filed. If the Proposal is not filed within the 30 day period, or if the cash flow statement is not filed within the 10 day period, then the company is adjudged to be bankrupt effective at the date of the filing of the Intention to File a Proposal.

During the period between the filing of the Intention to File a Proposal and the filing of the actual Proposal, it is the trustee's duty to monitor the business and have access to and examine the property and books and other financial documents to the extent necessary to adequately assess the business' financial affairs. It is also the duty of the trustee to file a report on the state of the business' financial affairs so that a report can be made to the creditors.

MEETING OF CREDITORS TO CONSIDER THE PROPOSAL

Creditors vote on the Proposal in person or by mail at a creditors' meeting held approximately three weeks after the Proposal is filed. The trustee must file a report to the creditors on the affairs of the company and causes of the financial difficulties. The trustee must also present to the creditors his estimate of what the creditors would realize under a bankruptcy as compared with the amount they are being offered under the Proposal. In order for the Proposal to be justified, the creditors must be better off under the Proposal than they would be under a bankruptcy.

The Proposal must receive approval by at least 66 2/3% in dollars and 50% plus one in number of eligible creditors who vote, and the Proposal must be approved by the Court. If the Proposal is accepted by the creditors and approved by the Court then all unsecured creditors and all secured creditors, in respect of which the Proposal was made, are bound by the Proposal; not just the creditors who voted in favour of the Proposal.

If the Proposal does not receive the required votes the company is immediately bankrupt effective on the date of the creditors' meeting.

KEY CONSIDERATIONS

1. A Proposal can only be filed through a Trustee in Bankruptcy.
2. A Proposal is simply an agreement between the company and the company's creditors.
3. The filing of a Proposal stays legal actions undertaken or contemplated by secured and unsecured creditors.
4. The trustee is required to monitor the business until the Court approves the Proposal a minimum of six weeks).
5. Secured Creditors included in the Proposal who are in a class that votes in favour are bound by the Proposal. Secured Creditors not included in the Proposal are not bound and it may be necessary to get their concurrence if the Proposal is to succeed.
6. Goods supplied within 30 days prior to the filing of a Proposal, or the filing of an Intention to File a Proposal, do not have to be returned if the Proposal is approved but are eligible for return if the Proposal is defeated or a "receiver" is appointed.
7. A lease can be disclaimed (cancelled) with the landlord being entitled to file a proof of claim as follows:
 - (a) actual losses resulting from the disclaimer, or the lesser of:
 - (i) three years rent, or
 - (ii) the aggregate of the rent provided for in the lease for the first year of the lease following the date on which the disclaimer becomes effective and 15% of the rent for the remainder of the term of the lease after that year.

The Proposal must include provisions to pay:

1. Employee source deductions outstanding within 6 months after Court approval.

and

Employee and former employees' outstanding wages and vacation pay up to a maximum of \$2,000 immediately after Court approval.

ACCEPTANCE (REFUSAL) OF THE PROPOSAL

1. The trustee must file a report to the creditors on the affairs of the company and the causes of financial difficulty.
2. Creditors vote on the proposal, in person or by mail, at a creditors' meeting held approximately three weeks after the proposal is filed.
3. In order to be accepted by the creditors, the Proposal must receive approval by at least 66 2/3% in dollars and 50% plus one in number of eligible creditors who vote. The Proposal must then be approved by the Court.
4. If the Proposal does not receive the required votes, the company is immediately bankrupt effective the date the creditors or the Court refuses the Proposal.
5. Once the Proposal is approved by the Court then all unsecured creditors and included secured creditors are bound by the Proposal; not just the creditors who voted in favour of the Proposal.
6. If the terms of the Proposal are not honoured then the trustee or a creditor may apply to Court for the Proposal to be annulled and the company placed into bankruptcy.

CHECK LIST TO DECIDE WHETHER A BUSINESS IS A CANDIDATE FOR FILING A PROPOSAL

If the answer is Yes to all the following questions then the filing of a Proposal may allow the company to survive:

1. Is the company insolvent or not financially viable?
2. Could the company survive if either: a) part of its debt was forgiven; or b) it had a moratorium on debt repayment for some months?
3. Do the owners of the company have the competence, desire and energy to work to save the company?
4. If you intend to make a Proposal to the secured creditor, will the secured creditor(s) support the Proposal?
5. If you intend to repudiate your lease in the current premises, or other premises, do you have other arrangements for the continuing operations of the company?
6. Will the unsecured creditors be better off under the terms of the Proposal than if the company becomes bankrupt?

SOURCE: <http://www.sands-trustee.com/busprop.htm>