CAIRP
Rebuilding Success • Réétablir le succès

INSOLVENCY ADMINISTRATION

Canadian Association of Insolvency and Restructuring Professionals

Course for
Insolvency Administrators

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Welcome

Thank you for enrolling in the *Insolvency Administration* Course. This course teaches you the administration processes involved in handling a bankruptcy, a proposal or a receivership in Canada.

Course materials

The course material consists of:

1. Insolvency Administration modules;
2. Competency assessments;
3. Reference glossary.

Program rules

To follow the program, you will also require the ***IA Course Policy and Guidelines*** – available on our website www.cairp.ca. Please read this document carefully as it contains important information on the program.

Competency Assessments (CAs)

Each module has a matching Competency Assessment component, which is to be completed online. You are to complete the lesson assignments, or "*Competency Assessments*" in order, beginning with Module 1, "Introduction to Insolvency". You must successfully complete each CA with a passing mark of **at least 60%,** before you can move on to the next one. Once the CA is completed, you will receive the results in real-time, with a mark for the assignment. More information can be found in "**Frequently Asked Questions**" posted to D2L.

Exam readiness

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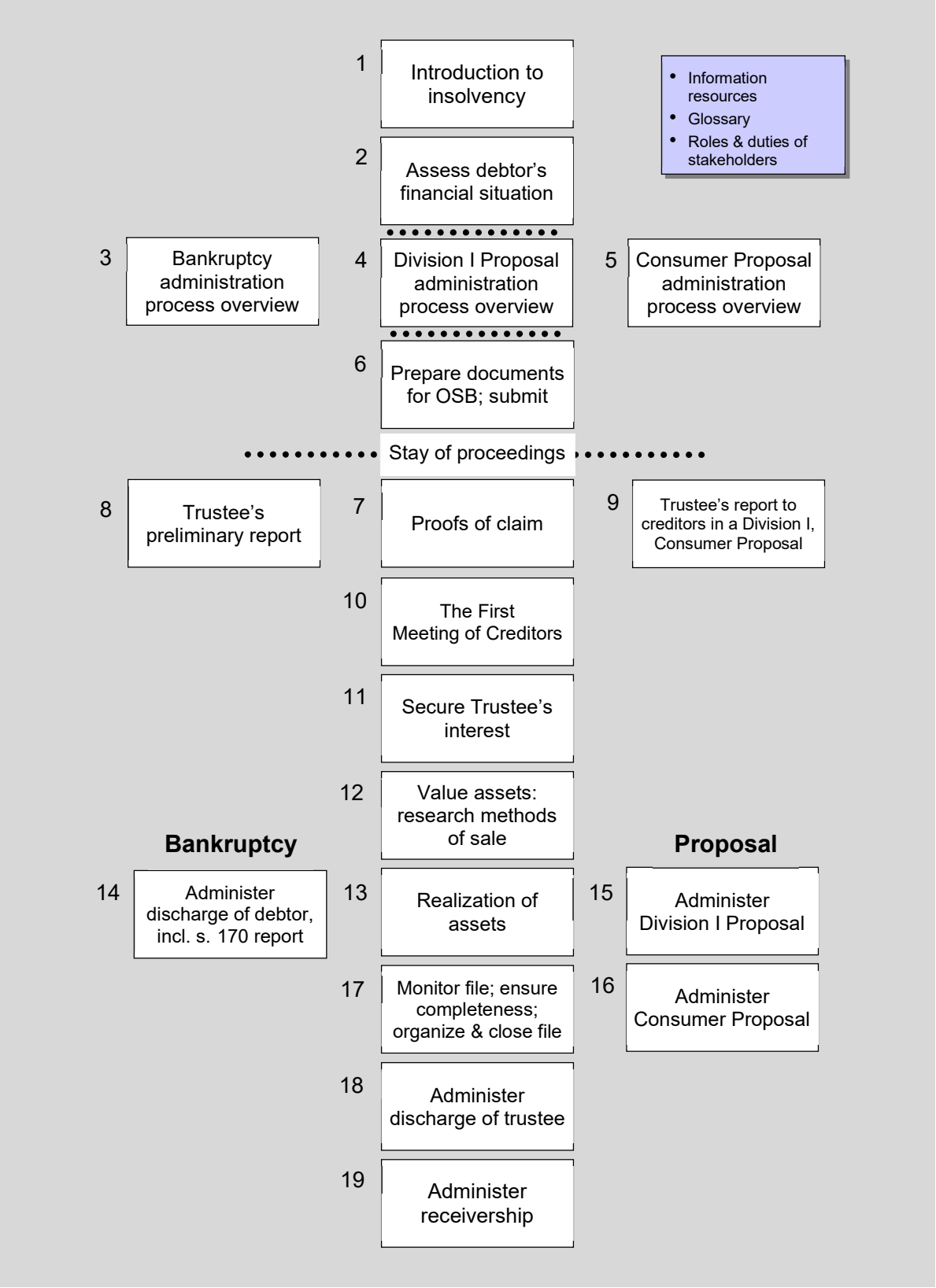
Once you have successfully completed all 19 CAs, you are eligible to write the final exam. The exam is available on-demand and you must contact the CAIRP program coordinator (benjamin.lecointre@cairp.ca) once you have completed the course requirements to register for the exam and pay your exam fee. Once you have successfully passed the exam you will receive a certificate of completion. If you are unsuccessful on the exam you should arrange for payment for another exam attempt. The exam passing grade is 60%.

The Course Map

This is a course map, not a process chart. Each box in the map corresponds with a course Module (same number).

Insolvency Administration Course Map



Roles and responsibilities

Who does what

The content of this course is customized for insolvency administrators working in the office of a Licensed Insolvency Trustee.

Directive 4, published by the Office of the Superintendent of Bankruptcy ("**OSB**") spells out the circumstances in which Trustees may delegate tasks to another individual in their office. This course does not attempt to differentiate which tasks are permitted and commonly performed by staff of the Trustee (i.e., insolvency administrators like you), since Trustee practices vary among companies, depending on their size, location, markets served, etc. This course may state that the Trustee is the person completing a specific task when the task is actually performed by a staff member of the Trustee's office.

Whether or not the staff member is asked to do each of these tasks depends on the company, management, training, and his/her professional development as well as the limitations of Directive 4. The underlying principle however, is that the Trustee remains responsible for the administration being completed professionally and in a timely manner.

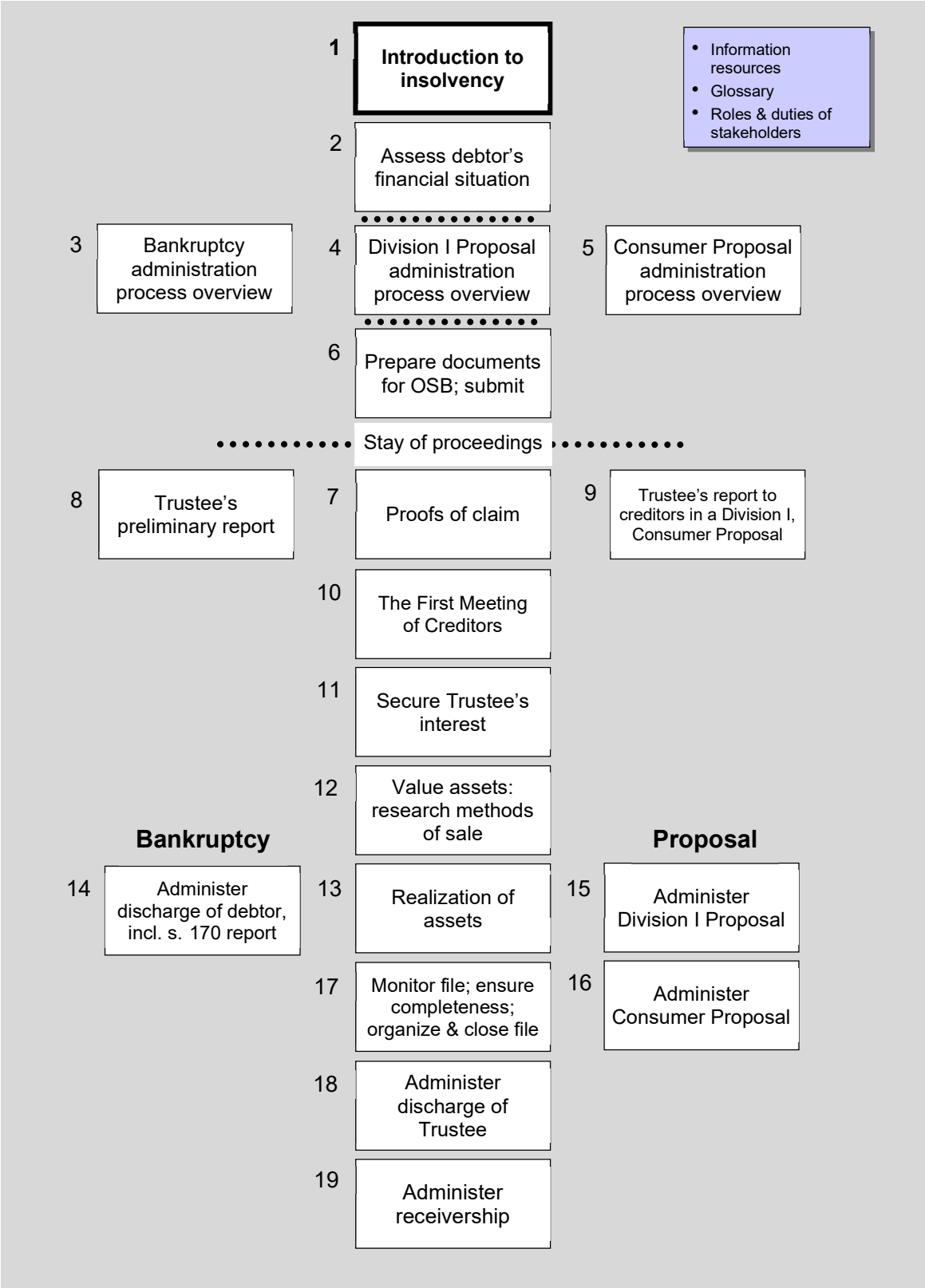
Use of "you"

When the pronoun "you" is used in this course, it does not necessarily mean you personally—it means either the Trustee or the Insolvency Administrator.

Disclaimer / Rules of the Road

1. While we are committed to gender equality, we have sacrificed the goal of using gender neutral language in this course material to keep the text grammatically simple. So, for example, references to insolvency professionals that are in the singular are generally third person masculine (in other words, "he" rather than "he or she").
2. The material in the CQP program can be time sensitive. Notwithstanding all of the efforts of the professionals involved in the preparation and review of these notes, some errors may be present. You should review the material carefully with your sponsor, with a critical thinking approach and bring to the attention of the sponsors and CAIRP any material that is not clear.
3. The Office of the Superintendent ("OSB") Directives are described in the text in generic terms. It is up to you to research and become familiar with the latest versions of these directives. For example, the Directive on Surplus Income is referred to in the text as Directive 11R and not as Directive 11R2.
4. A deliberate decision has been made in the preparation of the course materials to refer only to sections of the legislation, such as the *Bankruptcy and Insolvency Act* ("BIA") and the *Companies' Creditors Arrangement Act* ("CCAA"), and not to subsections. The intent is to encourage you to read all parts of the acts and not just specific sections so that the relevant provisions can be looked at in context.

1. Introduction to Insolvency



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1.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Describe the various roles a Trustee can or cannot accept.
- Explain how Trustees receive their designations, how they are licensed and by whom.
- Know and understand the rules governing a Trustee's behaviour (and those in his employ) allowing you to adhere strictly to them.
- Understand that there are various provincial and federal legislations which impact the day-to-day administration of estates.

Assigned reading

- BIA s. 2, 13.3-13.5, 16-38, 161 and 178
- BIA Rules 34-53
- Directive 5 - Estate Funds and Banking
- CAIRP Rules of Professional Conduct; CAIRP Standards of Professional Practice

1.1.1. Philosophy

Bankruptcy and insolvency legislation has the following primary goals:

- Financial rehabilitation: to allow an honest but unfortunate debtor the ability to obtain a fresh start unfettered by an insurmountable debt load; to obtain a discharge from his debts on reasonable conditions;
- Compromise: to facilitate a process whereby an individual or a business can discuss a settlement of an unmanageable debt load with the creditors to avoid bankruptcy and the resulting loss of value and social impacts, by compelling creditors to act collectively rather than individually;
- Collective process: to provide for an orderly and fair distribution of available proceeds to the creditors in an equitable manner;
- Investigation: to provide a forum to carry out an investigation into the affairs and transactions of the insolvent person; and
- Confidence: to assist the credit granting system by promoting confidence of all the stakeholders in the insolvency process.

1.1.2. What is insolvency?

While the terms bankruptcy and insolvency are often used interchangeably, in fact, they are not one and the same. A person who is bankrupt is usually insolvent, but an insolvent person is not always bankrupt.

A bankrupt person has either filed an assignment in bankruptcy or has been petitioned into bankruptcy by a creditor and is now subject to the provisions of the BIA.

Insolvency is the financial situation a person finds himself in when he is unable to pay his debts when they are due, or has ceased making payments, or his liabilities exceed the value of his assets.

The BIA is a rehabilitative act that offers an insolvent person an opportunity to be released from his debts. It also offers creditors an orderly wind-up and distribution of a bankrupt's realizable assets.

1.1.3. Who is the Trustee?

A Trustee is an officer of the court who owes a duty of care to all stakeholders.

A Trustee operates in a position of trust and must maintain a high standard of ethics in the administration of his duties.

A Trustee can delegate certain duties, but is ultimately responsible for all actions taken by individuals under his supervision.

There is an inherent conflict of interest in the role of the Trustee as the Trustee has obligations to both the creditors and the debtor. Both the Office of the Superintendent of Bankruptcy and CAIRP have established codes of conduct to address these conflicts and ensure that the insolvency process remains transparent.

1.2. Rules of conduct and ethics

BIA Rules 34-53

CAIRP Rules of Professional Conduct; CAIRP Standards of Professional Practice

1.2.1. Ethics

The Superintendent of Bankruptcy is responsible for overseeing estates administered under the BIA and has established a Code of Ethics that is set out in the BIA.

This code, together with the BIA and the Directives, deals with the competency and integrity of Trustees and establishes standards of care required in the administration of the estates and the operation of an insolvency practice.

CAIRP also issues Rules of Professional Conduct and has established the Standards of Professional Practice that are found on the CAIRP website, www.cairp.ca.

These codes of conduct establish standards that deal not only with trustees but also with other parties, e.g., receivers, agents, or liquidators involved in the insolvency and restructuring process.

1.3. History of statutes and the profession

Bankruptcy legislation was first enacted in Canada shortly after Confederation. Aside from the period between 1880 and 1919 there has been some form of legislation in place. On July 1, 1950, the *Bankruptcy Act* came into force. This allowed for the filing of proposals by non-bankrupt individuals, as well as a provision for the administration of summary estates[1].

In November 1992 significant amendments were made and the act was renamed the *Bankruptcy and Insolvency Act*. Further amendments to the Act came into force in 1997 and 1998. The most recent amendments came into force in July 2008 and September 2009.

Other Acts that regulate bankruptcy and insolvency in Canada include:

- *Companies' Creditors Arrangement Act (CCAA)*
    - Enacted in 1933.
    - Provides for the financial restructuring of a company or related group of companies with debts of more than $5,000,000 under court supervision.
- *Winding-up and Restructuring Act (WURA)*
    - Enacted in 1882.
    - Provides for the winding-up of insolvent banks, insurance companies and trust companies under a liquidator. These companies are excluded from utilizing the provisions of the BIA.
- *Farm Debt Mediation Act (FDMA)*
    - Enacted in 1998.
    - Provides for the restructuring of insolvent commercial farmers under an Administrator appointed by the Minister of Agriculture and Agri-Food.

[1] An estate in which, at the time of filing, unencumbered, realizable assets are valued at $15,000 or less. Certain provisions of the Bankruptcy and Insolvency Act are waived in order to reduce administration time and costs.

1.4. Current legislation

1.4.1. Legislative framework

The Parliament of Canada has exclusive jurisdiction over bankruptcy and insolvency matters and the BIA is federal legislation that is applicable across the country.

The BIA is broken down into 13 parts. Also, the Bankruptcy and Insolvency General Rules, Eligible Financial Contract General Rules and Orderly Payment of Debts Regulations complete the BIA by providing more information on matters that are more administrative or procedural. Directives and Circulars are issued by the Superintendent of Bankruptcy and help interpret the provisions of the BIA or provide practice notes designed to make the administration of estates more uniform. Finally, jurisprudence completes the legislation by providing interpretations of the provisions that are useful in administering estates.

Other federal legislation that can impact on the BIA includes, but is not limited to, the following:

- *Income Tax Act*
- *Excise Tax Act*
- *Canada Pension Plan Act*
- *Employment Insurance Act*
- *Bank Act*
- *Canada Business Corporations Act*

Provincial legislation that impacts the BIA includes, but is not limited to the following:

- *Exemptions/Execution Act*
- *Landlord and Tenant Act*
- *Fraudulent Conveyances Act*
- *Assignment & Preferences Act*
- *Personal Property Security Act*
- *Employment Standards Act*
- *Workers Compensation Act*
- *Labour Relations Act*
- *Pension Benefits Act*
- *Family Law Act*
- *Retail/Harmonized Sales Tax Act*

- *Municipal Act*
- *Public Utilities Act*
- *Partnership Act*
- *Creditors Relief Act*
- *Construction/Builders Lien Act*
- *Conditional Sales Act*
- *Civil Enforcement Act*
- *Insurance Act*
- In Quebec, the *Civil Code; Code of Civil Procedure; Tax Administration Act*

The individual provinces have jurisdiction over property and civil rights legislation.

The provisions of the BIA are subject to provincial legislation involving property and civil rights as long as the legislation does not conflict with it.

1.5. Typical appointments and your role

1.5.1. Licensed Insolvency Trustee:

- holds a licence as a Licensed Insolvency Trustee issued by the Superintendent of Bankruptcy after qualifying under the procedures set out in the Trustee Licensing Directive;
- must complete a financial assessment of the debtor's circumstances and provide him with the various options available;
- has a duty of care to both the debtor and the creditors and must remain impartial while completing the administration of the estate;
- once appointed, must carry out his duties in an honest and competent manner and must provide full and accurate information to all the stakeholders in the insolvency process; and
- is not required to accept an appointment in respect of any particular bankrupt estate but having accepted the appointment, he cannot withdraw.

1.5.2. Administrator of a Consumer Proposal:

- must be either a Licensed Insolvency Trustee or an individual appointed by the Superintendent of Bankruptcy to administer a consumer proposal;
- must assess the debtor's financial situation and assist in the preparation and filing of the proposal and other statutory documents as required under the BIA; and

- is responsible for monitoring the payments made under the proposal and ensuring that the dividends are issued to the creditors according to the provisions of the BIA.

1.5.3. Insolvency Counsellor:

- provides counseling to individuals who file an assignment in bankruptcy or make a consumer proposal as they must attend two counselling sessions that are provided for by the Trustee or the Administrator;
- must ~~be~~ meet the criteria outlined in Directive 1R, including obtaining the qualifications and skills to provide financial counseling through the Practical Course in Insolvency Counselling (PCIC); and
- must provide information to the debtor regarding consumer and credit education as well as identification of road blocks to solvency and rehabilitation pursuant to Directive 1R.

1.5.4. Receiver:

BIA s. 243-252

- must be a Licensed Insolvency Trustee;
- can be appointed privately by a secured creditor, pursuant to a security instrument, or can be court-appointed;
- will take possession and sell the assets pledged as security for the benefit of the secured creditor after the debtor has defaulted under the terms of the agreement;
- does not have the authority to continue to operate a debtor's business; and
- must comply with BIA sections 243-252.

1.5.5. Receiver Manager:

BIA s. 243-252

- is usually appointed pursuant to the terms of a security instrument but can also be court-appointed;
- will take possession and sell the debtor's property subject to the security agreement;
- has the authority to continue operation of the debtor's business; and
- must comply with BIA sections 243-252.

1.5.6. Interim Receiver:

BIA s. 46 and 47

- appointed by the court to preserve and protect the assets of a debtor.

- must be a Licensed Insolvency Trustee;
- appointed when a creditor has a legitimate concern that the assets of the debtor could be at risk during a time period when he is unable to exercise his rights or when it is useful and convenient to do so to protect the estate of the debtor or the interests of the creditors in the context of a restructuring proceeding; and
- may be appointed during a petition in bankruptcy proceeding, a notice of intention to make a proposal, a notice of intention to enforce security or (in certain circumstances) during a CCAA proceeding.

1.5.7. Liquidator:

- appointed by either the court or shareholders to wind up a company, pursuant to a court order or the relevant legislation.

1.5.8. Monitor:

- appointed by a secured creditor to conduct a review a debtor's financial situation when a secured creditor has a concern as to the viability of the debtor's continued operation; can also be appointed pursuant to the terms of a CCAA application to assist the debtor during its restructuring process and to advise the court; or
- is a Trustee, appointed in a Division I proposal, required to monitor the operation of the debtor's business until either court approval of the proposal or the bankruptcy of the debtor.

In the case of a monitor appointed by a secured creditor to review the on-going activities, the monitor does not operate the debtor's business and is there only with the consent of the debtor.

In the case of a monitor appointed by the court in a CCAA proceeding or a Trustee monitoring the activities during a proposal proceeding, the Trustee/monitor must report any adverse material changes to the court and the Superintendent of Bankruptcy.

1.6. Key Organizations

1.6.1. Office of the Superintendent of Bankruptcy (OSB)

BIA s. 5

The Office of the Superintendent of Bankruptcy (OSB) is a special operating agency of Innovation, Science and Economic Development Canada and operates bankruptcy districts throughout Canada.

The Superintendent of Bankruptcy is appointed by an order in council and heads the OSB. He is responsible to oversee all estates administered under the BIA.

He is also responsible to license, supervise and discipline Licensed Insolvency Trustees, as per statutes and directives.

The OSB is mandated to “maintain investor and lender confidence in the Canadian marketplace by protecting the integrity of the bankruptcy and insolvency system.”

The Superintendent of Bankruptcy delegates specific duties to various different levels.

These delegates are Official Receivers, Assistant Bankruptcy Analysts, Bankruptcy Analysts, and Senior Bankruptcy Analysts.

1.6.2. OSB directives

From time to time, the Superintendent of Bankruptcy issues directives to aid in the administration of the BIA.

These directives carry the same statutory authority as the BIA. Failure to comply with these directives can have serious consequences for a Trustee.

1.6.3. Canadian Association of Insolvency and Restructuring Professionals (“Association” or “CAIRP”)

The Association is a national organization of professionals established in 1979 to assist, educate and support its members in their various insolvency roles.

The Mission Statement of the Association is:

advance the interests of members and the public by:

- promoting excellence amongst members,
- providing relevant professional development,
- establishing and enforcing CAIRP’s Rules of Professional Conduct and Standards of Professional Practice,
- maintaining rigorous certification standards and providing innovative education to aspiring insolvency and restructuring professionals, and
- advocating for a fair, transparent and effective insolvency and restructuring system throughout Canada.

The Association works closely with the Superintendent of Bankruptcy in establishing rules and standards to maintain a high standard of ethics in the insolvency system.

The Association has developed the Chartered Insolvency and Restructuring Professional Qualification Program (CQP). Once a candidate has completed the program and passed the final exam (CNIE) he may be admitted as a member of CAIRP and receive a designation as a Chartered Insolvency & Restructuring Professional (CIRP). In order to become a Licensed

Insolvency Trustee, an individual must complete the CQP and then must challenge the Oral Boards, which are organized by the OSB.

1.7. Ethics and professionalism

1.7.1. Conflicts of Interest Rules

CAIRP Rules of Professional Conduct; CAIRP Standards of Professional Practice

The Trustee often finds himself in a situation of competing interests. Advice he gives to one party may adversely affect another. The Trustee must always remember that he has obligations to many stakeholders in the insolvency process including the bankrupt and the creditors.

On occasion, the Trustee may have a relationship with a creditor or a debtor through previous business dealings. The BIA details situations where the Trustee is not qualified to act or may act only if he complies with certain requirements.

A Trustee is an officer of the court and at all times must be independent of any influence that might affect, or appear to affect, the administration of an estate. Both the Superintendent of Bankruptcy and the CAIRP have developed guidelines relating to conflict of interest issues.

1.7.2. Handling of Trust Funds

All receipts collected by a Trustee during the administration of an estate are held in trust for the benefit of the creditors.

The BIA, including the rules and directives, and CAIRP Rules of Professional Conduct and Standards of Professional Practice, provide the requirements for control and proper record keeping of these funds.

1.8. Public trust and policy

1.8.1. Reputation

A Trustee must be of good character and reputation as he is placed in a position of trust.

He must maintain a high standard of care in the administration of the insolvency process to uphold public confidence.

The Superintendent of Bankruptcy, in the directive regarding Trustee licensing, details the minimum standard required to become licensed as Trustee. This includes the possibility of a complete investigation into a candidate’s character and qualifications.

CAIRP Rules of Professional Conduct and Standards of Professional Practice also detail minimum standards of conduct to ensure the integrity of the insolvency system.

The Trustee is subject to the scrutiny of the stakeholders in the insolvency system and must always conduct himself with integrity and due care.

1.8.2. Dealing with the public

Adhering to the CAIRP Rules of Professional Conduct and Standards of Professional Practice ensures consistent application of the BIA and instills confidence in the system.

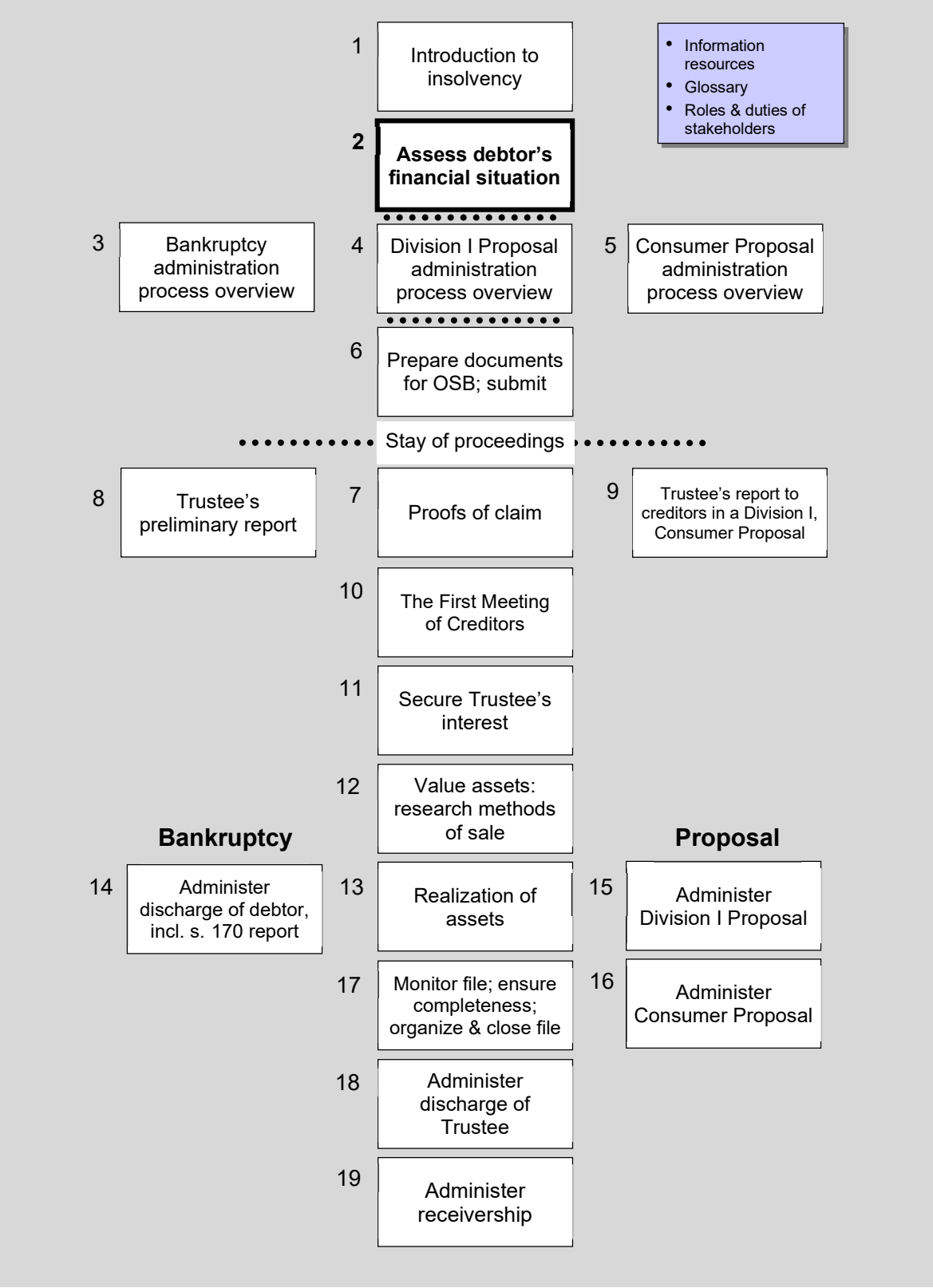
1.8.3. Confidentiality

There is no solicitor – client privilege between a Trustee and a debtor. That does not mean however that all information that the Trustee receives is necessarily public. The Trustee has an obligation to maintain the confidentiality of information that is personal, privileged, confidential or sensitive. Information disclosed by the debtor pertaining to his property, earnings, transactions, dealings, etc., however, must be provided to the creditors when dealing with the affairs of the debtor.

The BIA rules and CAIRP rules prohibit a Trustee from disclosing confidential information to the public unless required by law or with the permission of the debtor.

The Trustee cannot use confidential information to benefit himself or any third party.

2. Assess Debtor's Financial Situation



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2.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Assess the financial situation of the debtor.
- Explain the alternatives available to a debtor.
- Explain the debtor's duties and the repercussions if he does not comply.
- Describe the requirements of the counseling sessions.

Assigned reading

- BIA s. 26(1), 67, 68, 155 - 159, 178 and 198 - 200
- BIA Form 65
- BIA Rules 68 and 105
- Directives 1R, 6R, 11R, 16R and 23

2.2. Assessment

2.2.1. Definition of Assessment

Directive 6R

Assessment is the first stage of the insolvency process, providing for a financial appraisal interview, a description of statutory and non-statutory options available to an individual debtor and a discussion and review with that debtor of the merits and consequences of each of the options available.

Careful questioning to clarify facts with respect to their situation, combined with your understanding of the BIA, will result in your being able to assist the Trustee in the assessment process.

When a debtor is seeking a solution to his financial problems, the Trustee must perform an assessment. Although only Trustees and Administrators of consumer proposals are authorized to provide the assessment, registered individuals may be authorized to provide part of the assessment.

Directive 6R is an important directive that sets out all the standards that a Trustee, or someone designated by him, must adhere to in carrying out the assessment. As this is the first encounter with the debtor, complying with this directive will ensure he has received the appropriate information to be able to make an informed choice.

Every debtor must have an assessment and at the end of the assessment, both the Trustee and the debtor must sign a copy of the assessment certificate. The certificate is to be filed with the Office of the Superintendent of Bankruptcy and a file copy is retained by the Trustee. The certificate will indicate what option under the BIA the debtor has chosen and whether the debtor has sought advice from other persons in the last six months or not.

If the Trustee is of the opinion that the debtor could have filed a viable proposal but elects to file a bankruptcy, he must inform the debtor that this will have to be reported in the Report of Trustee on Bankrupt's Application for Discharge. This will prompt a mediation process. If this procedure is unsuccessful, a hearing in court on the debtor's discharge will take place.

2.3. Conducting the assessment interview

2.3.1. Purpose

During the interview all relevant information pertaining to the debtor is obtained and many Trustees use standardized forms to collect this information. These forms must be properly completed and maintained on file for future reference.

Although much of the information on the original standardized information collection form will be transferred onto the formal Statement of Affairs, other information will only be found in this standardized form. As an example, it may be beneficial in the original form to gather information that will be required for purposes of filing the bankrupt's tax returns.

Information contained in the original form can support the Trustee's position that relevant information was passed on to the bankrupt. As an example, a notation in the original form that alimony was discussed as a non-dischargeable debt would negate any future claims by the bankrupt that he was not advised of this information.

2.3.2. Interview techniques

Conduct the interview in a co-operative manner. You are there to obtain all information that is helpful and required by you to assist the debtor make an informed decision. Be open, honest, encouraging, understanding and non-judgemental.

This is the first time the debtor is being introduced to many insolvency terms, so it is very important to make sure the debtor understands these concepts. You should ask the debtor to demonstrate his understanding by asking him to describe, in his own words, the area that you just covered. If there is a language barrier, arrange to have an interpreter present.

After the interview you need to prepare, based on information obtained from the debtor, a complete statement of the debtor's financial affairs including details of:

- the debtor's assets;
- the debtor's liabilities;

- a detailed current monthly income and expense statement, including all income, gross and net; and all expenses, including special needs expenses, alimony, support or maintenance payments, transportation costs, medical and prescription expenses; and
- conveyances, preferences and transfers at undervalue of real or personal property of the debtor.

Research the following factors to help you determine a course of action under the BIA:

- whether the debtor has sufficient property available to make a "lump sum payment" proposal;
- whether the debtor has surplus income and also has the capacity at the time of assessment to sustain continued payments to a proposal for a period of time;
- the family or personal situation of the debtor;
- the financial situation of the debtor;
- the number and type of creditors of the debtor, both secured and unsecured;
- the likelihood of acceptance of a proposal by the creditors; and
- whether the return to creditors from a potential proposal would be greater than the return from a bankruptcy.

2.3.3. The need for understanding the relationship between the debtor and any business he may be involved in, or may have shares in

You may discover that the debtor is involved in a business or has an investment in a company. You will need to obtain additional facts about the business (i.e., most recent financial statements, tax liability, names of business creditors, debts for which the debtor has a personal guarantee, etc.). You must have or acquire general business knowledge to ask the right questions and understand how the answers impact on the debtor's position.

All debts from an unincorporated business are personal debts. They will form part of the list of creditors. The debtor is also liable for debts from an incorporated business if the debtor has personally guaranteed the debt or if the debtor is a director and the debt attributes liability to the directors (e.g. GST/HST and source deductions). In the event that the debtor has personally guaranteed corporate creditors, those creditors will be included in the personal bankruptcy estate.

The investment in a company may mean a majority ownership or a partial ownership of a company by way of shares. This investment will form part of the assets of the debtor. You need to advise the debtor as to how the shares would be affected in each of the options that you provide to him. Pursuant to the *Canada Business Corporations Act*, a person cannot be a director of a corporation if bankrupt so the company could be impacted if there is only one director.

These factors could drastically affect the choice of filing a bankruptcy or a proposal and also affect the value of the company that the Trustee must state on the Statement of Affairs.

2.3.4. Debtor must be insolvent to file an assignment in bankruptcy or a proposal

BIA s. 2

While obtaining information about the debtor's assets and liabilities, determine if the debtor is insolvent. An individual must be insolvent to file any proceedings under the BIA.

An insolvent person is defined by BIA s. 2

2.3.5. Minimum documentation requirements

BIA s. 26; BIA Rule 68

CAIRP Standard of Professional Practice No: 6

Directives 16R 17 and 32

The Trustee is required to maintain proper accounting and documentation for each estate administered by his office. This is set out in BIA s. 26.

Unless the court otherwise orders, these records are to be maintained for four years after the date of the Trustee's discharge (or whatever time period is prescribed[2]).

Estate records are often maintained in separate files covering:

- Banking;
- Correspondence;
- Minutes of meetings of creditors or inspectors;
- Income Tax;
- Proofs of Claim; and
- Official Documents.

The Statement of Affairs is one of the most important documents for the administration of the estate and one on which a variety of users base their decisions. Accordingly, it is important to

[2] You will see this expression "as prescribed" fairly often in the text. It means that the legislator wanted to leave some discretion for the government to make changes to limits that are set in the legislation, and has chosen to allow the limits to be set by the rules or regulations instead. So when you see that an amount or a period is "X or as may be prescribed" it is necessary to check in the Rules or Regulations to the legislation to see if the Rules or regulations provide for a different amount or period. Essentially, "as prescribed" means it is as specified in the Rules or Regulations. The reason for this is that it is much easier for the government to change a Rule or Regulation than it is to amend the legislation.

give as much information as possible in order to accurately reflect the bankrupt's affairs. Directive 16R, “Preparation of the Statement of Affairs,” and CAIRP’s Standard of Professional Practice No: 6, “Preparation and Verification of Statement of Affairs”, provides the guidance needed to adequately prepare this document.

Copies of all information sent to the Official Receiver and provided to the bankrupt are to be maintained in the estate file.

Directive 32 allows for electronic recordkeeping of the estate records under specified conditions. Generally, the electronic estate records must “ensure the accessibility, authenticity, integrity, reliability, readability and perennity of the information recorded therein.”

2.3.6. Initial steps to commence legal proceedings under the BIA

After the initial assessment and after all of the necessary information has been obtained, the formal documentation will be prepared for filing with the Official Receiver. These documents will vary depending upon the type of proceedings, but typically will include:

- Assignment for General Benefit of Creditors (if bankruptcy);
- a copy of the proposal or notice of intention to file a proposal (if proposal) or a copy of the consumer proposal (if proposal under Division II of Part III of the BIA);
- a Statement of Affairs (except in the case of the filing of a notice of intention);
- a list of creditors;
- the Estate Information Summary;
- Form 65 – Monthly Income and Expense Statement; and
- an Assessment Certificate.

Once these documents are filed with and accepted by the Official Receiver, the debtor has legally filed an assignment in bankruptcy or has commenced a proposal process and is now bound by the BIA.

It is critical that the debtor understand that once the documents are signed and filed, changing his mind can have very dire consequences. Once a bankruptcy is filed, it cannot be withdrawn. Once a Division I proposal process is filed, it cannot be withdrawn, and any insufficiency or missed deadline in the process is likely to result in bankruptcy. A consumer proposal can be withdrawn prior to (deemed) court approval, but that withdrawal may affect the ability to obtain a stay of proceedings if a subsequent consumer proposal is filed.

After all documents have been prepared and signed, it is important to ensure that the bankrupt retains the following information:

- acknowledgement of receipt of notice to bankrupt;
- acknowledgement of surplus income obligations;
- a copy of any guarantee of costs related to the bankruptcy; and

- a statement for purposes of recording monthly income and expenses.

Module 3 will explain the administration of a bankruptcy in more detail. Module 4 and Module 5 will explain the administration of proposals in more detail.

2.4. Alternate courses of action

2.4.1. Overview

An assignment in bankruptcy is not appropriate for everyone in financial difficulty. In a bankruptcy, all assets owned by the debtor, except certain assets that are exempt from seizure, will be realized upon by the Trustee and the proceeds distributed equally to his creditors. The Administrator should be familiar with other options that may be available to the debtor and inform the debtor accordingly.

2.4.2. Non-legislative debt settlement arrangements

If the debtor is able, he may be able to contact his creditors and work out a repayment arrangement with each separate creditor. This takes a significant amount of time and requires willingness to hold these discussions in a co-operative manner. Most creditors are willing to accept some form of reasonable repayment schedules.

Another possibility is for the debtor to arrange for a debt consolidation loan from the debtor's bank. If approved, all the debtor's debts will be paid off and replaced with one large consolidated loan. This loan will have specific terms of repayments, over a longer period of time that may be more manageable to the debtor. This will stop the many creditor/collection calls from the individual creditors and may reduce the interest charges incurred by the debtor, as the interest on the loan may be lower than the interest charged by the consumer credit granting organizations such as credit card companies.

In both arrangements, the debtor will keep his assets.

2.4.3. Orderly payment of debts

BIA, Part X

Another alternative for a debtor in some provinces[3] is to obtain a Consolidation Order under Part X of the BIA. The Consolidation Order allows a debtor to pay off his debts over three years. It sets out the amount and the times when payments are due to the court and the court will distribute the payments to the creditors. Unlike in bankruptcy, the debtor will not lose his assets. Consolidation Orders are available in Alberta, Saskatchewan, Prince Edward Island or Nova Scotia.

[3] Candidates are encouraged to determine if their province offers the Orderly payment of Debts **("OPD")** program or a voluntary payment scheme (colloquially referred to as the "Loi Lacombe" in Quebec).

2.4.4. Ordinary bankruptcy vs. summary bankruptcy

BIA s. 155-157

No one who is insolvent is precluded from filing a bankruptcy, provided he is not already an undischarged bankrupt. A debtor may even file bankruptcy multiple times (although each subsequent bankruptcy may be longer than the previous bankruptcy and obtaining credit afterwards may be problematic). Once a debtor has decided to file an assignment in bankruptcy, the Trustee will file the official bankruptcy documents as either a summary administration or an ordinary administration. The only impact to the bankrupt is that in a summary administration, a notice of bankruptcy is not published in a newspaper where he lives.

The distinction, however, is important to the Trustee as the type of administration determines which set of rules the Trustee is to follow and how the Trustee calculates and withdraws his fees.

A summary administration is only available in respect of individual bankrupts (not corporations) where the estimated net realizable value of the assets of the bankrupt will not exceed $15,000 (or such other amount as is prescribed).

An ordinary administration is how all business bankruptcies are filed and how individual bankruptcies are filed if the estimated net realizable value of the assets of the bankrupt will exceed $15,000. The difference between the two types of filings is the reduction of the cost of administering a summary administration file (since it has fewer assets to pay for these costs). Sections of the BIA set out the tasks that either do not have to be completed or are streamlined in a summary administration, including:

- certain notices can be combined into one notice;
- notices can be sent by regular, not registered, mail;
- a first meeting of creditors is not mandatory unless creditors request such a meeting;
- no publication of the notice of bankruptcy in a newspaper is required unless ordered by the court; and
- a separate bank account need not be opened by the Trustee.

In addition, the manner in which the fees of the Trustee are calculated and withdrawn from the estate differ from that under an ordinary administration.

Module 6 discusses summary vs. ordinary administration in more detail.

2.4.5. Conversion of summary administration to ordinary administration

BIA s. 49 and Circular 2R

There may be situations where, after the filing of an assignment as a summary administration, it becomes apparent that there will be extraordinary time or disbursements

incurred in the administration. It is proper for the Trustee to recover such costs through the conversion of the estate from a summary to an ordinary administration.

The process to convert the status of an estate has these stages:

1. The Trustee will make an application in writing to the Official Receiver advising of the receipts and reason for the conversion request.
2. The Official Receiver, if he feels it is warranted, may approve the request.
3. Once the Official Receiver agrees with the conversion of the estate, the Trustee must adhere to the normal requirements for ordinary administrations (i.e., taxing of accounts) unless otherwise directed.

2.4.6. Proposals

A proposal is an agreement between a debtor and his creditors and usually involves the unsecured creditors agreeing to accept something less than 100% of their outstanding accounts, or to grant additional time to make payment, or both. Generally, proposals may be used when a debtor recognizes that he can afford to pay a portion of the debts, but not all and not right away. In a proposal, the debtor retains his assets, but proposes to pay his creditors a reasonable amount over a period of time. Normally the debtor can make these payments from future earnings combined with the sale of selected assets if the debtor so chooses. It is important to note that there is no set rule as to how a proposal is designed and from what sources the payments are made. This depends on the imagination of the person drafting the proposal, public policy (because the proposal should not purport to do something that is illegal or immoral) and what is acceptable to the creditors. For example, the debtor's proposal could be financed from future earnings, sales of assets, new loans, money contributed by a family member, etc., or a combination of sources. Usually the proposal will require a greater dividend to creditors than that which they would receive should the debtor file an assignment in bankruptcy.

The debtor must be insolvent to file a proposal.

Just as there are two different types of bankruptcies, there are two types of proposals. Division I proposals and consumer proposals, also known as Division II proposals (named as such because the consumer proposal provisions are found in Division II of Part III of the BIA, while the "regular" proposal provisions are found in Division I of Part III of the BIA). The type of proposal available to a debtor is dependent upon whether or not the debtor is an individual and on the estimated total of his debts (excluding a mortgage on a principal residence).

The debtor needs to carefully decide which proposal to file, as there are risks and benefits to each type.

2.4.7. Division I proposal vs. consumer proposal

A Division I proposal is available to any natural person (i.e., a human being) and to all corporations, regardless of the amount of debt owing to creditors.

A consumer (Division II) proposal is available only to a natural person whose aggregate debts, excluding any debts secured by the person's principal residence, do not exceed $250,000 or such other maximum as is prescribed. Corporations cannot file a consumer proposal.

An individual may choose between filing a Division I and a consumer proposal (provided, of course, that he meets the criterion for a consumer proposal).

During your interview, you may discuss the differences between the two types of proposals and the risks and benefits of each type. See the table below for more details.

Comparison of proposal types

NOTE: The details of a Division I vs. consumer proposal are discussed in more detail in Module 4 and Module 5.

Common debtor question	**Division I proposal answer**	**Consumer proposal answer**
Do I need to attend mandatory counselling sessions?	No	Yes
Can I change my mind after filing a proposal and request that it be withdrawn?	No – there is no possibility of backtracking without special permission from the court. If the proposal is not filed or not accepted, a bankruptcy occurs.	You can withdraw the proposal prior to court approval or deemed court approval, however, if you make another proposal within 6 months, the stay provisions will not apply.
Do I need to attend a creditors' meeting?	Yes, a creditors' meeting must be held for creditors to vote on the proposal.	Yes. But a meeting will only be held if creditors with an aggregate of at least 25% of the value of proven claims have so requested.
What happens if creditors reject the proposal?	There is an automatic bankruptcy. The Trustee will then realize upon all non-exempt assets owned by you for distribution to your creditors.	There is no automatic bankruptcy but the rights of the creditors revive and they will seek full payment. You can make another consumer proposal (but there may not be a stay of proceedings) or you can decide to make an assignment in bankruptcy. There are other options, but without the benefit of the extensive protection

		from creditors that arises from the stay.
Common debtor question	**Division I proposal answer**	**Consumer proposal answer**
How is the proposal accepted?	Proposal is accepted if, out of the creditors with proven claims voting in each class, a majority of creditors, holding at least 2/3 of the dollar value of the claims votes 'yes' (i.e., two conditions, majority in number and 2/3 in value, applied only to those who decide to vote).	Proposal is deemed to be accepted if there is no creditor meeting; OR If a meeting is required, the proposal is accepted if the majority of creditors, based on dollar value of claim, vote in favour of the proposal at the meeting (i.e., one condition, simple majority calculated based on 1 vote per $ of claim, applied only to those who decide to vote).
How does the proposal become binding on all creditors?	A court hearing must be held to obtain court approval.	The proposal is deemed accepted by the court 15 days after creditor approval, unless a creditor, the Official Receiver or the Administrator requests a review by the court. If a review is requested, a court hearing must be held to obtain court approval.
What happens if I can't make the payments after the proposal is accepted?	If you default, there is an opportunity to remedy the default within 30 days, or such longer period as is approved by the inspectors or the creditors. If the default is not remedied within that delay, the proposal is officially in default and the creditors or the Trustee can make application to the court to annul the proposal. This will result in the deemed bankruptcy of the debtor.	If you default, the proposal is annulled and the creditors' rights revive. They can seek full payment, plus interest, of the debt owing, less any dividends received in the proposal. Administrators have discretion to revive a consumer proposal that would otherwise be deemed annulled, however, creditors retain the right to object to the revival. Furthermore, application may be made to court to revive the proposal. There is no automatic bankruptcy.

2.5. Brief introduction to insolvency concepts

2.5.1. Duties of the debtor

BIA s. 158, 159, and 198 – 200

In most instances, debtors contemplating bankruptcy will not be familiar with the bankruptcy process, their rights in bankruptcy, or their duties and responsibilities as bankrupts. You need to inform the debtor of all relevant information to enable them to make an informed decision. Debtors filing proposals have duties to perform even though they have not filed an assignment in bankruptcy. These duties are the same as the duties of a bankrupt, insofar as they are applicable in the context of the particular proposal (for example, an obligation to help the Trustee realize on the property of the bankrupt would not apply to a proposal unless the proposal provides for the Trustee realizing on property).

If a debtor fails to comply with his duties, that fact will be taken into consideration and might prevent him from getting an automatic discharge from bankruptcy, or having the proposal completed. It is critical that the debtors are properly informed and understand their duties and rights under the Bankruptcy and Insolvency Act.

Immediately before the debtor, whether consumer or corporate, files an assignment in bankruptcy or a proposal, he should be given a copy of "Notice to Bankrupts and Officers of a Bankrupt Corporation with Regard to Their Duties and Status". If need be, the document should be explained to the debtor, since the document is to be signed by the debtor to confirm it has been received and understood. The signed original notice should be maintained on file and a copy given to the debtor.

2.5.2. Counselling

Directive 1R

In order to be eligible for an automatic discharge, or to obtain a Certificate of Full Performance in a Division II proposal, the debtor must attend two counselling sessions. The first counselling session deals with budgeting with the debtor developing a realistic budget and discussing expense tracking strategies. The second counselling session covers financial goal-setting, spending habits and the responsible use of credit. The requirements are set out in Directive 1R –"Counselling in Insolvency Matters".

After each session, both the Trustee (or the BIA counselor registered under the LIT's license) and the debtor sign a Report on Insolvency Counselling to acknowledge the session was completed. These reports are submitted to the OSB.

2.5.3. Contributions from earnings (surplus income)

BIA Form 65

Directive 11R

A common question that bankrupts ask is, “What happens to the wages I earn from my job now that I am bankrupt?”

All wages earned by the bankrupt after filing an assignment in bankruptcy will continue to go directly to the bankrupt. His pay cheque will continue to be deposited into his bank account or in whatever manner he receives his pay. However, there is a requirement that the bankrupt must contribute some of these earnings, each month, to the Trustee during the bankruptcy period. How much he is to contribute is set out in Directive 11R - “Surplus Income”. This amount is updated annually to reflect current economic conditions.

The BIA requires the bankrupt to disclose the “family unit’s total monthly income” which includes his earnings and the earnings of anyone else in the family unit. Family unit is defined in Directive 11R as including any persons who reside in the same household and who benefit from either the expenses incurred or income earned by the bankrupt, or who contribute to such expenses or earnings. The bankrupt is also required to disclose the family unit’s total monthly non-discretionary expenses (i.e., child/spousal support, medical expenses, child care). After subtracting the non-discretionary expenses from the family unit’s total income, the Directive allows a deduction of a standard minimum monthly amount the family unit is allowed to retain. If there are any funds remaining after the minimum standard amount is deducted, this amount is considered surplus income. A formula as to the debtor’s portion of total income is then used to determine the final payment amount that is to be remitted to the Trustee.

In situations where the non-bankrupt spouse refuses to divulge their income or expenses, as part of the family unit, the standard minimum monthly amount that is deducted from the family unit income is reduced by 50%. Refer to Example 6 in Appendix B of Directive 11R.

Upon filing an assignment in bankruptcy the bankrupt must prepare (and the Trustee is to review) the required financial information as set out in “Monthly Income and Expense Statement of the Bankrupt and the Family Unit and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt.” This form is then sent to the Official Receiver and a file copy is retained.

2.5.4. Mediation

BIA s. 68

Bankrupts have a right to disagree with certain decisions made by a Trustee and they can request that a third party review the situation. This process is called mediation. A bankrupt can request mediation if he does not agree with the amount of the monthly surplus income payments established by the Trustee.

Usually, the mediation hearing will resolve the issue and the parties will agree on a settlement. However, if no agreement is made, the matter is then brought before the court and the court's decision is final.

2.5.5. Assets

In the event of an assignment in bankruptcy the assets of the bankrupt vest with the Trustee.

Each province has its own legislation about what assets are exempt from execution or seizure. Certain federal laws can also state that certain assets are exempt from execution or seizure. Those legal rules also apply to the right of possession of assets by a Trustee. Property of the bankrupt and exempt assets are discussed in more detail in Module 12.

In a proposal, the debtor may choose to retain his assets.

3. Bankruptcy Administration Process Overview

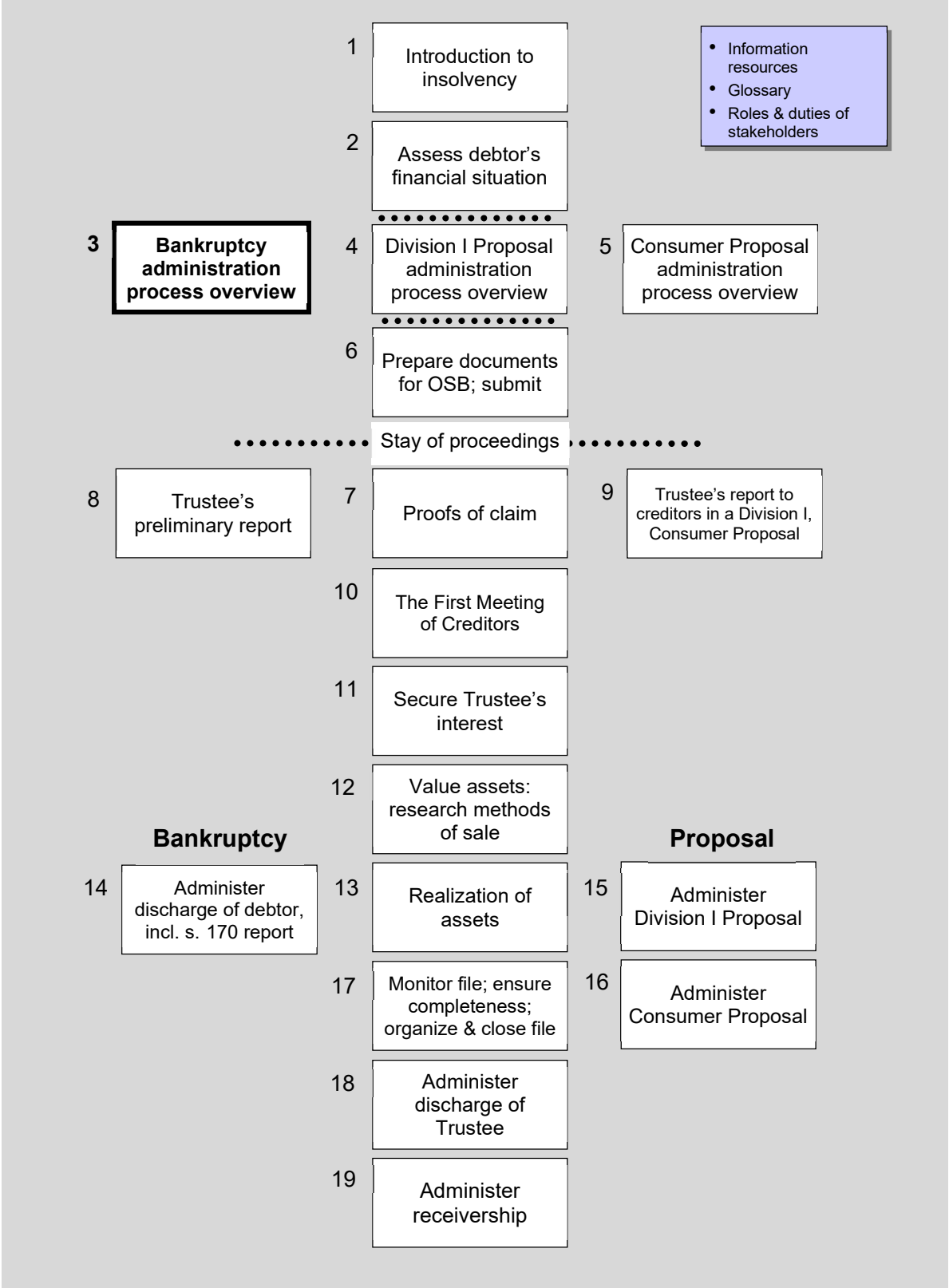


Table of Contents

3.1. Introduction

Module objectives

At the end of this module, you will be able to describe an overview of bankruptcy administration.

Assigned readings

- BIA s. 49(6), 67(1)(a), 68, 69, 71, 81, 81.1, 84, 102, 124, 135, 136(1), 155 and 170
- BIA Forms 21, 22, 31, 65, 67, 69, 70, 78, 79
- BIA Rule 130
- Directives 9R and 26

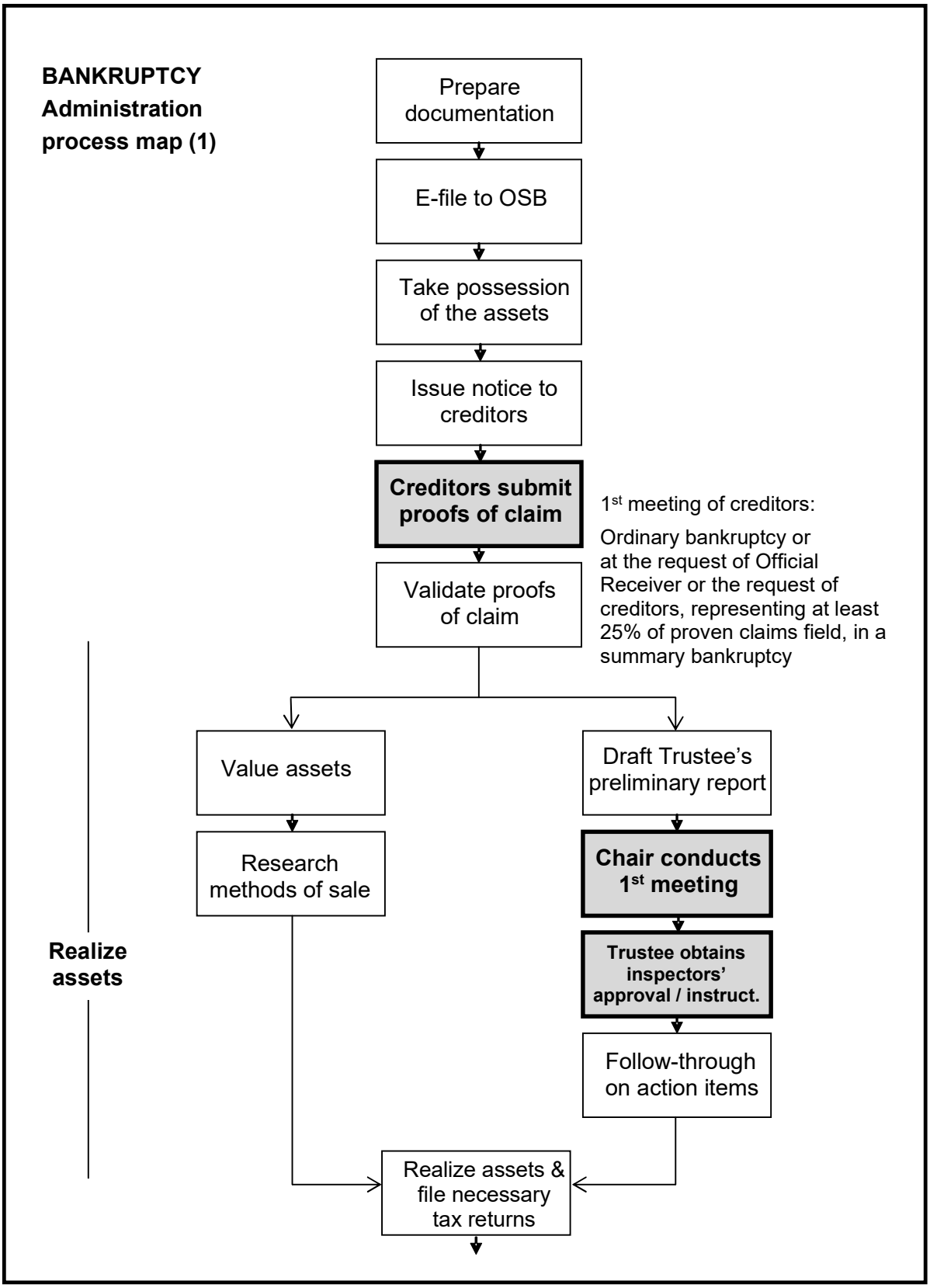
In Module 2, you saw that bankruptcy may be one of the debtor's options. This module provides an overview of the insolvency administration process for bankruptcy. The overview is the foundation for later modules that describe the main tasks of administering a bankruptcy engagement in greater detail. By first "seeing the forest" and previewing "the trees," you will be better prepared to learn the individual tasks.

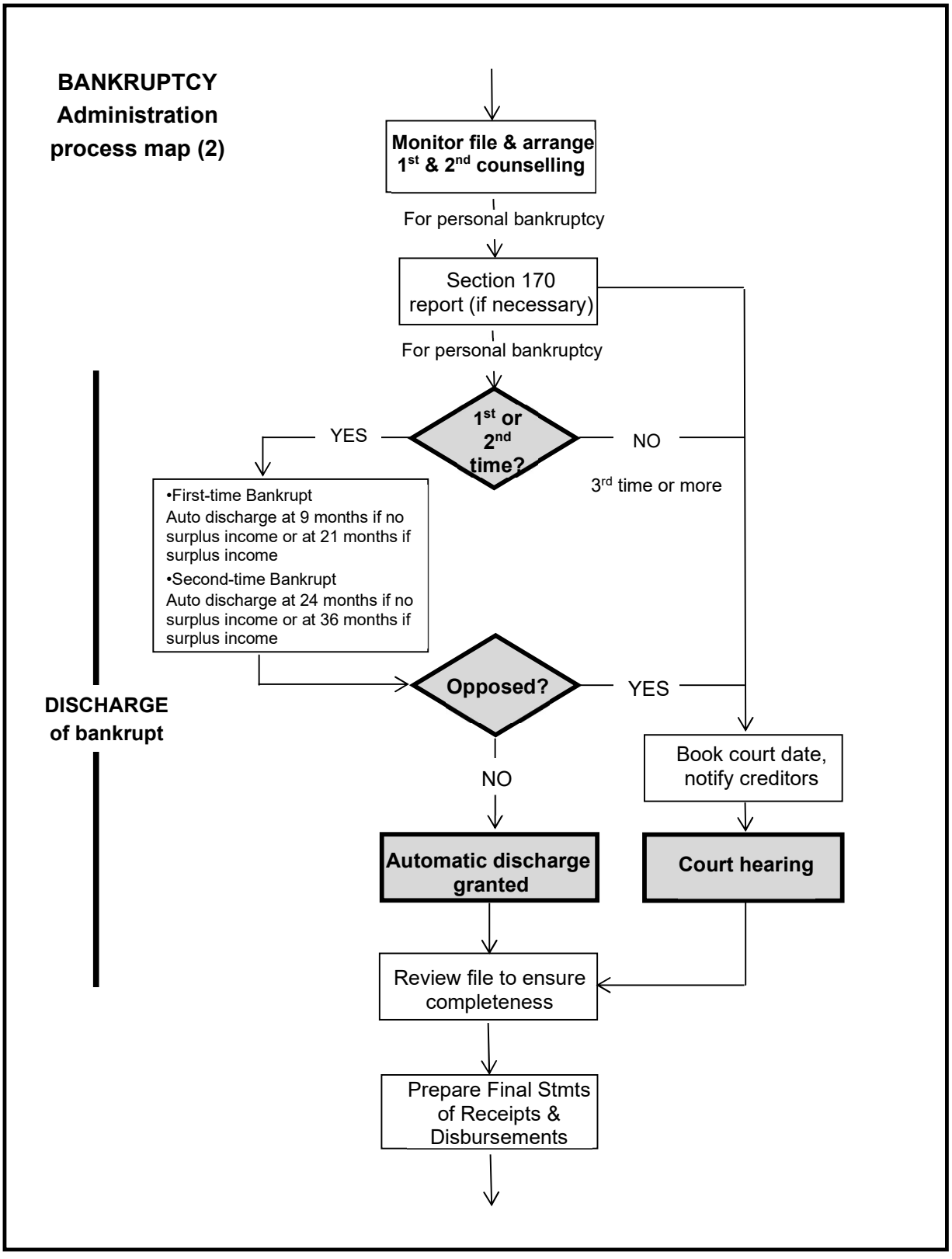
3.2. The bankruptcy administration process

The next three pages illustrate the bankruptcy administration process. The key elements of each task are described in the pages following the process charts.

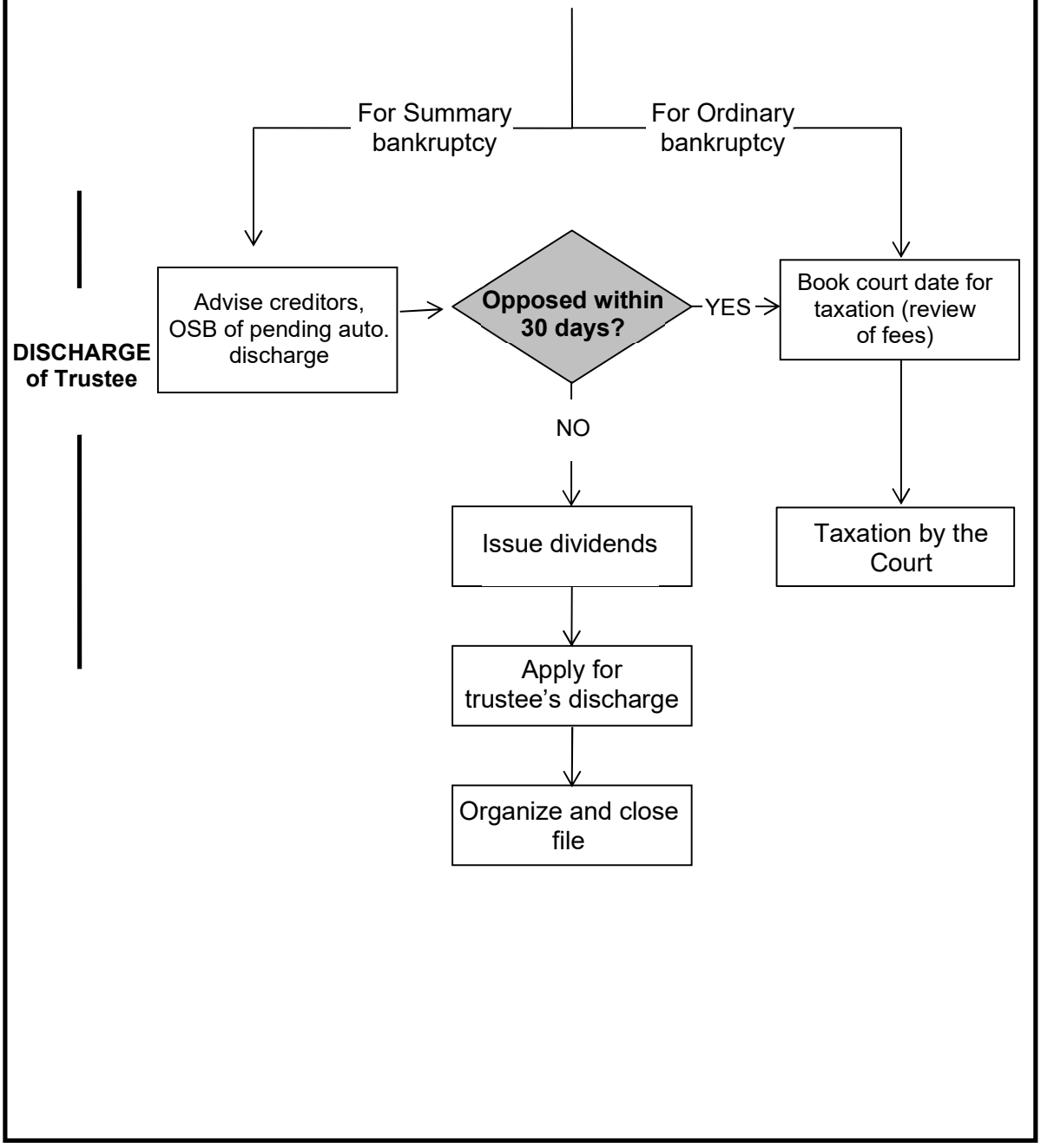
Grey process boxes

Grey boxes indicate actions or events that may not be the responsibility of the insolvency administrator. Examples: *Creditors submit proof of claim*; *Automatic discharge granted*. They are included to complete the picture and enable you to see your role in the context of the overall process and other stakeholders.


BANKRUPTCY
Administration
process map (1)
Prepare documentation
E-file to OSB
Take possession of the assets
Issue notice to creditors
Creditors submit proofs of claim
Validate proofs of claim
1st meeting of creditors:
Ordinary bankruptcy or at the request of Official Receiver or the request of creditors, representing at least 25% of proven claims field, in a summary bankruptcy
Value assets
Research methods of sale
Draft Trustee's preliminary report
Chair conducts 1st meeting
Trustee obtains inspectors' approval / instruct.
Follow-through on action items
Realize assets & file necessary tax returns
Realize assets

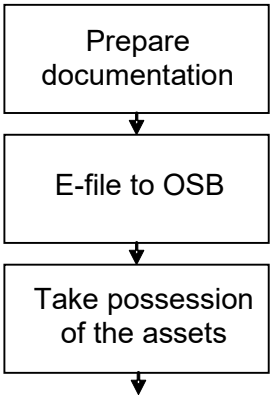

BANKRUPTCY
Administration
process map (2)
Monitor file & arrange 1st & 2nd counselling
For personal bankruptcy
Section 170 report (if necessary)
For personal bankruptcy
1st or 2nd time?
YES
NO
3rd time or more
•First-time Bankrupt
Auto discharge at 9 months if no surplus income or at 21 months if surplus income
•Second-time Bankrupt
Auto discharge at 24 months if no surplus income or at 36 months if surplus income
Opposed?
YES
NO
Book court date, notify creditors
Automatic discharge granted
Court hearing
Review file to ensure completeness
Prepare Final Stmts of Receipts & Disbursements
DISCHARGE of bankrupt

BANKRUPTCY
Administration
process map (3)



3.2.1. Assessment

Pursuant to the OSB Directive 6R, the Trustee is required to assess the debtor. A full discussion of how this is done was covered in Module 2.



3.2.2. Prepare documentation

BIA Forms 21, 65, 78 and 79

Directives 9R and 26

Preparing documentation is covered in more detail in Module 6.

In a literal reading of the *Bankruptcy and Insolvency Act,* it would appear that the Trustee is not involved in the bankruptcy process until his/her appointment. This is only true in situations where a creditor (or creditors) petitions a debtor into bankruptcy. It is far more common for insolvent persons to determine they need to file an assignment in bankruptcy during or following the initial assessment meetings held at the Trustee's office. Based on the information provided in these meetings, the Trustee compiles the documentation necessary for the filing of the assignment in bankruptcy and for the upcoming administration. While it is true that the Official Receiver is the person who appoints the Trustee, the Official Receiver will usually (almost always, save for very exceptional circumstances) appoint the Trustee who assisted the debtor in preparing the bankruptcy documentation, because at least the Official Receiver knows that this Trustee is willing to take on the appointment.

Each document that needs to be signed by the insolvent person is prepared for a specific purpose, in an industry-wide format in accordance with the *Bankruptcy and Insolvency Act*. You need to know the purpose of each document. Their accuracy and completeness are fundamental to the administration process. The Trustee compiles the documentation on behalf of the debtor because the Trustee is more familiar with the form and required content of the documentation, but it is still the debtor who is responsible for the accuracy and completeness of the information.

The documents that must be filed with the Office of the Superintendent of Bankruptcy (OSB) include the following:

- Statement of Affairs;
- Resolution authorizing the filing of an assignment
- Assignment for the General Benefit of Creditors;
- Monthly Income and Expense Statement of the Bankrupt and the Family Unit;
- Estate Information Summary; and
- Assessment Certificate.

Of course, the documents above are only filed if applicable – for example, an assessment certificate and a statement of monthly income and expenses would not be included for a corporation, and a resolution authorizing the assignment would not be included for an individual.

3.2.3. Submit to OSB

BIA s. 49

BIA Rule 130

When the documentation has been reviewed and signed by the Trustee and the insolvent person, it is electronically filed with the Official Receiver for review and response. With the filing of this documentation, the Trustee advises the Official Receiver whether the estate is to be administered as a Summary or as an Ordinary Administration bankruptcy based on the BIA.

The response of the OSB is to issue a Certificate of Appointment. The formal bankruptcy process commences with this appointment.

3.2.4. Secure Trustee's interest in assets

Securing the Trustee's interest in assets will be covered in more detail in Module 11.

Immediately upon appointment, the Trustee secures his interest in the assets of the bankrupt. This is done to ensure that the assets of the estate are not sold, transferred, damaged, stolen, or dissipated before they can be dealt with by the Trustee.

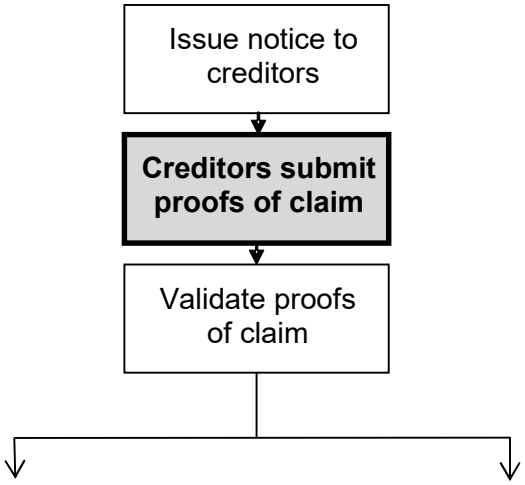
It also ensures that the assets do not cause harm or incur a potential liability for the estate, i.e., create environmental concerns.

Securing the assets of the bankrupt estate may take several forms, depending on the type of asset and the interest that the Trustee has. The securing may include:

- obtaining insurance;
- seizing and storing inventory;
- registering on title; and/or

- reviewing the interests of any other party in the same asset.

In all cases, the Trustee is to comply with the Act and BIA Rules, and the Directives of the OSB and act in a commercially reasonable manner. The Trustee must take the necessary steps to ensure the interests of the estate and the general body of creditors are protected until the assets are either sold or released.



3.2.5. Issue notice to creditors

Issuing notice to creditors is covered in more detail in Module 10. Notice of the bankruptcy must be issued to creditors within five business days following the date of appointment. In cases where legal action was commenced against the bankrupt at the time of the bankruptcy, it may be appropriate, immediately following the bankruptcy, to notify the creditor that commenced legal actions, and/or the court, of the stay of proceedings arising from the bankruptcy. The stay occurs automatically, notwithstanding notification.

3.2.6. When a meeting of creditors is required

BIA s., 71, 102 and 155

BIA Forms 66, 68, 69, 70 and 71

A meeting of creditors is required for:

- Ordinary bankruptcies; and
- Summary bankruptcies, if creditors holding, in aggregate, at least 25% of claims proven request a meeting. BIA Form 71 must be sent to creditors informing them of the meeting.

3.2.7. Creditors submit proof of claim

BIA s. 124 and 135

BIA Form 31 and Directive 22.

The onus of submitting a proof of claim is on the creditor pursuant to the BIA. The creditor should be able to accurately demonstrate the balance owing as of the date of bankruptcy.

The estate welcomes proofs of claims because they provide supporting documentation on security held by creditors on the property of the bankrupt and information on payments made by the bankrupt in the three months prior to the date of bankruptcy.

The filing of a proof of claim entitles the creditor to ultimately participate in any distribution of dividends, if the claim is found to be valid. In the event of a first meeting of creditors, the filing of a valid proof of claim in advance or at the start of the meeting entitles the creditor to vote at the meeting. The validity of the proofs of claim is determined by the Trustee pursuant to the BIA.

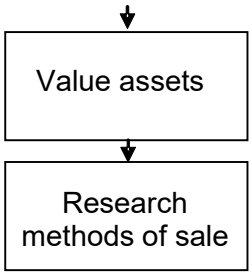
3.2.8. Validate proofs of claim

BIA s. 67, 81, 81.1, 124, 135 and 136

Directive 22

Validating proofs of claim is covered in more detail in Module 7**.** Proofs of claim are essential for the fair and equitable distribution of the estate, ensuring a creditor's voting power and entitlement in dividends. It is limited to the exact balance owing to the creditor at the date of bankruptcy. The Proof of Claim must be accurate, supported and complete. It is important to understand the requirements for a proof of claim to be valid and the procedure for disallowing a proof of claim considered to be invalid. At the first meeting of creditors, the chairperson has discretion to review the provable claims filed and allow them in whole or in part for the purposes of voting. This decision could be subject to revision by the court if contested.

Various types of claims may be made by creditors. In some cases, e.g., property claims, 30 day goods claims, etc., the Trustee may be required to respond within a given time period. The proper characterization of a claim, e.g., a preferred claim vs. an ordinary unsecured claim vs. a deferred claim, may have a dramatic effect on the funds available for distribution to ordinary creditors.



3.2.9. Value assets

To ensure that the assets of the bankrupt estate are not sold for an inordinately low price, reasonable steps are taken to determine market value prior to the Trustee making a sale. This typically includes commissioning professional appraisers to provide valuations.

Early valuation of the assets of the bankrupt estate provides:

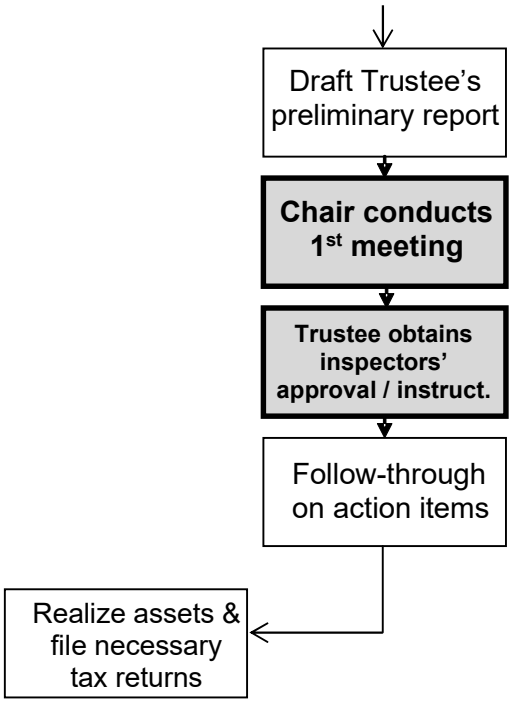
- a basis for reporting to creditors on anticipated realization; and
- supporting documentation for amounts that are eventually realized.

3.2.10. Research methods of sale

Researching methods of sale is covered in more detail in Module 12. The *Bankruptcy and Insolvency Act* allows the Trustee to use various methods of sale; for each type of asset and set of circumstances, there is usually one method that is most suitable. In every case, the Trustee conducts a cost-benefit analysis to assess the risks and costs associated with the available methods of sale. The results enable the Trustee to make recommendations and the inspectors of the estate to make informed decisions on the methods to be used.

Depending on the extent of the Trustee's interest in the asset relative to the claim of any third party, additional investigation may be necessary to realize on the Trustee's interest. For example, the preferred method of sale changes significantly in the case of:

- real property, where the bankrupt is a joint owner versus sole owner; and
- an asset fully or partially encumbered by a creditor vs. being owned free and clear of encumbrances.



3.2.11. Draft Trustee's preliminary report

Directive 30

Drafting the Trustee's preliminary report will be covered in more detail in Module 8. The Trustee gathers preliminary indications of what the bankrupt estate consists of and what future course of action is feasible to realize on the assets of the bankrupt.

The Trustee completes the preliminary report for the creditors. If, in the Trustee's opinion, there are few substantive issues, the report to the creditors may be delivered verbally at the meeting of creditors.

3.2.12. Chair conducts 1st meeting

BIA s. 105

The Official Receiver, or his designate, will chair the first meeting of creditors. The typical agenda of a first meeting of creditors includes:

- consideration of the affairs of the bankrupt;
- the affirmation or substitution of the Trustee; and
- the appointment of inspectors.

3.2.13. Instructions from creditors on administration issues/ Trustee obtains inspectors' approval / instructions

As the method of selling or an offer to purchase may not have been available at the first meeting of creditors, there may be a need to receive further authorization or instructions from inspectors at a later date. The BIA requires that all sales or disbursements from the estate be authorized first by the inspectors. Inspectors meetings are conducted throughout the bankruptcy administration as necessary. In a summary administration, if there are no inspectors appointed, the Trustee is able to realize on assets without prior approval.

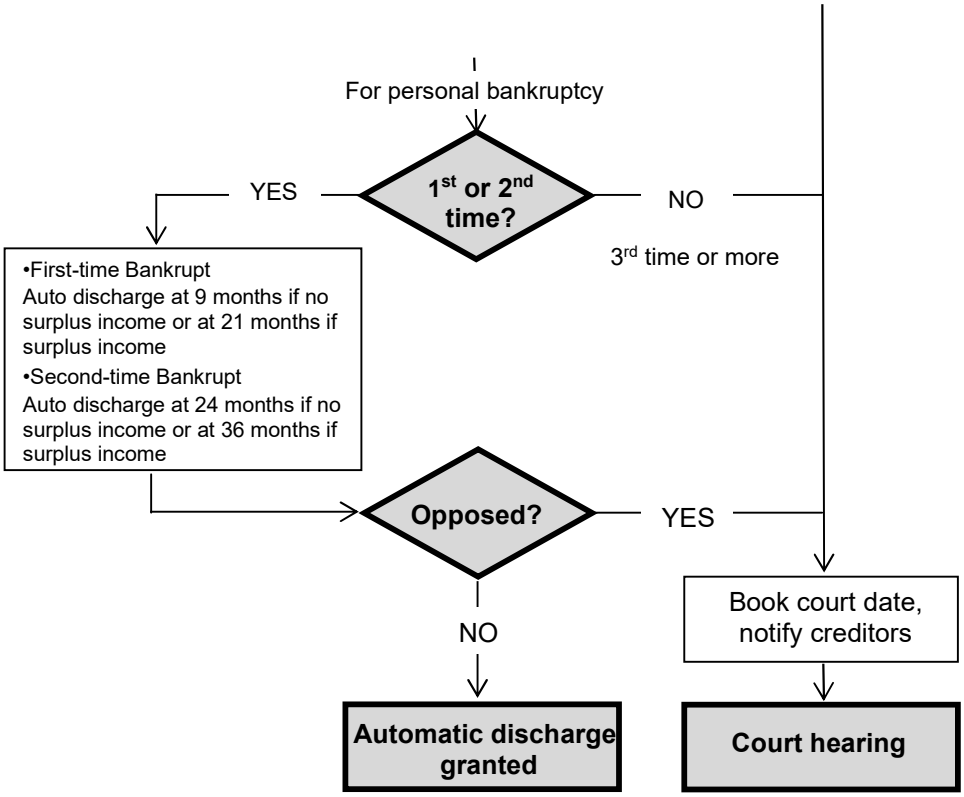
3.2.14. Follow through on action items

As instructions may have been provided to the Trustee during the first meeting of creditors, the estate needs to follow through on them. Instructions typically include realizing specified assets of the estate by agreed methods or continuing to research the value of assets or method of sale.

3.2.15. Realize assets

With approval from creditors or from inspectors, a sale may be effected in accordance with instructions provided. When it comes to the sale of an asset to a related party, court approval is required if there are no inspectors, or if requested by creditors.

Before an asset can be sold, you must ensure there are no encumbrances. This is usually done by requesting a search through the Personal Property Security Act (PPSA), or a title search when dealing with real estate. Sale documents must be reviewed to make sure that the terms of the transaction, as previously discussed with the purchaser, are clear and accurate and that the estate is released from future liability.



3.2.16. Monitor file

The estate is monitored to ensure that progress is being made:

- by the bankrupt in fulfilling his obligations;
- by the Trustee in carrying out his duties, i.e., pre- and post-bankruptcy tax returns, reconciliation of trust accounts, etc.;
- by the Trustee's office in providing required services, i.e., two counselling sessions for the bankrupt (that is, an individual); and
- by service providers, i.e., realtors, auctioneers, etc. for services commissioned by the estate.

3.2.17. Submit Section 170 report

Submitting a Section 170 report (Form 82) will be covered in more detail in Module 14. Prior to the discharge of a bankrupt individual, pursuant to Section 170 of the BIA, the Trustee may be required to complete a report. Commonly referred to as the "Section 170 report", this standardized report serves:

- as a report card on the bankrupt regarding compliance with required duties;
- as a status report on the asset realization made to date by the Trustee and the anticipated realization expected in the future; and
- on any matter considered by the Trustee to be relevant for the court to make a decision regarding the bankrupt's discharge. For example, while it is not a requirement, the Trustee often offers a recommendation regarding the terms of the discharge, taking into consideration the bankrupt's conduct, financial circumstances and ability to pay.

3.2.18. Discharge – first time or second time, not opposed

BIA s. 168 – 178

- Summary administration – Notice of Bankruptcy and of Impending Automatic Discharge of the Bankrupt and Request of a First Meeting of Creditors is sent within 5 business days of the filing of the assignment, so no further notice is required.
- Ordinary administration – Notice of Bankruptcy, First Meeting of Creditors and Impending Automatic Discharge of the Bankrupt is sent within 5 days of the filing of the assignment, so no further notice is required.

In summary administrations, creditors are advised with the initial notice that the bankrupt is a first or second time bankrupt and that an automatic discharge is pending. If the Trustee and/or creditors wish to oppose the discharge, they must do so prior to the expiration of the nine month[4] or twenty-one month[5] period in the case of a first time bankrupt, or within a twenty-four[4] or thirty-six month[5] period for a second time bankrupt.

If, upon the expiry of nine months, twenty-one months, twenty-four months, or thirty-six months following the date of bankruptcy, neither the Trustee nor creditors have opposed the discharge, the bankrupt is granted an automatic discharge.

In ordinary administrations, standard practice is that the creditors receive the notice of automatic discharge of a first or second time bankrupt together with the notice of the first meeting of creditors.

[4] if there is no surplus income payment requirement

[5] if there is a requirement to pay from surplus income

The Trustee, as opposed to the court, issues the Certificate of Discharge in the two scenarios noted above since all parties who would have an interest in the bankrupt's estate have been given an opportunity to oppose the discharge.

3.2.19. Discharge where court hearing is required

Only the court may issue a discharge from bankruptcy if a discharge has been opposed by the Trustee or a creditor, if the bankrupt has filed an assignment in bankruptcy three times or more, or if the bankrupt has a high level of income tax debts.

3.2.20. Book court hearing

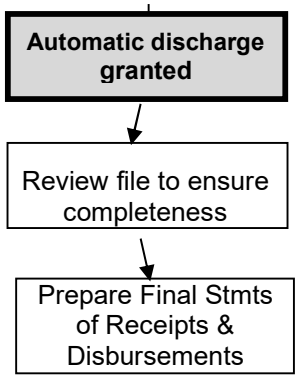
The outcome of the bankruptcy will be decided by a sitting official of the Bankruptcy court. The Trustee schedules a hearing date. The booking procedure may vary among bankruptcy districts. Should there be a delay between the filing of the section 170 report and the date of the hearing, the Trustee may be required to prepare and forward a supplementary report to the court.

3.2.21. Court hearing

The court may require that the bankrupt attend the hearing in order that the court official and/or the Trustee and/or an opposing creditor may question him.

Having considered the recommendation of the Trustee, the concerns of opposing creditors, and the statements of the bankrupt, the court official will issue one of the following:

- Suspended Order;
- Conditional Order;
- Refused Order;
- Absolute Order (Discharge);
- Adjournment of the proceedings (Sine Die or Adjourned Generally); or
- No order



3.2.22. Review file to ensure completeness

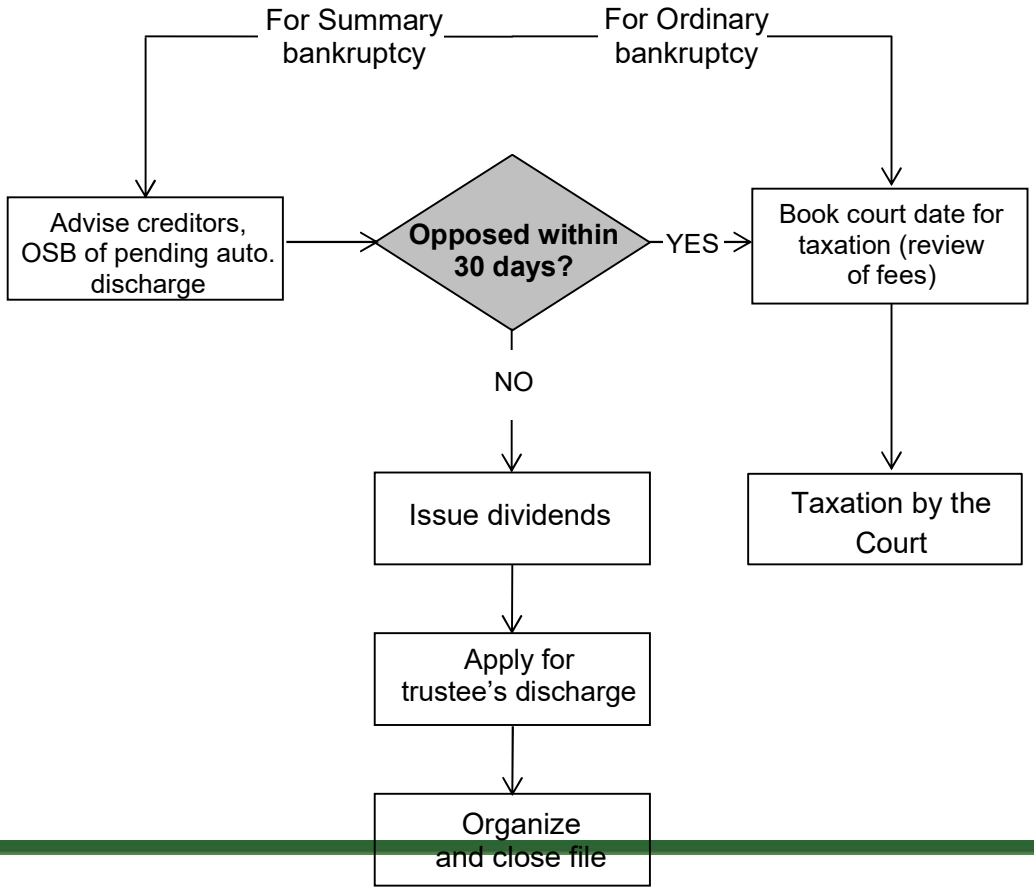
Before closing the estate, the Trustee:

- ensures that the realization of all assets is complete unless certain assets cannot be realized upon in which case the file should be properly documented;
- verifies that all sale proceeds are properly accounted for; and
- verifies that all costs of realization have been paid.

3.2.23. Prepare Final Statement of Receipts & Disbursements

Preparing Final Statements of Receipts and Disbursements will be covered in more detail in Module 18. A dividend sheet is prepared showing the allocation of the funds available to creditors. Proofs of claim by ordinary unsecured creditors are not typically reviewed or admitted by the Trustee until the dividend sheet is prepared, unless there is some reason for doing so at an earlier stage. The final statement outlines the funds realized and disbursed by the estate.

This statement must be approved by the inspectors at a meeting of inspectors if any, and then provided to the Office of the Superintendent for comment. Once a positive letter of comment (indicating that there is no need to go to taxation) is issued by the Office of the Superintendent, the Trustee may disburse the funds in accordance with the statement if the file is a summary administration or apply to court for taxation of his account if it is an ordinary administration.



3.2.24. Ordinary administration bankruptcy – book court date for taxation

The fees of the Trustee for an ordinary administration bankruptcy are subject to taxation (review) by the court.

The Trustee prepares an application to court which includes all of the information requested in the ordinary court procedures to approve the accounts and the fees. This will typically include a copy of the Statement of Receipts and Disbursements, an analysis of the billable time spent on the bankruptcy estate and an explanation of the tasks accomplished and complexities encountered. This information is often provided by way of an affidavit from the Trustee. Depending on the court, the contents of the letter of comment from the OSB and the requests expressed by inspectors or creditors during the administration, the creditors and/or the OSB may be notified of the upcoming taxation so they may attend to state any concerns regarding the amount of fees and disbursements incurred by the Trustee.

After taxation of the Trustee's account, the Trustee will send the creditors a notice advising them of the results (by providing the taxed final Statement of Receipts and Disbursements) and of the intention to distribute the final dividend and proceed to the Trustee's discharge. This notice provides the creditors with an opportunity to contest the contents of the Final Statement of Receipts and Disbursements within a specified delay. After the delay has expired, assuming no creditor contested, the Trustee can then issue dividends and pay other outstanding matters, e.g., legal fees etc. Once all funds have been distributed and the required delays have expired, the Trustee can apply to court for his discharge.

Summary administration bankruptcies are intended to have simplified procedures. In keeping with this intent, no taxation of the Trustee's Statement of Receipts and Disbursements is generally required by the Superintendent. A taxation process is possible, but this is the exception rather than the rule.

3.2.25. Issue dividends

Dividends may be issued, in accordance with the prepared Statement of Receipts and Disbursements, either upon inspector approval (interim dividends) or following the taxation of the Trustee's Final Statement of Receipts and Disbursements.

A copy of the Trustee's Statement of Receipts and Disbursements and the dividend sheet accompany all dividend cheques issued to creditors who have proven claims in the estate.

3.2.26. Apply for Trustee's discharge

Upon payment of dividends, the clearing of cheques and the bank account being closed, etc., the Trustee must make application to the court for its discharge.

3.2.27. Summary bankruptcy – advise creditors and OSB of pending Trustee discharge

Upon proper notification to creditors and the OSB, the Trustee is able to obtain a deemed discharge.

The effect of the Trustee's discharge is that:

- The Trustee is now discharged and can close his files.
- All unrealizable assets are returned to the bankrupt upon the Trustee's discharge. The Trustee retains an interest in any assets which may be realizable in the future.
- The Trustee is able to destroy the administration file in four years following his discharge.

3.2.28. Organize and close file

With all money paid out of the estate and the Trustee discharged, the Trustee organizes and closes the file. The estate trust account is closed and the file is stored for the statutory period, after which it may be destroyed.

4. Division I Proposal Administration Process Overview

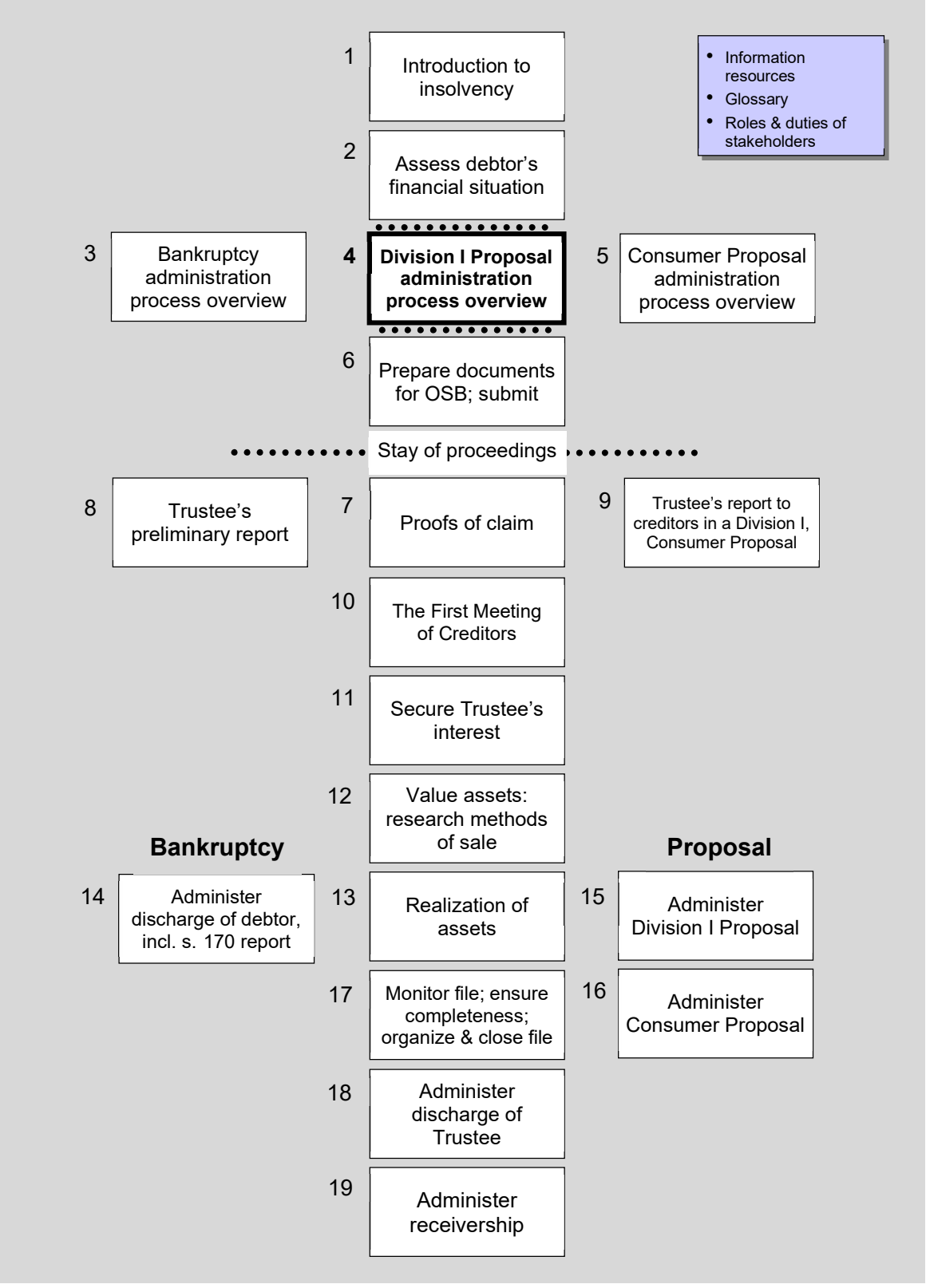


Table of Contents

4.1. Introduction

Module objectives

At the end of Module 4 and Module 5, you will be able to describe an overview of proposal administration.

Certain processes and procedures will be identical for both Division I and consumer proposals. Similarities in consumer proposal administrations will refer back to this module.

Assigned readings

- BIA s. 2(1), 4(2), 50 – 66, 50.4, 50(10), 69(1), 69.1(1-6), 91 – 101, 243(2) and 244 (1)–(2)
- BIA Rules 89 - 95
- BIA Forms 29 - 31, 33 - 34, 36 - 38, 40, 40.1, 41, 43, 45 - 46, 78 – 79 and 92
- Directives 6R, 22R and 24
- CAIRP - Standards of Professional Practice No. 9 and 10

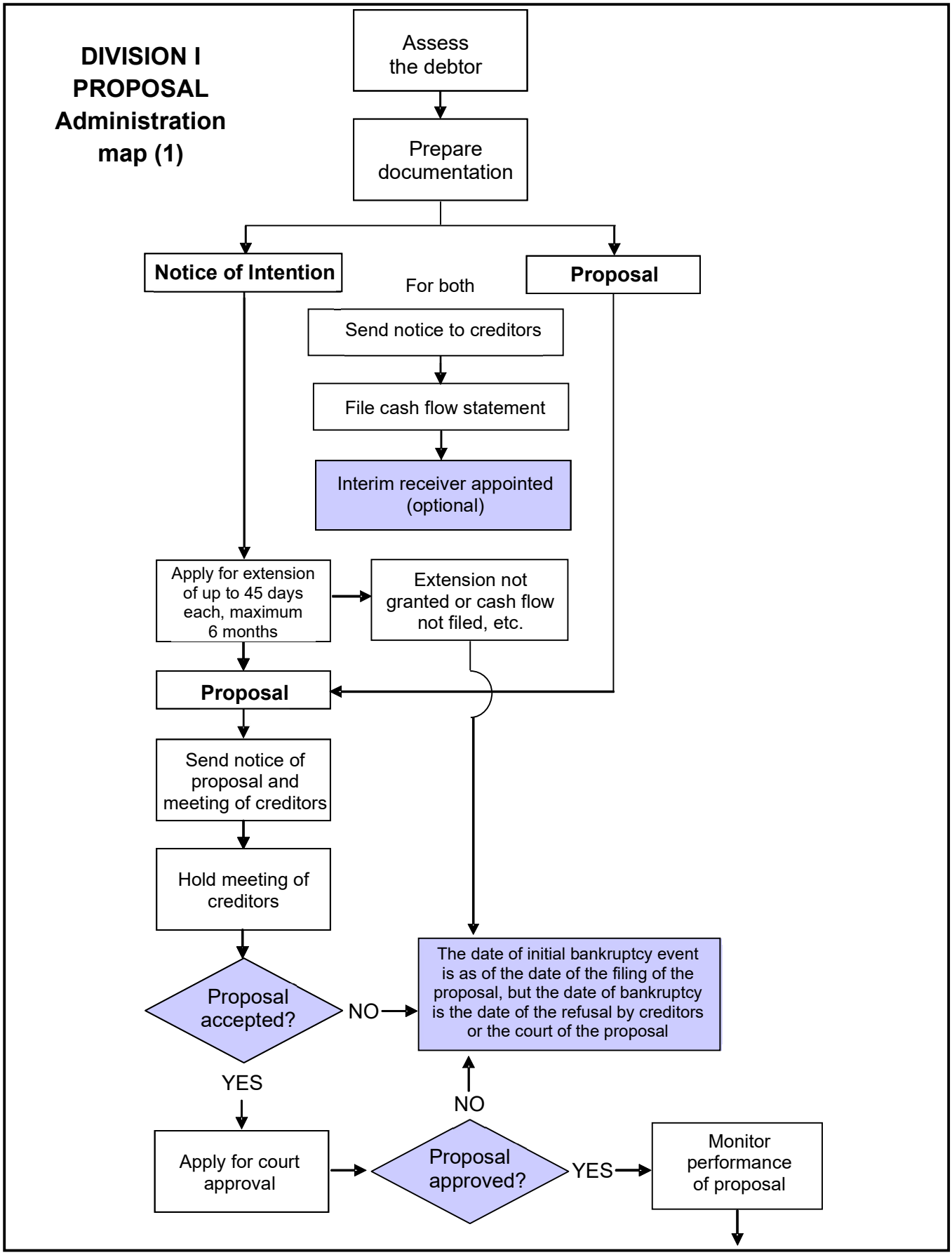
4.2. The Division I Proposal administration process

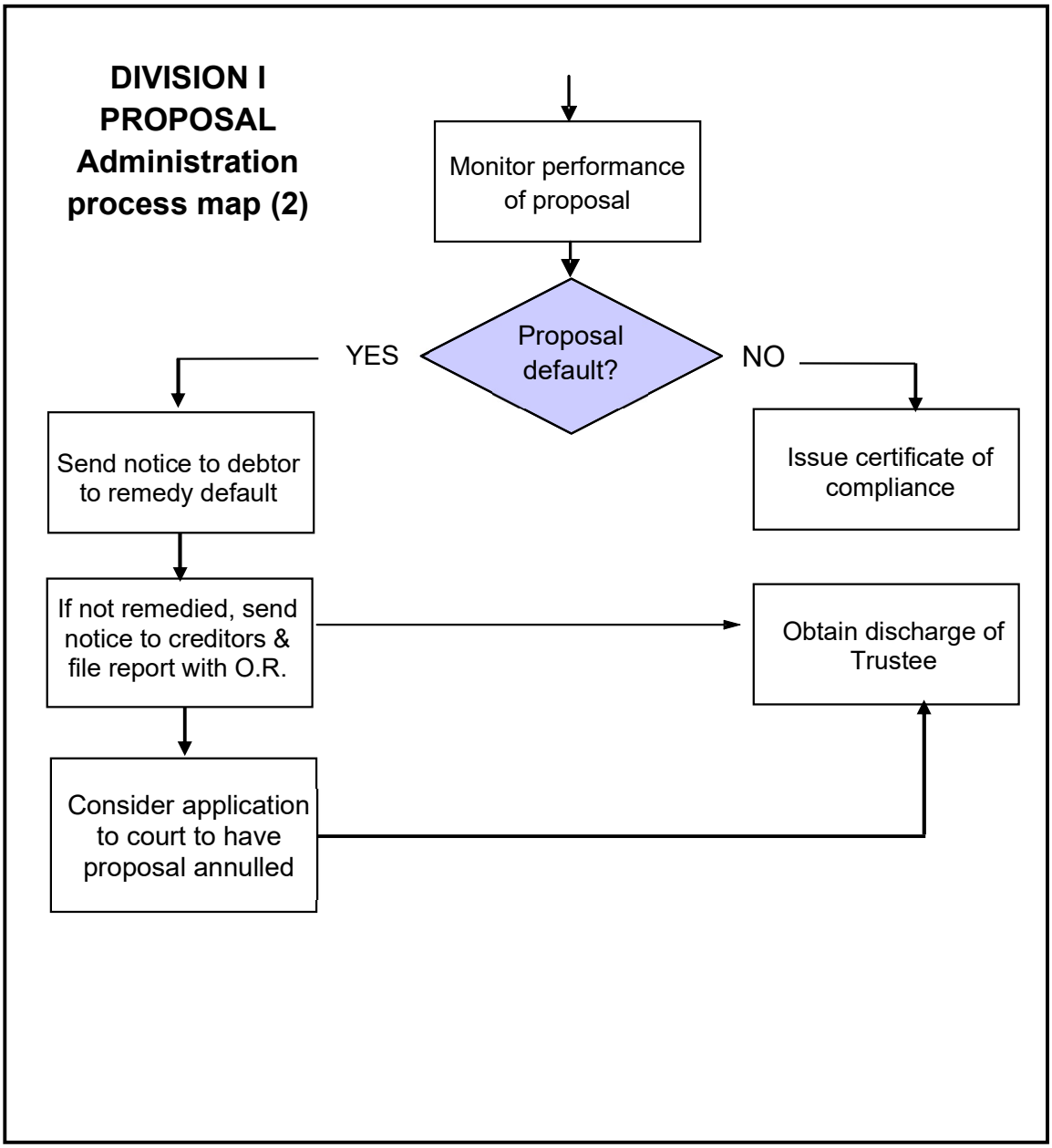
The next two pages illustrate the Division I proposal administration process. The key elements of each task are described in the pages following the process charts.

Grey process boxes

As seen in Module 3, grey boxes indicate actions or events that may not be the responsibility of the insolvency administrator. Example: *Interim receiver appointed (optional).* They are included to complete the picture and enable you to see your role in the context of the overall process and other stakeholders' responsibilities.

DIVISION I
PROPOSAL
Administration map (1)




DIVISION I
PROPOSAL
Administration
process map (2)
Monitor performance of proposal
Proposal default?
YES
NO
Send notice to debtor to remedy default
Issue certificate of compliance
If not remedied, send notice to creditors & file report with O.R.
Obtain discharge of Trustee
Consider application to court to have proposal annulled

4.3. Division I proposals

4.3.1. Definition

A Division I proposal is an agreement between a debtor and his creditors reached pursuant to the provisions set out in the BIA. Such an agreement usually involves unsecured creditors agreeing to accept an amount less than 100% of their outstanding debt, but a proposal could also include other characteristics, such as an exchange of property, an extension of time to make the payment, etc. A proposal could include one or more or all of these characteristics, but most often it involves primarily a payment of a lesser amount than what is otherwise due. This repayment can either be a lump sum payment or a percentage of each of the creditors' claims, may be paid in one instalment or over a period of time, and may or may not include some liquidation of assets. Proposals are generally used when a debtor recognizes that he can afford to pay a portion of his debt but not all.

4.3.2. Who can file a proposal?

BIA s. 50(1)

A Division I proposal can be made by:

- an insolvent person;
- a receiver, within the meaning of, but only in relation to, an insolvent person;
- a liquidator of an insolvent person's property;
- a bankrupt; or
- the Trustee of the estate of a bankrupt.

An insolvent person or bankrupt, as defined in the BIA, would include a corporation, an individual, a partnership or an income trust.

4.3.3. Who can a proposal be made to?

BIA s. 50(1.2)

A proposal must be made to all creditors generally, either en masse or separated into classes, as provided in the proposal. A proposal may also be made to secured creditors in respect of any class or classes of secured claims.

4.3.4. Assessment

BIA s. 50(1) and 243(2), Directive 6R

Before filing a proposal, the Trustee must make an assessment of the debtor. The assessment process is discussed in detail in Module 2.

For a debtor to file a proposal, the proposal must be more beneficial than bankruptcy. The Trustee will review the options available with the debtor during the assessment and the debtor will choose his best option. It is important to note that the final decision has to be the debtor's, as he is the party affected by this decision. The Trustee's role is to provide information on the various options and their possible consequences, to make sure the debtor makes an informed decision.

A debtor will assess his ability to make monthly payments for a period of time under the proposal or, if possible, make a lump sum payment by obtaining the funds through a bank loan, sale or mortgage of assets, or monies from a third party.

A corporation would only file a proposal if it was thought the business operation was viable and that the business would continue operations, or if there is a compelling reason to carry out the liquidation in a context of a proposal as opposed to a bankruptcy.

There is no provision in the BIA for filing of a joint Division I proposal, although the court in the past has allowed the administration of estates on a joint basis or the filing of a joint proposal. This has happened where it is commercially more efficient to do so, for example, where there is a group of related entities that are inextricably integrated to a point where it is impossible or impractical to differentiate between the activities and the debts of one entity versus the other.

Leave can be given for the estate of a deceased debtor to file a proposal.

4.3.5. Filing

BIA s. 50(6) and 62.1

BIA Forms 29, 30, 78 and 79

Once the debtor has made the decision to file a proposal, the Trustee will prepare the following documents for the debtor's signature:

- Assessment of an Individual Debtor;
- Statement of Affairs, Statement of Affairs (Business Proposal) or Statement of Affairs (Non-Business Proposal);
- Cash Flow Statement;
- Proposal; and
- A report regarding the preparation of the cash flow.

It is important to note that these documents are most often compiled by the Trustee because of the Trustee's familiarity with the specific format and content requirements of these documents. The debtor is, in fact, the person who is responsible for the contents of these documents. For example, the cash flow statement may be compiled by the Trustee, but it is compiled from information provided and assumptions made by the debtor, and the debtor is fully responsible for such information and assumptions.

The Trustee would then prepare and sign:

- A report on the reasonableness of the cash flow prepared and signed by the Trustee; and
- Estate Summary Information.

If the debtor is a corporation, a certified copy of a resolution of the Board of Directors authorizing the making of the proposal must be filed with the Official Receiver.

The proposal is effective only when filed with the Official Receiver and not simply when lodged with the Trustee. An Official Receiver has no discretion to refuse to accept a proposal.

4.3.6. Purpose of filing the Notice of Intention

Occasionally, an insolvent person who wishes to file a proposal will not have all of the information needed in order to proceed with the proposal and will require the Stay of Proceedings provision of the BIA. Examples of this situation would be:

- where a judgement has been granted against the insolvent person and the judgement creditor is about to garnish the bank account or wages;
- when a judgement creditor is about to seize the property of the insolvent person; or
- Canada Revenue Agency (CRA or other taxing authority) has issued a Requirement to Pay against the insolvent person's bank account or wages, or is about to place a lien on the insolvent person's real property.

4.3.7. Filing the Notice of Intention

BIA s. 50.4(1)

BIA Form 33

The insolvent person would file the Notice of Intention with the Official Receiver in his locale.

The Notice of Intention states the following:

- the insolvent person's intention to make a proposal;
- the name and address of the Licensed Insolvency Trustee who has consented, in writing, to act as the Trustee in the proposal; and
- the names of creditors with claims amounting to $250 or more and the amounts of the claims, as known.

Normally, the list of creditors is attached to the Notice of Intention as a separate list, as is the Trustee's consent.

The Trustee would sign both an Assessment Certificate, in the case of an individual debtor, and the Estate Information Summary to accompany the Notice of Intention.

An insolvent person could file a Notice of Intention with the Official Receiver during, or just after, the preliminary consultation with a Trustee. The Notice of Intention is filed by the Trustee with the Official Receiver through e-filing (or, if circumstances warrant, by telecopier) and, once received in his office, at any time of day, the Stay of Proceedings takes effect.

4.3.8. Other documents to be filed

BIA s. 50.4

BIA Forms 29 and 30

Within ten days of filing the Notice of Intention the insolvent person must file the following with the Official Receiver:

- the Cash Flow Statement (containing a list of the significant assumptions on which it is premised), signed by the Trustee and the insolvent person;
- a report by the insolvent person regarding the preparation of the cash flow, prepared and signed by the insolvent person; and
- a report on the reasonableness of the Cash Flow, signed by the Trustee.

Within 30 days of filing the Notice of Intention the insolvent person must either file the proposal, or ask for an extension of the delay to file a proposal. In both cases, it will be necessary to file a revised Cash Flow Statement with the Official Receiver and, in the case of an extension of the delay, with the court.

4.3.9. Notification to Creditors

Within five days of filing the Notice of Intention, the Trustee sends a copy of the Notice of Intention to every known creditor.

4.3.10. Extension of delay to file a proposal

BIA s. 50.4(9)

An insolvent person may apply for an extension of the delay to file the proposal before the expiration of the 30 days. The court may grant an extension for a period not exceeding 45 days and may grant subsequent extensions of the delay, provided that the entire period, including the original 30 days, does not exceed 6 months. The court will consider a number of factors when reviewing the request for the extension, for example:

- whether the insolvent person has acted in good faith and with due diligence;
- the likelihood the insolvent person will be able to file a viable proposal if the extension is granted; and
- whether any creditor will be materially prejudiced if the extension is granted.

During the extension period, if the court believes that any of the factors above are not being met, it may terminate the delay allowed to file the proposal and the insolvent person will be thereupon deemed to have made an assignment in bankruptcy.

4.3.11. Failure to file the Cash Flow or Proposal

BIA s. 50.4(8) and 102

BIA Form 34

If the insolvent person fails to file the Cash Flow Statement within the 10 days, or the proposal within the 30 days (or within such extension of the delay to file a proposal as may have been allowed by the court), he is deemed to have made an assignment in bankruptcy.

The Trustee will then forward a report in prescribed form to the Official Receiver, who will issue a Certificate of Assignment. The Trustee must also, within five days after the issuance of the Certificate, send notice of a meeting of creditors.

4.3.12. Statutory terms which must be included in a proposal

BIA s. 60 (1), 60 (1.1), 60 (1.3), 60(2), 136 (1)

As discussed earlier, a proposal is an agreement between an insolvent person and his creditors. However, in order for a proposal to be approved by the court, these provisions must be included:

- payment of preferred claims in priority to claims of ordinary creditors;
- payment of all proper fees and expenses of the Trustee;
- unless the Crown consents otherwise, payment in full to CRA, in the right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal and are of a kind that could be subject to a demand for garnishment under section 224(1.2) of the *Income Tax Act*, i.e., principally the payroll source deductions, employer's share of CPP contributions or employment insurance premiums, including any related interest or penalties thereon;
- the similar amounts due to the Quebec Revenue Agency, to be paid within six months after court approval of the proposal, unless the Crown consents to a longer delay;
- in a proposal by an employer, payment to employees, immediately after court approval, of amounts equal to what the employees would be qualified to receive if the employer became bankrupt, together with the payment of wages, salaries, commissions or compensation for services rendered after the date the proposal is filed and before the court approval;
- if the proposal is made by an employer that has a pension plan available for its employees, payment to the plan of the amounts that would be a claim secured by the

statutory security under sections 81.5 or 81.6 of the BIA if the insolvent person became bankrupt. The proposal could also provide for payment of less than the full amount of these claims, if the pension plan and the relevant pension regulator agree;

- if the proposal provides for the payment of equity claims, it must provide that no such amount will be paid unless all other claims have been paid in full;
- all payments of monies in the proposal should be paid to the Trustee; and
- if the creditors are to receive promissory notes, debentures, shares, etc., the delivery of these should be made to the Trustee for distribution to the creditor(s).

Terms of the proposal must be clear and definite so that any interested party can determine whether the terms of the proposal are being met.

4.3.13. Statutory terms which may be included in a proposal

BIA s. 55 and 56

These terms may be included:

- the appointment of one or more, but not exceeding five, inspectors; and
- at a meeting of creditors to consider the proposal, the creditors, with the consent of the insolvent person, may include terms in the proposal with respect to supervision of the affairs of the insolvent person.

4.3.14. Statutory terms which may be excluded in a proposal

BIA s. 95-101

The BIA permits a proposal to provide that the section dealing with fraudulent transfers of property not apply in the proposal. Should the proposal be annulled by the court, sections 95 – 101 of the BIA will apply as if the debtor became bankrupt on the date of the initial bankruptcy event.

4.3.15. Definition of Cash Flow Statements

CAIRP Standard of Professional Practice No. 9

The Cash Flow Statement is a statement prepared by the insolvent person, indicating his projected cash flow. The statement is based on the probable and hypothetical assumptions that reflect the insolvent person's situation and his planned course of action for the period covered in the proposal.

The Trustee will often assist the insolvent person in preparing the Cash Flow Statement. In the case of an individual debtor, it is often a statement of current income and expenses. If the proposal is for a lengthy period of time, the expenses will need to cover annual or even bi-annual expenses that an individual may have.

In the case of a corporation or business, the Cash Flow Statement may be prepared by the company's staff or accountant but again, often the Trustee will assist in the preparation of this Cash Flow Statement.

The Canadian Association of Insolvency and Restructuring Professionals (CAIRP) has prepared a Standard of Professional Practice, No. 9, entitled Cash Flow Statement. The Standard of Professional Practice was developed to provide guidance to the Trustee as to his statutory responsibilities under the BIA.

4.3.16. Revised Cash Flow Statement

If an insolvent person has previously filed a Cash Flow Statement with the Notice of Intention to File a Proposal, a revised Cash Flow Statement must be filed at the time of the filing of the proposal with the Official Receiver.

4.3.17. Appraisal and investigation of the affairs and property of the insolvent person

BIA s. 50(5) and 50(10)

BIA Rule 90, Directive 24

The Trustee is required to make an appraisal and investigation of the affairs and property of the insolvent person so the Trustee can estimate with reasonable accuracy the financial situation of the insolvent person and the causes of the insolvency. The Trustee must report his findings to the meeting of creditors held to discuss the proposal. The report should be filed with Official Receiver and provided to the creditors as early as possible in the process so that they may make an informed decision on the proposal. Sometimes, a preliminary report is sent with the notice of the meeting and an update (with a recommendation) is provided before or at the meeting of creditors. Directive 24 discusses the information to be provided to creditors in commercial proposals.

This report gives the creditors the information they need to make a decision regarding their acceptance or rejection of the proposal. One key element of the report is the Statement of Estimated Realization, which gives a summary of both a bankruptcy and proposal scenario and the resulting funds available for distribution for unsecured creditors in each scenario.

4.3.18. Notice to Creditors of Proposal and First Meeting of Creditors

BIA s. 51 (1)

BIA Forms 31, 36, 78 and 92

At least 10 calendar days before the meeting of creditors, the Trustee must mail the following to every known creditor and to the Official Receiver:

- notice of the day, time and place of the meeting;

- a condensed Statement of Assets and Liabilities (this is usually the Statement of Affairs);
- a report on the insolvent person's business and financial affairs;
- a list of creditors with claims amounting to $250.00 or more;
- a copy of the Proposal;
- a Proof of Claim form;
- a proxy; and
- a voting letter.

If the proposal provides for a waiver of the recourses for preferential payments, transfers at undervalue, dividends, share redemptions, or other such void or voidable transactions, the Trustee needs to file a report (which could be incorporated in the report on the financial affairs) providing the Trustee's opinion on the reasonableness of the decision to exclude these recourses in the circumstances.

4.3.19. Effect of the Stay of Proceedings

BIA s. 69(1) and 69.1(1)

Upon the filing of a Notice of Intention to File a Proposal or the filing of a proposal, a creditor is prohibited from instituting or continuing any proceedings against the insolvent person or his assets with a view to recover a claim provable in bankruptcy without leave of the Bankruptcy Court.

4.3.20. Officer of the court

Although in a proposal the Trustee is often looked upon as working for the debtor, this is not a correct characterization. The Trustee is an officer of the court and does not represent the debtor or the creditors.

A Licensed Insolvency Trustee is an impartial party who must aim to properly carry out the objectives of the bankruptcy legislation and, as such, has an obligation to the debtor, the creditors, the court and other interested parties. The Trustee ensures the insolvent person gets the protection of the BIA and also that the creditors get the proper distribution they are entitled to.

4.3.21. During the proposal

The role of the Trustee during the administration of the proposal is to ensure that the debtor and creditors comply with the terms of the proposal.

4.3.22. Monitoring

BIA s. 50(10) and 50.4(7)

As there could be almost seven months between the time of the filing of the Notice of Intention and the first meeting of creditors, the financial position of the debtor could change substantially between the time the proceedings are commenced and the time creditors look at a proposal. For this reason, the BIA attributes a responsibility for the Trustee to monitor the operations of the insolvent person. To monitor does not mean to take over operations or control them, but rather to supervise without interfering, to enquire into changes in the circumstances, compare the actual and forecasted cash flow projections, remain informed about the changes that are occurring in the debtor's operations, discuss the structural changes that might be desirable to return the operations to a viable level, and assess the impact of current events, changes in circumstances, in the cash flow or in assumptions on the ability of the debtor to present a viable proposal.

For the purpose of monitoring, the debtor must allow access to the Trustee to the insolvent person's property, including premises, books, records and other financial documents to the extent necessary to adequately assess the insolvent person's business and financial affairs.

4.3.23. Interim receivership

BIA s. 47 (1)

It is sometimes appropriate to appoint an interim receiver during the pendency of the proposal process. The interim receiver can be appointed to give creditors comfort, or if it is necessary to protect the assets of the insolvent person. The interim receiver could be appointed at the request of the creditors, an interested party or the insolvent person himself. The interim receiver could be the Trustee named in the Notice of Intention or the proposal, another Trustee, or both of them jointly. The interim receiver would have the powers that the court allows, between taking possession of the assets, taking conservative measures, disposing of property that is perishable or likely to rapidly depreciate in value, or monitor the affairs of the insolvent person instead of the Trustee appointed in the Notice of Intention or proposal.

This is very rarely, if ever, used for an individual debtor. It is usually used for a business which continues to operate during the period after the Notice of Intention is filed but before filing the proposal and holding the first meeting of creditors.

4.3.24. Trustee's responsibility to report

If there is any material adverse change to the debtor's cash flow or financial circumstances, the Trustee must file a report with the Official Receiver and the court, as required.

In the case of a Notice of Intention to File a Proposal, a report must also be filed with the court if the insolvent person applies for an extension for filing the proposal.

4.3.25. Proposal to secured creditors

BIA s. 50(1.2-1.3)

A proposal can be made to secured creditors. The proposal does not have to be made to all secured creditors but must be made to each creditor within a specific class.

If a proposal is made to secured creditors, it must also be made to all unsecured creditors.

4.3.26. Classes of secured claims

BIA s. 50(1.3-1.4)

Secured claims may be included in the same class if the interests of the creditors holding these claims are sufficiently similar to give them a commonality of interest. Points which must be taken into consideration when setting the classes are:

- the nature of the debts giving rise to the claims;
- the nature and priority of the security with respect to the claims;
- the remedies available to the creditors in the absence of the proposal and the extent to which creditors would recover their claims by exercising those remedies; and
- the treatment of the claims under the proposal and the extent to which the claims would be paid under the proposal and any further criteria consistent with the above.

If there is any difficulty in setting the classes of secured claims, an application may be made to court for a determination of the proper classes.

4.3.27. Stay of Proceedings

BIA s. 69(1-3), 69.1(1-6), 69.4 and 244(1-2)

A secured creditor cannot enforce its security if a Notice of Intention to File a Proposal or a proposal has been filed, because of the stay of proceedings that prevents all creditors, secured and unsecured, from taking proceedings against the debtor or the debtor's assets to recover a claim provable in bankruptcy. The stay is in effect until the Trustee has been discharged or the insolvent person has become bankrupt.

However, as regards the secured creditor, the stay does not apply or is terminated if the following has occurred:

- the secured creditor took possession of the assets prior to the filing of the Notice of Intention to File a Proposal or the proposal;
- the secured creditor gave notice of its intention under the BIA to enforce its security more than 10 days prior to the filing, or the secured creditor gave notice of its intention to enforce its security prior to the filing and the insolvent person has waived the notice and consented to the earlier enforcement;

- the proposal does not deal with the claims of the secured creditors; or
- a particular class of secured creditor has rejected the proposal.

In addition, a secured creditor or an unsecured creditor can ask the court to declare that the stay does not apply or ceases to apply, if the secured or unsecured creditor can demonstrate that it suffers a material prejudice from the application of the stay, or that it is equitable on other grounds to terminate the stay.

4.3.28. Debtor carrying on business

Where an insolvent person intends to carry on business after the filing of a proposal, it is usual for the proposal to contain a clause which states that any creditors' claims arising after the date of filing the proposal will be paid in full in the ordinary course of business. This clause is not essential as the BIA specifies which claims can be compromised in the context of a proposal. It does however serve to reaffirm the debtor's intentions regarding the on-going relationship with the creditors. The creditors have a right to request, and may very well have requested, that all transactions after the date of the Notice of Intention or proposal be on a "cash on delivery" basis. The debtor wants to set the stage in the proposal for a return to a more convenient and usual business relationship based on some reasonable trade terms.

4.3.29. Disclaimer of leases

BIA Form 45

BIA Rule 95

The BIA gives an insolvent person who is a commercial tenant of real property the right to disclaim a lease. Notice of 30 days must be given to the landlord and the notice must be given by:

- registered mail;
- personal service; or
- a manner described in the lease.

The notice may be given at any time between filing of the Notice of Intention and filing a proposal or at the time of filing the proposal. The BIA does not require the debtor to undertake any sort of negotiations with the landlord prior to disclaiming the lease.

4.3.30. Rights of the landlord

BIA s. 65.2

Directive 22R (Appendix B in particular)

The landlord may apply to court within 15 days after receiving notice of the disclaimer, for a declaration that this section does not apply with respect to his lease. The court is required to

make such a declaration unless the insolvent person can satisfy the court that he will not be able to make a viable proposal without the disclaimer of the lease and all other leases disclaimed by the debtor. The burden of satisfying the court that the insolvent person would not make a viable proposal is on the debtor.

The landlord has no claim for accelerated rent and the proposal must indicate whether the landlord may file a proof of claim for actual losses resulting from the disclaimer or for an amount equal to the lesser of 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;
- 15% of the rent for the remainder of the term of the lease after that year; or
- 3 years' rent.

The landlord's claim would be included in the general class of unsecured claims that includes claims of all unsecured creditors, including persons who are not landlords. The debtor's proposal, however, could create different classes of creditors, one of which could be a class of landlords whose lease has been disclaimed. Note that it is not usually advisable to create several classes of unsecured creditors.

4.3.31. Proofs of claim

Form 31, Directive 22

Only creditors who have filed a proof of claim are entitled to vote. The proof of claim must be properly completed and filed prior to the commencement of the meeting. Proofs of claim are more fully discussed in Module 7.

4.3.32. Voting

BIA s. 54 , Directive 22 (Appendix B)

In order for the proposal to be binding on a class of creditors, that class of creditors must vote to approve the proposal. A resolution accepting the proposal must be carried by a majority in number (i.e., counting heads) and 2/3's in value of the creditors who are present and voting on the resolution, or those who have sent voting letters. If one class of secured creditors votes against the proposal (or if none of the secured creditors in that class votes), the proposal does not apply to that class of secured creditors, and the secured creditors in that class are no longer subject to the stay of proceedings. If one class of unsecured creditors votes against the proposal, the insolvent person is deemed to have made an assignment in bankruptcy right then and there.

4.3.33. Voting letters

BIA s. 53, BIA Rule 91

A creditor does not have to be present (in person or by proxy) in order to vote on the proposal. The BIA permits a creditor who has proven a claim to accept or reject the proposal by way of voting letter.

4.3.34. Voting by secured creditors

A secured creditor must file a proof of security in order to vote on the proposal. Unless the proposal has set an assessed value to the secured creditor's claim, the secured creditor can vote the entire amount of the claim. If an assessed value has been set, the creditor can vote the lesser of the amount of the claim or the assessed value. If the secured creditor is dissatisfied with the assessed value, it can apply to court to revise the assessment.

A secured creditor is not required to file a proof of security and, if no secured creditors of a particular class file a claim, the secured creditors of that class are deemed to have rejected the proposal.

4.3.35. Voting restrictions

BIA s. 4(2) and 54

These voting restrictions apply:

- a related person may vote against, but not for, acceptance of the proposal;
- in a proposal by an employer, an employee cannot vote in respect of the claim for wages that must be paid in priority;
- a person with an "equity claim" (i.e., a claim that relates to ownership interest, such as a claim for an unpaid dividend, or the price for a share redemption, or a claim in damages for a lost investment by a shareholder due to misrepresented information or a similar claim) cannot vote unless the court decides otherwise; and
- the Trustee, as a creditor, may not vote on the proposal.

4.3.36. Purpose of the meeting of creditors

The purpose of the meeting is for the creditors to either accept or reject the proposal. The Trustee must attend the meeting of creditors and this duty cannot be delegated. The insolvent person is also required to be at the meeting and both the Trustee and the insolvent person should answer any proper question of the creditors at this meeting.

If the creditors are not completely satisfied with the proposal, or with the explanations given by the Trustee or the debtor, they can adjourn the meeting to allow the Trustee to carry out a further review and investigation in the debtor's financial affairs. If they believe they have sufficient information to make a decision but they are not satisfied with the compromise, they

can negotiate with the debtor. As a result of these negotiations, amendments can be proposed and approved at the meeting of creditors. This is more fully discussed in Module 15 and Module 16.

Also at the meeting the creditors may appoint one or more, but not exceeding, 5 inspectors.

The procedures involving the acceptance or rejection of a proposal are more fully covered in Module 15 and Module 16. As well, the full procedure regarding the meeting of creditors is discussed in Module 10.

4.3.37. Procedure for court approval

BIA s. 58, BIA Forms 40-40.1

If a proposal is accepted by creditors, the Trustee has five days to apply to court for an appointment for a hearing of the application for the courts approval of the proposal.

Notice of the hearing must be sent at least 15 days prior to the hearing to every proven creditor, the Official Receiver and the court.

The Trustee must file a report with the court at least two days prior to the date of the hearing and a copy of this report must be sent to the Official Receiver at least 10 days prior to the hearing.

The approval of the proposal by court is more fully discussed in Module 15 and Module 16.

4.3.38. Operations during the proposal

In the proposal for an individual insolvent person the Trustee has very little involvement with the day-to-day life of the individual. It is essentially “business as usual”, although often the proposal will lay out certain specific requirements for the insolvent person. These usually revolve around:

- making regular payments to the Trustee for the benefit of the creditors;
- complying with certain requirements, such as filing the required income tax returns and making the required instalments in accordance with the *Income Tax Act* and the *Taxation Act* in Quebec*;* and
- filing whatever financial requirements were required in the proposal.

4.3.39. Businesses

The Trustee may have more involvement during the proposal with a business, again depending upon the terms of the proposal. Usually a proposal is filed if a business is viable and the operations are to continue. However, there may be provisions to:

- sell a division of the business;
- sell certain equipment;

- obtain further financing; and/or
- begin a new area of operations.

The Trustee may or may not be involved in any of the above and again, this would depend on how the proposal was structured.

4.3.40. Interim dividends

During the term of the proposal the Trustee will pay dividends to creditors based on the terms set out in the proposal.

Normally, dividends are paid semi-annually or annually to creditors who have proven their claims prior to the dividend being declared.

4.3.41. Preferred creditors

As the proposal must state that preferred creditors are paid in priority to other creditors, a preferred creditor can be paid at any time the funds become available.

4.3.42. Crown Claims

BIA s. 60(1.1), ITA s. 224(1.2)

Although not classified as a dividend, any payments relating to Crown Claims in respect of source deduction amounts owing must be paid within six months after court approval of the proposal.

4.3.43. Payment and distribution of funds

BIA s. 60(2 -3) and 147

All monies payable under a proposal must be paid to the Trustee and must be distributed by him to any creditor. Even if the proposal provides for distribution of promissory notes, etc., the distribution must be made by the Trustee. When paying a dividend to proven creditors, the Trustee must deduct the Superintendent's levy.

4.3.44. Completion of proposal

BIA s. 65.3, Form 46

If the proposal is fully performed by the insolvent person, the Trustee issues a Certificate of Full Performance to the debtor and the Official Receiver. The issuance of the Certificate of Full Performance has the same effect as a discharge from bankruptcy.

4.3.45. Final Statement of Receipts & Disbursements

BIA s. 66 (1.2), Form 12

Once the proposal is fully performed and the Trustee has received all the funds, he will complete the Final Statement of Receipts and Disbursements. If there were inspectors appointed at the first meeting of creditors, a meeting of inspectors must be called in order for the inspectors to approve the Trustee's Final Statement of Receipts and Disbursements.

4.3.46. Taxation and final dividend

Form 17

Upon completion of the Final Statement of Receipts and Disbursements and inspectors' approval, if applicable, the Trustee will forward the Statement to the Office of the Superintendent for comment. If the Office of the Superintendent sees no concerns or problems with the statement, it will then forward a comment letter to the Trustee indicating the Trustee should proceed to taxation of his account. Once the Trustee has had the statement taxed by the court, he will send notice to all proven creditors of the Trustee's application for discharge and forward the final dividends to the creditors.

4.3.47. Trustee discharge

Form 10 or 11

Once all the dividend cheques have cleared the bank, the account is closed and the prescribed time has passed, the Trustee may apply to court to obtain his discharge.

The final step in the administration of a proposal is more fully covered in Module 18.

4.3.48. Discharge of debts

BIA s.65.3 and 178

Once the insolvent person receives his Certificate of Full Performance, the balance of any debt owing by the insolvent person is discharged, except those debts that would not be discharged by an order of discharge in a bankruptcy (unless the creditors that have undischargeable debts have specifically voted in favor of a proposal that clearly provides that these debts will be discharged). The advantage of a proposal is that the insolvent person is able to receive some relief from the burden of his debts but has avoided a bankruptcy.

4.3.49. Credit bureau

A proposal will be recorded as an 7 rather than an 9 on the credit bureau report for a period of three years from the date of full performance. Creditors reviewing the credit bureau reports will know that, if the insolvent person filed a proposal, the creditors received a better distribution than in a bankruptcy.

4.3.50. Assignment in bankruptcy

If a proposal is not approved by the creditors or the court, the debtor is deemed to have filed an assignment in bankruptcy. The debtor then must proceed through the bankruptcy process in order to obtain his discharge from his debt.

5. Consumer Proposal Administration

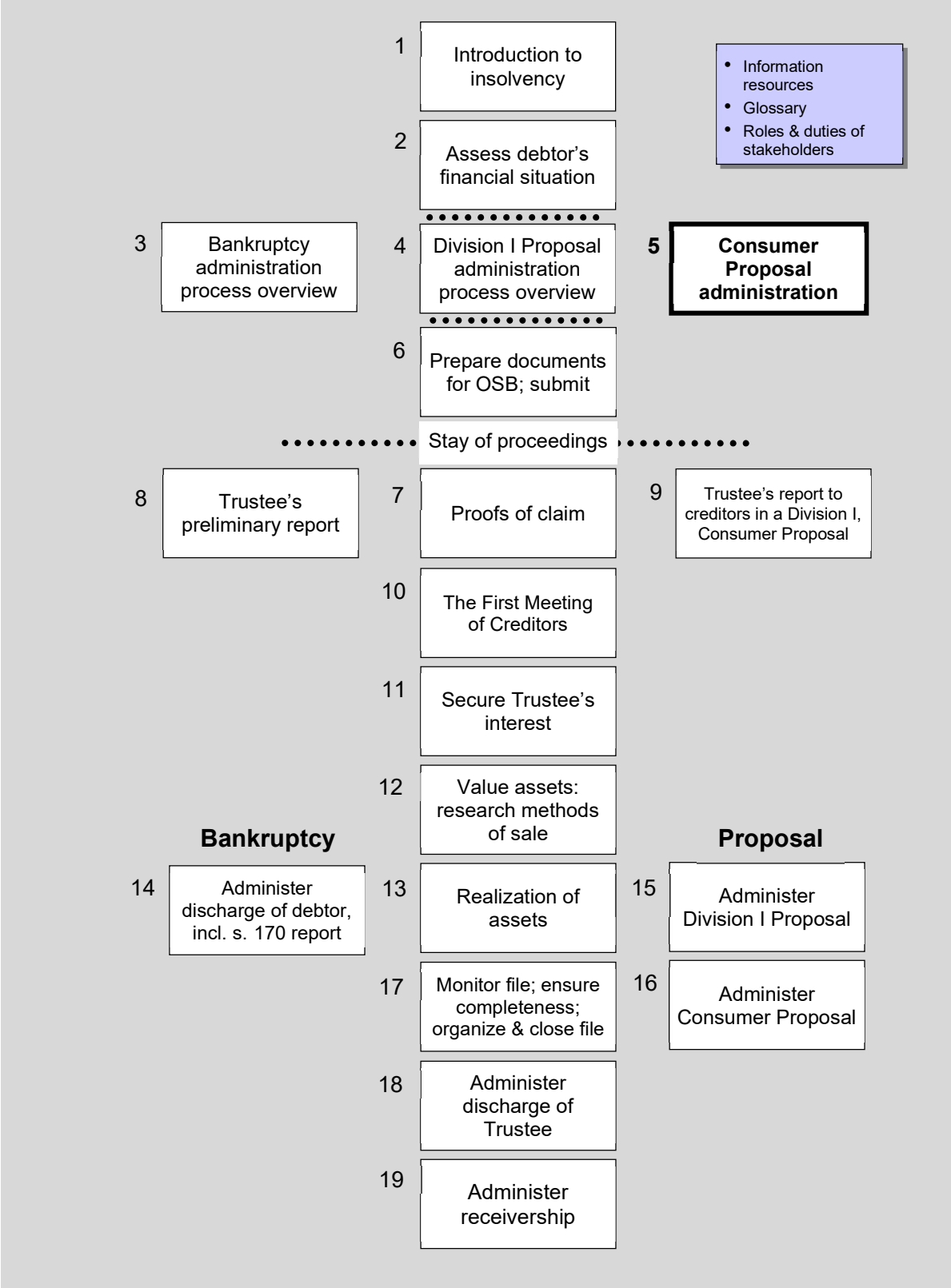


Table of Contents

5.1. Introduction

Module objectives

At the end of this module, you will be able to describe an overview of proposal administration.

Certain processes and procedures will be identical for both Division I and consumer proposals and will be discussed in this module. Similarities in consumer proposal administrations will refer back to Module 4.

Assigned readings

- BIA s. 66.4 - 66.11, 106.1 and 136
- BIA Forms 31, 47 - 59, 65 and 79
- BIA Rules 96 – 103 and 129
- Directives 1R and 2R
- CAIRP Standard of Professional Practice No. 8

Amendments of a consumer proposal

A consumer debtor may have filed a proposal a couple of years ago and his current circumstances have changed and could prompt a modification to his consumer proposal. The consumer debtor could have changed employment, separated, ~~incurrent~~ incurred new monthly expenses in his budget and now affects his ability to continue payments on his initial consumer proposal.

It is possible throughout the proposal process to file an amended proposal, which would address those new changes and allow the debtor to balance out his budget and creditors to still recover funds from a proposal and avoid a bankruptcy.

In the event that an amended proposal is filed, the Administrator is expected to send out notices, a report, the terms of the consumer proposal, voting letter and allow the creditors a delay of 45 days (same delay as the initial proposal) to file their voting letter. The approval process will be the same as for the initial proposal.

Revival of a consumer proposal

BIA s. 66.31(1) (6)

A consumer proposal is deemed annulled when the payments are in default of the equivalent of 3 months (either a monthly or less frequently than monthly payment)

Once the consumer proposal is deemed annulled the stay of proceedings is not applicable and the rights of creditors are reinstated.

If the consumer proposal is made by a bankrupt, once it is annulled, the consumer debtor is deemed to have filed for bankruptcy. The automatic revival process is not an option for the bankrupt.

If the consumer proposal is not made by a bankrupt, from the date of the deemed annulment, there is a 30 day period to revive the debtor's proposal. Based on the circumstances, the administrator may consider that it is appropriate to send a notice in the prescribed form (Form 93) informing that the consumer proposal will be revived automatically 60 days after the deemed annulment.

Once they receive the notice, the creditors and official receiver have the option to file an objection to the automatic revival process. If no objection is filed, the Administrator will file in the prescribed form (Form 96) confirmation that the proposal is duly revived. The stay of proceedings will be reinstated.

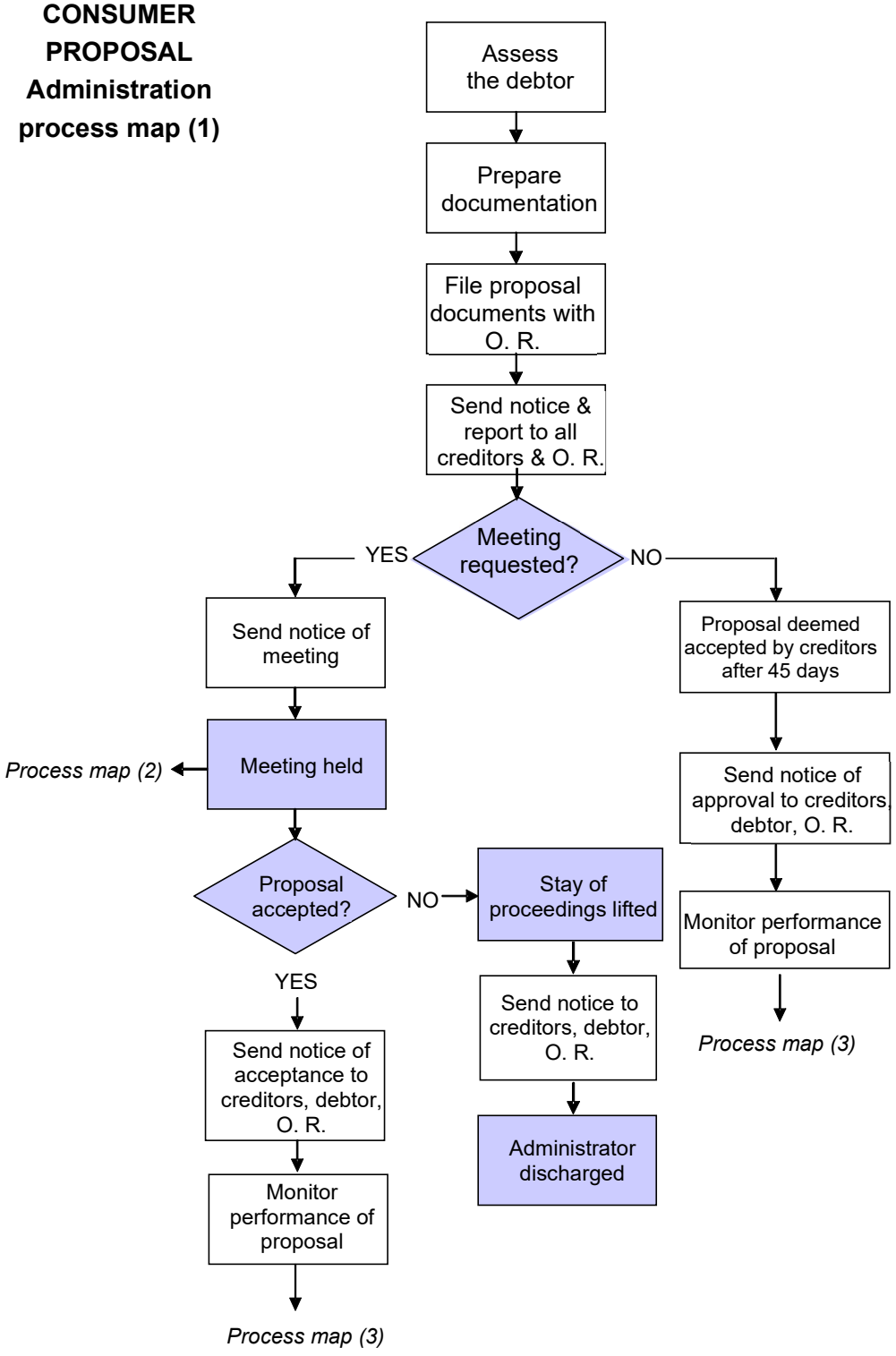
If the administrator receives an objection to the revival process, a notice is sent out to inform creditors and official receiver.

If a consumer debtor wants a proposal revived outside the 30 day period (automatic revival) or if an objection is filed by a creditor, the administrator may apply to court to have the proposal revived by the court. The court will consider the current circumstances and may make an order reviving the proposal.

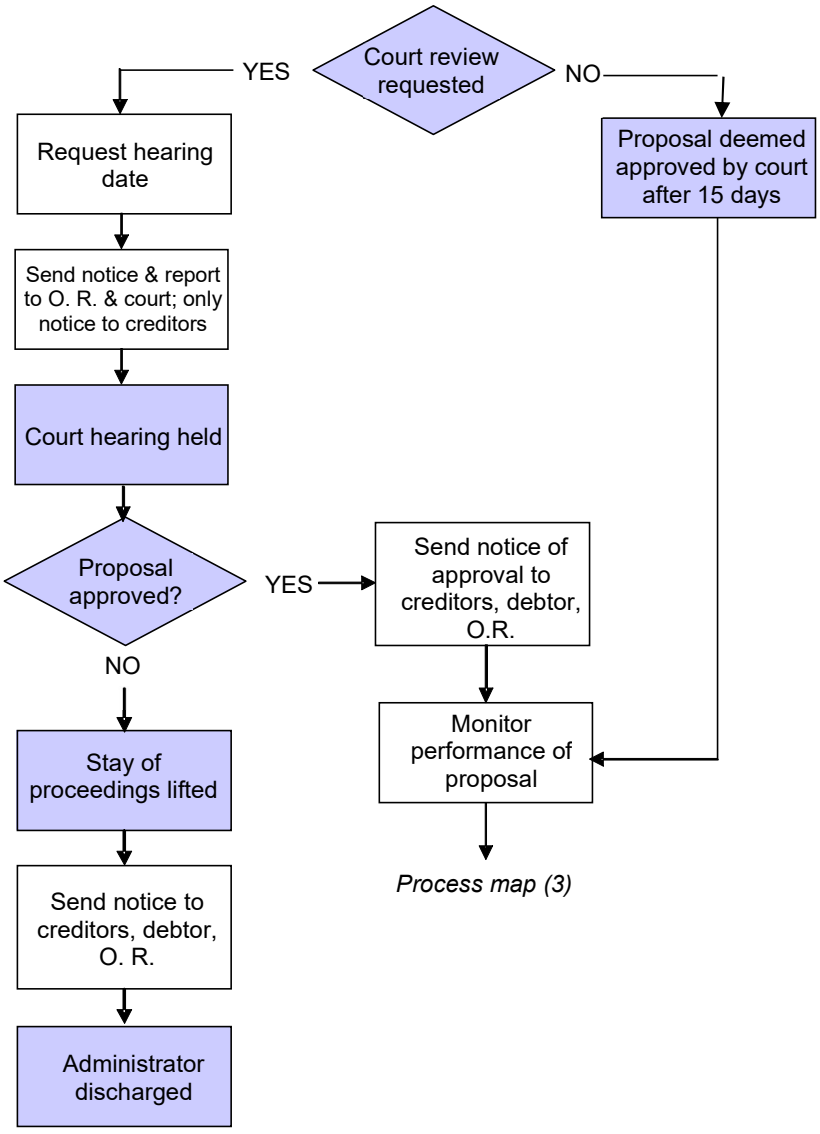
5.2. The consumer proposal administration process

The next three pages illustrate the consumer proposal administration process. The key elements of each task are described in the pages following the process charts.

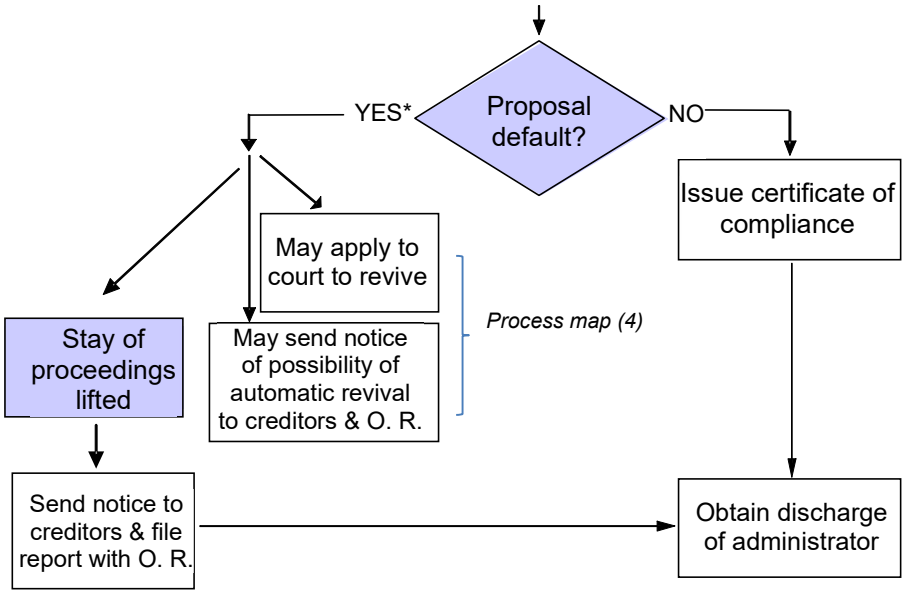
CONSUMER PROPOSAL Administration process map (1)



CONSUMER PROPOSAL Administration process map (2)

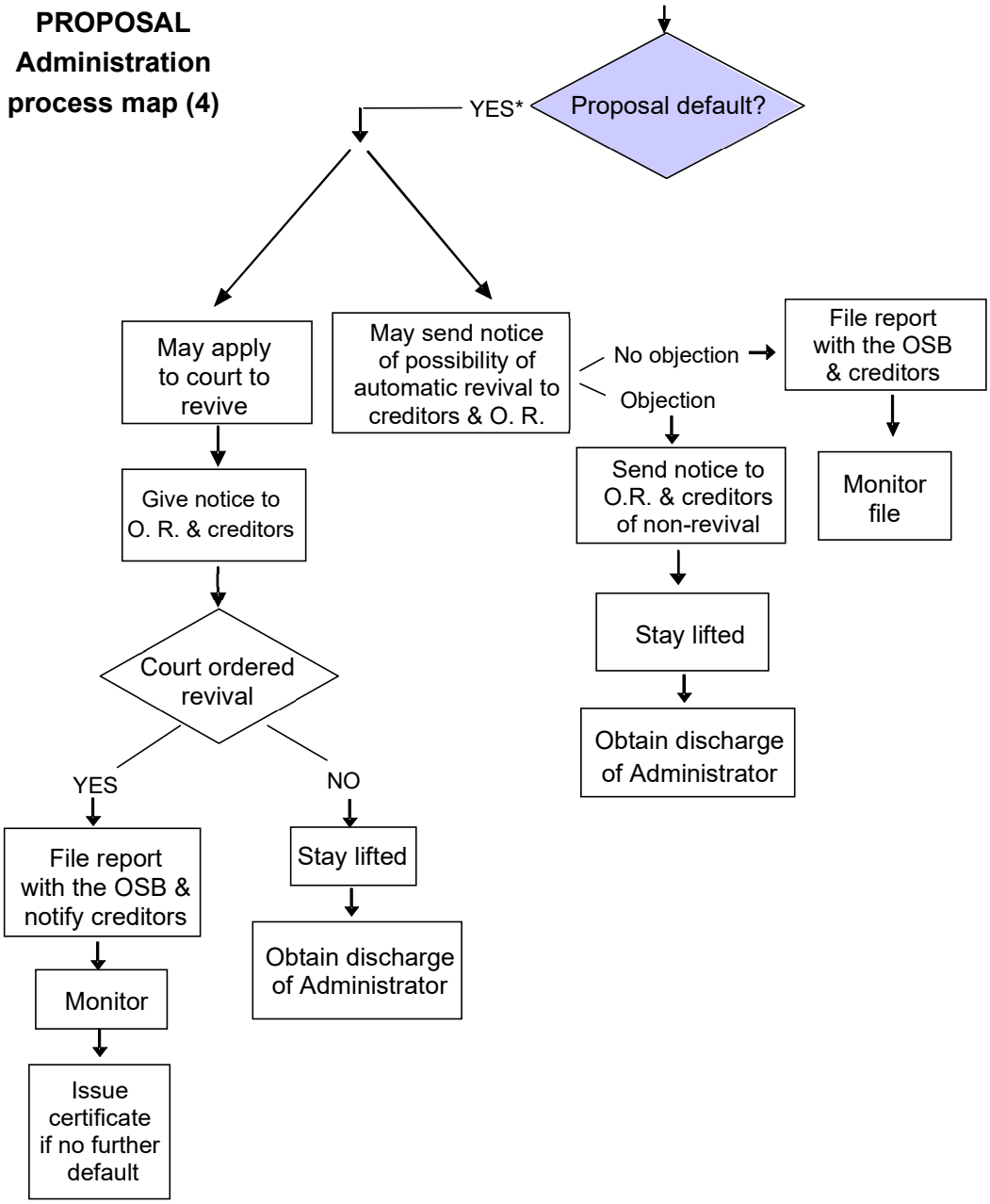


CONSUMER PROPOSAL Administration process map (3)



* ***Default of a Proposal is discussed more fully in Module 15***

CONSUMER PROPOSAL Administration process map (4)



* ***Default of a Proposal is discussed more fully in Module 15***

5.3. Consumer proposals

5.3.1. Definition

Consumer proposals are filed under Division II of Part III of the BIA. However, normally the proposal is referred to as a “consumer” proposal rather than a Division II proposal.

The title of “Administrator” is given to the Trustee or a licensed administrator of consumer proposals who administers the consumer proposal.

The purpose of the consumer proposal sections is to permit the proposals to be handled quickly, efficiently and with a minimum of administration and cost. For example, there is no court approval or taxation required in a consumer proposal, unless requested.

5.3.2. Who can file a consumer proposal?

BIA s. 66.11 and 66.12

The BIA states that a consumer proposal may be made by a consumer debtor. A consumer debtor is a natural person who is bankrupt or insolvent, and who owes $250,000 or less, excluding the mortgage on the principal residence.

5.3.3. Joint proposal

BIA s. 66.12(1.1)

Directive 2R

Two individuals can file a consumer proposal together where the debts of the individuals making the joint proposal are substantially the same, and the Administrator is of the opinion that it is in the best interest of the debtors and creditors to administer the proposal as a joint proposal because of the financial relationship of the debtors.

5.3.4. Assessment

Directive 6R

The assessment process is the same as described for Division I proposals.

You must review whether a joint proposal can be made and whether the total debt load, other than the mortgage on the principal residence, is less than $250,000. This debt load limit would include the mortgage on a rental property and/or the lease or loan for a vehicle.

5.3.5. Prepare documentation

BIA Form 47, 65, 79

The documents required in filing a consumer proposal are virtually the same as in a Division I proposal, except there is no requirement for a Cash Flow Statement or the Trustee and insolvent person's reports supporting the Cash Flow Statement. However, as the Statement of Affairs states that the budget information is attached to the Statement of Affairs, a type of cash flow is submitted with the documents.

The following documents are to be submitted to the Official Receiver's office:

- an assessment of an individual debtor;
- the proposal;
- a Statement of Affairs, along with the accompanying Form 65; and
- the Estate Summary Information.

If the debtor is bankrupt at the time of filing the consumer proposal, the inspectors' approval must also be obtained and submitted.

5.3.6. Statutory terms

BIA s. 66.12(5), 66.12(6) and 136

A consumer proposal must provide for:

- payment of preferred claims in priority to the claims of ordinary creditors;
- payment of all prescribed fees and expenses of:
    - the Administrator; and
    - any person in respect of counseling; and
- the method of dividend distribution.

The term of the consumer proposal cannot exceed five years.

5.3.7. Report to creditors and the Official Receiver

Form 51

Within ten days of filing the consumer proposal, the Administrator must prepare and file a report with the Official Receiver and the creditors setting out the following:

- the results of the investigation made by the Administrator;
- the Administrator's opinion as to whether the consumer proposal is reasonable and fair to both the consumer debtor and the creditors;

- a condensed statement of the debtor's assets, liabilities, income, and expenses; and
- a list of the creditors with claims of more than $250.

In practice, the report is sent along with the filing to the Official Receiver and with the notice of the consumer proposal to the creditors.

5.3.8. Notice to creditors

BIA s. 66.14(b)

BIA Form 31, 37.1 and 49

Within 10 days the Administrator must send the following to every known creditor:

- a copy of the consumer proposal;
- a copy of the report referred to above;
- a copy of a blank proof of claim;
- a voting letter; and
- a notice explaining that a meeting of creditors will be called only if required under the BIA and that a review of the consumer proposal by a court will only be made if required under the BIA.

5.3.9. Stay of proceedings and unsecured creditors

BIA s. 69.2

Upon the filing of a consumer proposal, no creditor has any remedy against the debtor or the debtor's property or can continue any action for the recovery of a claim provable in bankruptcy until:

- the consumer proposal has been withdrawn, refused, annulled or deemed annulled; or
- the Administrator has been discharged.

5.3.10. Secured creditors

BIA s. 69.2 (4)

A secured creditor is only bound by a consumer proposal if he files a proof of security. If he does so, and the proposal is accepted by the creditors, he is bound by the proposal.

5.3.11. Duties of the Administrator

CAIRP Standard of Professional Practice No. 8

An Administrator who agrees to assist a consumer debtor must:

- investigate the consumer debtor's property and financial affairs so as to be able to assess, with reasonable accuracy, the consumer debtor's financial situation and the causes of his insolvency;
- provide counselling in accordance with the directives issued by the Superintendent of Bankruptcy;
- prepare a consumer proposal in prescribed form; and
- file a copy of the consumer proposal signed by the debtor with the Official Receiver.

The Administrator is also an officer of the court and is not a representative of the debtor.

CAIRP has established Standard of Professional Practice 8 which set out the duties of an Administrator in a consumer proposal.

5.3.12. Voting

BIA s. 66.18 and 66.19

BIA Rule 97

The consumer proposal does not require that creditors vote to accept it. It is deemed to be accepted after the expiration of 45 days from the date of filing the proposal unless creditors request a meeting of creditors, at which point a vote will be held.

5.3.13. Proofs of claim and voting letters

Form 31 and 36

Should a creditor wish to vote in the proposal, he must file a proof of claim and voting letter.

5.3.14. Requirement for meeting of creditors

BIA s. 66.15, 105 and 106

Directive 22R

A meeting of creditors must be called by the Administrator if creditors, holding at least 25% of the claims proven, request it.

The Official Receiver can also request a meeting of the creditors to consider the consumer proposal.

If a meeting of creditors is held, the creditors who have filed proofs of claim may, by an ordinary resolution vote, agree to accept the proposal: that is, a creditor receives one vote for every dollar of his claim and a simple majority is all that is required. The creditors who vote can be present in person or by proxy, or can have submitted a voting letter. To assess whether or not the proposal is accepted, the decision is made only by the creditors who have voted (i.e., the claims of the creditors who abstain are not counted in the totals as either a "for" or "against" vote).

The proposal can also be amended at the meeting, but only if the debtor agrees.

If there is no quorum at the meeting of creditors, the proposal is deemed to be accepted by the creditors. Directive 22R, with respect to Proofs of Claim, Proxies, Quorums and Voting at Meeting of Creditors, states that a quorum is established by considering the number of creditors having filed their claim prior to the time for the meeting, present at the meeting in person, or represented by proxy or by voting letter.

5.3.15. Non-acceptance of the proposal

A consumer proposal differs from a Division I proposal in that an automatic bankruptcy does not occur if the proposal is not accepted by the creditors, except where the consumer proposal was made by someone who was already a bankrupt (in which case that person becomes bankrupt again).

Default of a proposal is discussed more fully in Module 16.

5.3.16. Deemed approval by the court

BIA s. 66.22(1)

The proposal is deemed approved by the court 15 days after the acceptance (deemed or otherwise) by the creditors, unless the Official Receiver, or some other interested party, requires that an application be made to court for approval.

5.3.17. Procedure for application to court

BIA s. 66.23

When an application has been requested, the Administrator must:

- send notice of the hearing at least 15 days prior to the hearing to:
    - the consumer debtor;
    - every proven creditor; and
    - the Official Receiver;
- file a report on the consumer proposal and the conduct of the consumer debtor with the court; and

- forward a copy of the report to the Official Receiver at least 10 days prior to the hearing.

5.3.18. Counselling

BIA s. 66.13(2)(b)

Directive 1R

Debtors making a consumer proposal must attend the mandatory two counselling sessions in order to receive a Certificate of Full Performance.

5.3.19. Interim dividends

As with a Division I proposal, there are interim dividends paid to proven creditors throughout the term of the proposal. The proposal will set out the terms of payment to the creditors.

Payments to proven creditors every three months can be a costly endeavor in a consumer proposal. The payment of dividends every six months or year is much more practical.

5.3.20. Certificate of Full Performance

BIA s. 66.38

BIA Form 46

The insolvent person will receive his Certificate of Full Performance once all terms of the proposal have been met and he has attended the requisite counselling sessions.

5.3.21. Final Statement of Receipts and Disbursements

BIA Rule 129, Form 14

Once the Certificate of Full Performance has been issued and the Administrator has received all funds to be paid in the proposal, the Administrator will prepare the Statement of Receipts and Disbursements and dividend sheet. These are sent to the Office of the Superintendent for comment, along with the approval of the inspector, if one was appointed.

For a consumer proposal, fee structure is based on a tariff. There is no need for taxation by the court unless requested by the Office of the Superintendent.

Once the Administrator has received the letter of comment from the Office of the Superintendent, Notice of Deemed Taxation of the Administrator's Accounts and Discharge of the Administrator is sent to every proven creditor, with a copy of the Final Statement of Receipts and Disbursements and dividend sheet.

If a creditor does not object in 30 days, the Administrator will be deemed to be discharged, within three months of the day on which the notice was sent.

5.3.22. Trustee/Administrator discharge

BIA s. 66.39, Form 16

Once the three months have passed and the cheques have cleared the bank, the Trustee is deemed to be discharged.

5.3.23. Discharge of debts

BIA s. 173

Once the insolvent person receives his Certificate of Full Performance, the balance of any debt owing by the insolvent person is discharged, except for those claims that would not be discharged by an order of discharge in a bankruptcy (unless the creditors that have undischargeable debts have specifically voted in favor of a proposal that clearly provides that these debts will be discharged).

5.3.24. Credit bureau

A proposal will result in an 7 rating rather than an 9 rating on the credit bureau report for three years from the date of the full performance. Creditors reviewing the credit bureau report will know that if the insolvent person filed a proposal, the creditors received a better distribution than in a bankruptcy.

5.3.25. No stay of proceedings

BIA s. 66.37

The stay of proceedings is no longer applicable once a consumer proposal, or the amended consumer proposal, has been withdrawn, refused, annulled or deemed annulled.

6. Prepare Documents for OSB; Submit

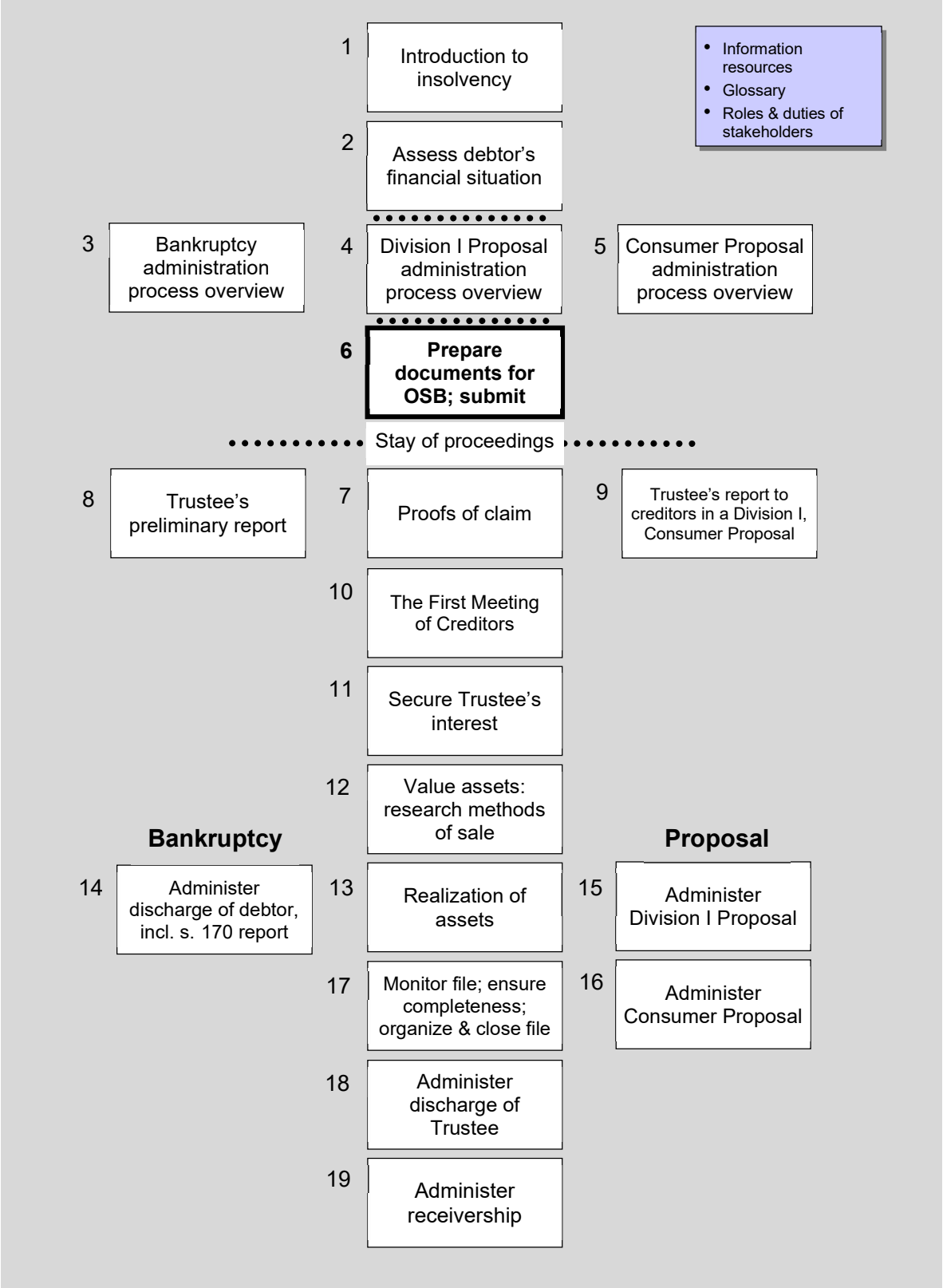


Table of Contents

6.1. Introduction

Module objectives

At the end of this module, the student will be able to:

- Prepare appropriate documents for summary or ordinary administration in either a bankruptcy or a proposal.
- Obtain appropriate signatures from the Trustee and the debtor.
- File documents with the OSB.
- Review the Certificate of Appointment received from the OSB for correctness.

Assigned reading

- BIA s. 2, 49, 50(6), 50.4(1), 50.4(2), 51, 66.12(1-2), 66.13(2), 66.14, 66.15(3), 66.32, 102(1)&(4), 155(d.1)& (h), 158(d), 168(a), 168.1(1), 178(2) and 243(2)
- BIA Forms 1, 21, 29 - 31, 33, 37, 47, 48, 65, 66, 68 - 70, 73, 78, 79 and 92
- Directives 2R, 3, 9R3, 11R2, 23 and 24
- BIA Rule 4
- Appendices to this Module A through D

6.2. Document Preparation

6.2.1. Review information given by debtor

Directive 11R2

CAIRP Standards of Professional Practice No. 6

6.2.2. Size of family

The number of members in a family unit will be used in the determination of surplus income. The bankrupt's family unit includes, in addition to the bankrupt, any person who resides in the same household and who benefits from either the expenses incurred or income earned by the bankrupt, or who contributes to such expenses or earnings. A person who does not reside in the same household is also considered a member of the family unit if the person benefits from or contributes to the expenses incurred or income earned by the bankrupt.

6.2.3. Assets and liabilities

The assets must be reviewed to ensure that any encumbrances are also included on the Statement of Affairs.

Review the liabilities to ensure that secured debts are linked properly to the asset(s) to which they relate and that no liabilities have been omitted.

It is usually prudent to conduct a PPSA search to determine if there are any security registrations on any of the assets prior to any filing or, as the case may be, identify assets that the debtor may have forgotten to mention, such as a leased vehicle (a search in the RDPRM in Quebec).

6.2.4. Income and expenses

Form 65, Directive 11R

Review income and expenses to determine if there will be surplus income payments required.

Prepare a comparison schedule of the realization in a bankruptcy vs. proposal scenario.

The OSB Directive 11R2 sets out the amount of surplus income to be paid.

Ensure that there is a corresponding expense for any secured asset which the debtor wishes to retain (i.e., mortgage on a principal residence, vehicle, etc.).

6.3. Obtain Trustee's assessment

6.3.1. Ordinary or summary administration \ bankruptcy or proposal

BIA s. 49.1, 66.12(1 -2), and 66.32

Directive 6R

Review with the Trustee to determine how the estate is to be filed.

Bankruptcy

Ordinary administration:

The debtor must be an insolvent person (as defined in the BIA), which means that he/she/it must not be an undischarged bankrupt, has to have debts of at least $1,000 and that he/she/it must reside, carry on business or have property in Canada. In order for an estate to be filed as an ordinary administration, the debtor must be:

- a corporation or an income trust;
- an individual, with realizable assets over $15,000; or
- an individual, with realizable assets under $15,000 if the Trustee believes that there will be extraordinary costs or time involved.

Summary administration:

In order for an estate to be filed as a summary administration, the following criteria must be met. The bankrupt must:

- be an individual;
- be resident, have property or carry on business in Canada;
- have debts of a least $1,000;
- have realizable value of assets under $15,000; and
- not be an undischarged bankrupt.

Proposal

Division I Proposal:

The following persons may file a Division I proposal:

- an insolvent corporation or income trust;
- an insolvent individual with debts over $250,000 (excluding mortgage on principal residence);
- a receiver within the meaning of BIA, but only in relation to an insolvent person;
- a liquidator of an insolvent person's property; or
- a Trustee of the estate of a bankrupt.

An individual who has filed a consumer proposal may not file a Division I proposal until the Administrator under the consumer proposal has been discharged.

Consumer Proposal:

The following criteria must be met to file a consumer proposal. The debtor:

- must be an insolvent or bankrupt individual;
- must be resident, have property or carry on business in Canada;
- must have debts of a least $1,000 and less than $250,000 (excluding mortgage on principal residence);
- who has filed an Notice of Intention ("NOI") or lodged a proposal under Division I may not make a consumer proposal, until the Trustee appointed in respect thereof has been discharged; and
- who has filed a consumer proposal which was annulled, or deemed to be annulled, may not make another consumer proposal until all claims for which proofs of claim were filed (in the first consumer proposal) are paid or extinguished, unless otherwise ordered by the court.

6.4. Prepare documents required

6.4.1. Summary administration

BIA s. 49, 66.13(2), 66.14 and 158

BIA Forms 21, 65 and 79 (Summary Administration), BIA Forms 47, 48, 65, 79 (Consumer Proposal)

Directives 2R, 3, 6R, 26 and 16R (pre-1992)

Appendices A – D

Bankruptcy forms:

It is possible for two people to file a joint bankruptcy assignment in such circumstances as are specified by Directive 2R – Joint Filing. In such case, both bankrupts' information would be on each of the following forms and both individuals would have to sign all forms. If the filing is not joint, then only one name would be used on each of the following forms:

- ☐ Statement of Affairs (Non-Business Bankruptcy/Proposal)
  - Assets
  - Liabilities
  - Pertinent Information
- ☐ Income and expense form
  - Information (or amended information) Concerning the Financial Situation of the Individual Bankrupt
- ☐ Assignment for the General Benefit of Creditors (Non-Business Bankrupt)
- ☐ Assessment Certificate
- ☐ Notice to bankrupt of his duties
- ☐ Estate Information Summary
- ☐ Data Entry Sheet – Office of Superintendent (if required by local OSB office)
- ☐ Bankrupt's Authorization for CRA (authorization for Trustee to prepare tax returns – *May not be required in all provinces*)
- ☐ Bankrupt's Acknowledgement Re: Credit Cards
- ☐ Optional:
  - Acknowledgement regarding agreement to pay the Trustee's fees
  - Acknowledgement that the bankrupt must attend two counselling sessions, which should include the time frame

Consumer proposal forms:

- ☐ Statement of Affairs (Non-business Bankruptcy/Proposal) should include:
  - Assets
  - Liabilities
  - Pertinent Information
- ☐ Income and expense form – Cash Flow Statement
  - Information (or amended information) Concerning the Financial Situation of the Individual Bankrupt
- ☐ Assessment Certificate
- ☐ Consumer Proposal
- ☐ Notice to the debtor of his duties
- ☐ Report of Administrator on Consumer Proposal
- ☐ Estate Information Summary
- ☐ Data Entry Sheet – Office of Superintendent (if required by local OSB office)
- ☐ Optional:
  - Acknowledgement that the debtor must attend two counselling sessions, which should include the time frame.
  - Acknowledgement that the debtor understands what constitutes a default in the terms of the proposal and its possible consequences.

6.4.2. Ordinary administration

BIA s. 49(2) and 158

BIA Forms 21, 65, 78 and 79

Bankruptcy forms:

Pursuant to the BIA, a Statement of Affairs is required to be filed with the assignment. In theory, this could be a preliminary Statement of Affairs, and the "full" Statement of Affairs could be filed within 5 days of the assignment, however, in practice the "full" Statement of Affairs is most often filed with the assignment. The forms will vary slightly depending upon whether the debtor is an individual or a corporation. The forms should include:

- ☐ Statement of Affairs (Non-business Bankruptcy/Proposal), if an individual, should include:
  - Assets
  - Liabilities

- Pertinent information

☐ Income and expense form

- Information (or amended information) Concerning the Financial Situation of the Individual Bankrupt

☐ Statement of Affairs (Business Bankruptcy/Proposal), if a company, should include:

- Assets
- Real estate
- Promissory notes
- Debts due to the estate
- Liabilities

☐ If a corporate bankruptcy, minutes of the meeting (or official resolution) of directors authorizing the filing of the assignment in bankruptcy and naming the director to sign the documents

☐ Assignment for the General Benefit of Creditors

☐ Assessment Certificate (if an individual)

☐ Notice to bankrupt or an officer of a bankrupt corporation of his duties

☐ Accounting Records Letter (Business Bankrupt)

☐ Estate Information Summary

☐ Data Entry Sheet – Office of Superintendent (if required by local OSB office)

☐ Bankrupt's Authorization for CRA (authorization for Trustee to prepare tax returns - individual) *(May not be required in all provinces)*

☐ Optional (best practice):

- Acknowledgement regarding agreement to pay Trustee's fees (individual) (Appendix A)
- Acknowledgement that the bankrupt must attend two counselling sessions, which should include the time frame (individual) (Appendix B)
- Acknowledgement that bankrupt has given all credit cards for which he is responsible (individual) to the Trustee, or has destroyed the credit cards (Appendix C).

Occasionally, the bankruptcy will result from a bankruptcy order instead of an assignment. In such a case, the same documents would be required except, of course, the assignment document, the resolution of the board of directors authorizing the assignment (for a company) and the assessment certificate (for an individual). In such a case, the documents would need to be filed within 5 days following the bankruptcy.

6.4.3. Division I proposal:

BIA s. 50(6) and 50.4(1 -2)

BIA Forms 29, 30, 33, 78 and 79

Appendix D

CAIRP Standards of Professional Practice – No. 6, 9 and 11 BIA Rule 129, Form 14

Notice of Intention forms:

- ☐ Notice of Intention (NOI)
- ☐ If an incorporated company: Minutes of the meeting (or official resolution) of Directors authorizing the filing of the proposal and naming the director to sign the documents
- ☐ Trustee's Consent to Act in the Proposal
- ☐ Notice to bankrupt or an officer of a bankrupt corporation of his duties
- ☐ Estate Information Summary
- ☐ List of creditors, including names, addresses, account numbers and amounts owed
- ☐ In addition, a Cash Flow Statement, together with a list of assumptions, the representations of the debtor, and a report of the Trustee on the reasonableness of the Cash Flow Statement, will have to be filed within 10 days of the Notice of Intention.

Additional documents, including amended Cash Flow Statements and reports, may need to be filed throughout the period of the Notice of Intention, depending on the circumstances and the progress of the proceedings.

Proposal forms:

- ☐ Cash flow statements together with a list of assumptions, the representations of the debtor and a report from the Trustee on the reasonableness of the Cash Flow Statements
- ☐ Statement of Affairs (Non-business Bankruptcy/Proposal), if an individual. This is the same form as that used for a bankruptcy. (See the section above for the information it should contain.)
- ☐ Statement of Affairs (Business Bankruptcy/Proposal), if a company. This is the same form as that used for a bankruptcy. (See the section above for the information it should contain.)
- ☐ Minutes of the Meeting (or official resolution) of Directors authorizing the filing of the proposal and naming the director to sign the documents (company)
- ☐ Assessment Certificate (individual)

- ☐ Division I Proposal
- ☐ Report of Trustee on Proposal, if sufficient information is available to prepare it. If the information is not sufficient, this document needs to be prepared as early as possible before the meeting of creditors, and ideally should be provided to the creditors no later than at the time of sending the notice of the meeting of creditors.
- ☐ Notice to bankrupt or an officer of a bankrupt corporation of his duties
- ☐ Estate Information Summary
- ☐ Optional:
  - Acknowledgement that the debtor must attend two counselling sessions, which should include the time frame (individual).

6.5. Review and share with Trustee

6.5.1. Review all forms for accuracy

Review Statement of Affairs to ensure that all assets and liabilities are listed.

Ensure that all encumbered assets are linked to the liabilities/encumbrances.

Ensure that expenses for secured assets which the bankrupt is retaining are listed on the income and expense form.

Compare income to Superintendent's Standards to ensure that proper amount is noted for any surplus payments to be made to the Trustee (bankruptcy only).

6.5.2. Share with Trustee

Review all forms with the Trustee to ensure that nothing was omitted and that the file is going to be filed properly (Summary vs. Ordinary Administration or Bankruptcy vs. Proposal)

For ordinary bankruptcies and Division I proposals, discuss with the Trustee the location, date and time for the creditors' meeting and the chairperson.

Creditors meetings are not required for summary bankruptcies or consumer proposals, unless requested. The requirements for the requests for creditors meeting are detailed in Module 3.

6.6. Obtain debtor's and Trustee's signature

6.6.1. Debtor's signature

Determine date and time for the Trustee and yourself to meet with the debtor to obtain signatures and finalize all forms. Some (most) of the forms represent a document originating from the debtor (for example, a declaration of the debtor's assets and liabilities, a disclosure

of his revenues and expenses, a proposal to his creditors, an acknowledgement of duties, etc.) and the debtor is required to sign these.

6.6.2. Trustee's signature

The Trustee is required to perform the assessment of the debtor in person, unless the debtor lives in a designated area, and the Trustee is required to sign the following:

- ☐ Estate Information Summary
- ☐ Assessment Certificate
- ☐ Income and Expense Form
- ☐ Consent to Act in a Division I Proposal
- ☐ Trustee's report on Cash Flow

6.6.3. Other forms

- ☐ The Statement of Affairs must be sworn (or made under solemn declaration) before a commissioner for oaths.
- ☐ Assignment for the General Benefit of Creditors (for a bankruptcy), the proposal (for a proposal) and Notice of Bankrupt Duties must be signed before a witness who knows the debtor. The person witnessing the signature must also sign the documents. These documents do not need to be signed by the Trustee.

6.7. Submit to OSB

6.7.1. Bankruptcy forms to be sent to the OSB:

Directive 9R

- ☐ Statement of Affairs, including Income and Expense Form (Non-business or Business Bankruptcy/Proposal)
- ☐ Assessment Certificate (individuals only)
- ☐ Notice to Bankrupt or an Officer of a Bankrupt Corporation of His Duties (if required by local OSB office)
- ☐ Assignment for the General Benefit of Creditors
- ☐ Estate Information Summary
- ☐ Data Entry Sheet – Office of Superintendent (if required by local OSB office)
- ☐ Minutes of the Meeting (or official resolution) of Directors authorizing the filing of the assignment in bankruptcy and naming the director to sign the documents (company only)

6.7.2. Proposal forms to be sent to the OSB:

- ☐ NOI, Trustee's Consent Form, List of Creditors, Minutes of Directors and Estate Information Summary (if an NOI is being filed)
- ☐ Statement of Affairs
- ☐ Income and Expense Form required for an individual
- ☐ Proposal (Consumer Proposal or Division I Proposal)
- ☐ Report of the Administrator (Consumer Proposal)
- ☐ Report of the Trustee (Division I Proposal) (This document need not be completed and sent to the OSB at the time of filing. See the comments made previously in section 6.4.3)
- ☐ Assessment Certificate (individual)
- ☐ Estate Information Summary
- ☐ Data Entry Sheet – Office of Superintendent (if required by local OSB office)
- ☐ Cash Flow Statement, together with accompanying assumptions, representations and report of the Trustee.

Cash Flow Statements and accompanying documents must be received by the OSB no later than 10 days after the filing of the NOI, or concurrently with the filing of the Division I Proposal. If the Cash Flow Statements are not filed in the time frame required after the NOI there is a deemed assignment in bankruptcy. The filing of the proposal will not be considered complete if the Cash Flow Statement is not filed at the same time.

If an NOI is filed, the proposal must be received by the OSB no later than thirty days after the filing of the NOI, unless an extension for the filing is obtained from the court before the expiry of the delay to file the proposal. If the proposal is not filed in the time frame required, or if no extension is requested, there is a deemed assignment in bankruptcy immediately after the delay has expired.

Time frames for filing of documents in a proposal were detailed in Module 4 and Module 5.

Determine which OSB office to file the documents with, based upon the location of the debtor. If unsure, discuss this with the Trustee.

6.7.3. E-filing

Directive 9R

Electronic filing is mandatory for all new bankruptcy estates (whether summary or ordinary) and proposals (whether Division I or Division II) that are submitted by trustees and Administrators and for all subsequent prescribed documents submitted for these estates that are accepted by the OSB's electronic filing system (the exceptions are outlined below).

During a service interruption, for example, a power outage or a system malfunction, trustees should use alternative methods of filing after contacting the Official Receiver to discuss the proper protocol to follow.

For insolvency proceedings that cannot be electronically submitted, documents pertaining to those proceedings should be filed in person, or sent by mail, courier or fax. These proceedings are:

- partnership assignments and partnership proposals;
- receiverships under Part XI of the Act; and
- assignments deriving from bankruptcy orders.

6.8. Certificate of Appointment

6.8.1. Follow up receipt of the appointment with Trustee

Within 24 to 48 hours, the Certificate of Appointment should be received from the OSB. If this is not received, it will be necessary to follow up with the OSB to determine if there was a problem with the forms filed. If e-filing the documents, the Certificate of Appointment should download automatically and almost immediately.

Review the Certificate of Appointment to ensure that the requested date, time, and location for the creditors' meeting are correct.

6.9. Send notices and other documents to creditors

6.9.1. Summary

BIA s. 51(1), 66.15(3) and 155

BIA Forms 31, 36, 37.1, 48, 49, 65, 69, 70 and 79

Bankruptcy forms:

☐ Notice to creditors:

- Notice of Bankruptcy and of Impending Automatic Discharge of Bankrupt, and Request of a First Meeting of Creditors (if a first or second time bankrupt), or
- Notice of Bankruptcy and Request of a First Meeting of Creditors (for third time or more previous bankruptcies)

☐ Statement of Affairs, including Income and Expense Form

☐ Proof of Claim Form

☐ Copies of all above documents are also sent to the bankrupt

Consumer proposal forms:

- ☐ Notice of Consumer Proposal
- ☐ Consumer Proposal
- ☐ Report of the Administrator
- ☐ Statement of Affairs, including Statement of Income and Expenses
- ☐ Proof of Claim form
- ☐ Voting Letter
- ☐ Copies of all above documents are also sent to the debtor

6.9.2. Ordinary, Notice of Intention and Division One Proposals

BIA s. 51, 102(1), 155 and 168.1(4)

BIA Forms 31, 33, 36, 37, 40, 66, 68, 73, 78 and 92

Directives 23 and 24

Bankruptcy Forms:

- ☐ Notice to creditors:
  - Notice of Bankruptcy and First Meeting of Creditors together with the Notice of Impending Automatic Discharge (if a first or second time bankrupt) (Form 69); or
  - Notice of First Meeting (Form 70) for if third time bankrupt or greater. Notice of Hearing for Discharge should be sent when a date is set; or
  - Notice of Bankruptcy, First Meeting of Creditors (for corporations) (Form 68)
- ☐ Statement of Affairs (for both corporations and individuals), including Income and Expense Form (for individuals)
- ☐ Proof of Claim form
- ☐ Proxy form
- ☐ Copies of all documents above should be sent to the bankrupt together with the Notice to Bankrupt of Meeting of Creditors
- ☐ A notice must be published in a local newspaper

Notice of Intention:

- ☐ If an NOI was filed, you are required to send the NOI, Trustee's Consent Form and List of Creditors owed over $250 to all creditors
- ☐ Copies of all documents above should be sent to the debtor.

Division I proposals:

- ☐ Notice of Proposal to creditors
- ☐ Division I proposal
- ☐ Report of Trustee
- ☐ Statement of Affairs
- ☐ Proof of Claim form
- ☐ Proxy form
- ☐ Voting Letter
- ☐ Copies of all above documents should be sent to the debtor

Appendix A

Agreement to Pay

I/we, name of bankrupt(s), hereby agree to pay to the Licensed Insolvency Trustee, name of LIT, the sum of $_____, to be paid enter terms of payment.

I/we understand that cheques which are returned by the bank for any reason must be replaced with cash, certified cheque or money order, plus any bank charges. I/we understand that failure to pay the above amount in full will result in the automatic objection to my/our discharge from bankruptcy by the Trustee.

Dated this day of , 20___

_____ _____

Bankrupt's signature ***Signature of Licensed Insolvency Trustee***

_____

Joint bankrupt's signature (if applicable)

Appendix B

Counselling Sessions

Name of bankrupt:

Date of sign-up:

First counselling session

To be held at:

Second counselling session

To be held at:

I/we have been advised by my/our Licensed Insolvency Trustee that the:

1. First counselling session is to be completed between ten (10) and ninety (90) days following the date of the initial bankruptcy event or the filing of a consumer proposal.
2. Second counselling session is to be completed before the discharge date and at least after 30 days following the first counselling session

I/we agree to attend both of these counselling sessions. I/we understand that I am/we are not entitled to an automatic discharge from bankruptcy if I/we fail to attend, or fail to reschedule and attend a missed counselling session.

Dated this day of , 20___

_____ _____

Bankrupt's signature ***Signature of Licensed Insolvency Trustee***

_____

Joint bankrupt's signature (if applicable)

Appendix C

ACKNOWLEDGEMENT

RE: CREDIT CARDS

I/we name of bankrupt(s), hereby acknowledge the following:

_____ I/we have given the Licensed Insolvency Trustee all credit cards for which I am/we are directly or indirectly responsible for payment.

OR

_____ I/we have returned all credit cards to the appropriate company prior to filing for bankruptcy and I am /we are no longer in possession of any credit cards.

OR

_____ I/we do not have any credit cards or I/we have destroyed all credit cards

I/we understand that a false declaration with respect to the aforementioned may constitute an offence under the *Bankruptcy and Insolvency Act*.

_____ _____

Bankrupt's signature ***Date***

_____ _____

Joint bankrupt's signature (if applicable) ***Witness' signature***

Appendix D

Consent of Licensed Insolvency Trustee

To: Name of individual (corporation) filing NOI

Re: Proposal under Part III of the *Bankruptcy and Insolvency Act*

From: Name of Licensed Insolvency Trustee

Name of LIT, hereby consents to act as Trustee under a proposal to be made by name of individual (corporation) filing NOI, to its creditors under the provisions of Part III of the *Bankruptcy and Insolvency Act*.

DATED this day of , 20___

_____

Name of Licensed Insolvency Trustee

Per:

_____

Signature of Licensed Insolvency Trustee

7. Proofs of Claim

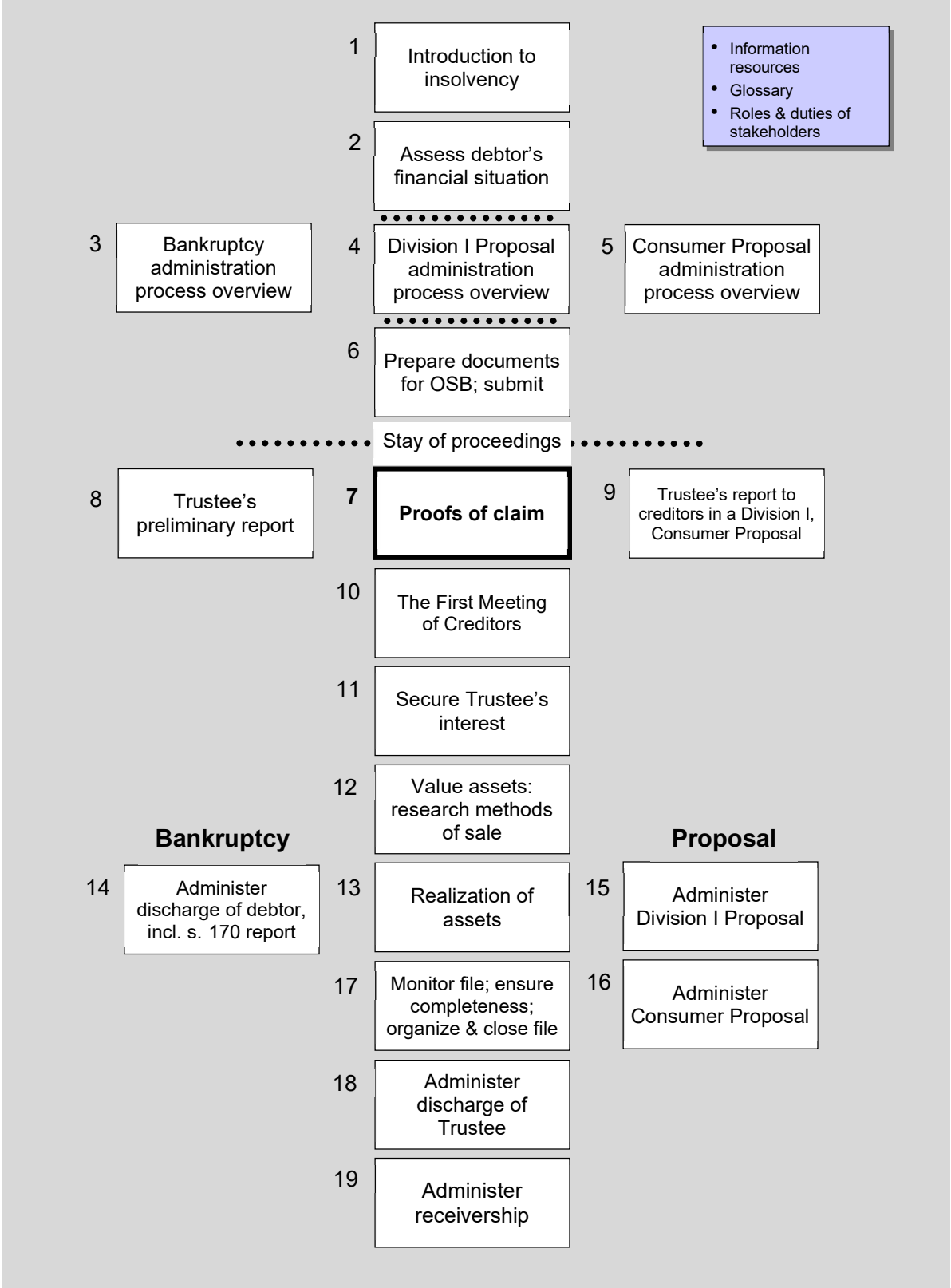


Table of Contents

7.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Explain the elements required in a proof of claim.
- Determine whether to recommend admitting or disallowing a claim to the Trustee.
- Protect the estate's interests while still allowing secured creditors the full extent of their rights.

Assigned readings

- BIA Sections 4, 81, 95, 121 – 147, 163, 170 and 178
- BIA Forms 31, 36 – 37, 37.1 and 74 – 77
- BIA Rules 112, 113 and 123
- Directive 11R and 22R
- CAIRP Standards of Professional Practice No. 6

7.1.1. Creditor's rights

BIA s. 81, 128, 161, 163 and 170

The BIA is designed to allow the creditors, within their class, as much input and control as possible over the bankruptcy process. The BIA ensures creditors receive a fair and equitable distribution of the bankrupt's property or distribution in the proposal. The Proof of Claim is the document which establishes a creditor's rights and status. Having proved a claim to the Trustee, a creditor may:

- establish his right to the bankrupt's property;
- establish his right to his own property;
- participate and vote at meetings of creditors;
- vote on the Trustee's appointment and the appointment of inspectors;
- be notified of material changes in the bankrupt's financial circumstances;
- inspect the Trustee's estate files;
- have the bankrupt examined under the BIA;
- review all the other claims and object to them if he see fit;
- obtain copies of the Trustee's report on the bankrupt's discharge;

- oppose the bankrupt's discharge;
- receive the Trustee's Final Statement of Receipts and Disbursements;
- object to the Trustee's discharge; and
- receive a dividend.

Having failed or neglected to prove a claim, the creditor has none of the rights listed above.

7.1.2. In a proposal

In a proposal, a claim establishes the creditor's voting rights at the meeting of creditors and his proper dividend from the debtor's contributions.

7.1.3. Provable claims

BIA s. 121

A claim provable is any debt or liability to which the debtor was subject at the date of the bankruptcy (or proposal), in other words, what was owed at the date of bankruptcy or proposal. This would include debts that are not released by a discharge.

7.1.4. Proving a claim

BIA s. 124

To be entitled to participate in the bankruptcy or proposal process all creditors are required to prove their claim. Those creditors who do not prove their claim will not be entitled to participate and therefore unable to receive a dividend. The onus is on the creditor to establish a right to a dividend and any of the other rights a creditor can claim in a bankruptcy or proposal.

7.1.5. The Proof of claim

BIA Form 31

The proof of claim addresses a number of important questions which determine a claimant's status. The Trustee must be satisfied that the claimant has properly responded to these questions before he can admit the claim. Until a claim is admitted, the claimant does not have creditor status.

7.2. Form 31

BIA Form 31

Directive 22R

7.2.1. Details of Form 31

The proof of claim must identify the following:

1. The debtor/bankrupt and the date of bankruptcy or proposal;
2. The creditor and the person submitting the claim (if not the creditor);
3. The amount owed to the creditor;
4. The nature of the indebtedness - secured, unsecured, preferred, landlord, agricultural or directorship claim;

   A secured creditor claims a right to some part of the bankrupt's property. A preferred claim establishes that creditor's right to be paid in full in priority to the other unsecured creditors. An unsecured claim entitles the creditor to a dividend "*pro rata*" or in proportion of his claim. Each class has its own rights.

5. The nature and value of any security held;

   A secured claim must identify the security and state the value which the creditor believes the security is worth at the date of bankruptcy.

6. Whether the creditor, is or is not, related to the bankrupt;

   The relationship between the creditor and bankrupt has various consequences. Someone related to the bankrupt may be restricted in his voting rights and in his right to a dividend, even though it is a legitimate debt. The BIA defines related persons.

7. All payments received from the bankrupt/debtor in the three months prior (if related, 12 months) to the bankruptcy or proposal;

   Payments made to the creditor by the bankrupt in the three months preceding the date of the initial bankruptcy event (12 months for related parties) may be found to be preferential. The Trustee may try to recover such payments for the estate.

8. The claim form allows the creditor to request certain information about the bankrupt's financial circumstances and the Trustee's report on the bankrupt's discharge (s. 170 Report).

7.2.2. Schedule A - Statement of Account

The creditor must back up his claim with proof of the debt. This may consist of a contract, promissory note or a credit card's monthly invoice. It must include a Statement of Account to show how the creditor arrived at the amount owing. The schedule must include the date,

number and amount of all charges, credits and payments on the account in the previous three months.

7.2.3. Voting rights

Only unsecured creditors may vote at a meeting of creditors. A creditor who is only partially secured may vote for the unsecured part of his claim. Some creditors may be restricted in their voting rights notwithstanding the fact that they hold an unsecured claim. These restrictions were described in Module 3 previously in this text.

7.3. Admitting and disallowing claims

BIA s. 135

7.3.1. Trustee's decision

Once a claim is filed, an Administrator will often be tasked with reviewing the claim and advising the Trustee of any reason to disallow the claim. However, the final decision to allow or disallow a claim rests with the Trustee.

7.3.2. Questions to ask

Some of the questions to be determined when reviewing a claim are:

- Does it properly identify both the bankrupt and the creditor?
- Does it specify the amount owing?
- Does it specify the nature or class of the debt, i.e., secured, unsecured, etc.?
- If secured, does the claim include a copy of the contract and proof of registration?
- Does it value the security?
- Does it state the relationship?
- Does it state the payments received in the previous three months (or 12 months)?
- Is it dated, signed AND witnessed?
- Is it accompanied by a proper Statement of Account?

Any inadequacy in the information above can be dealt with by contacting the creditor and requesting further information or corrections.

If there is a proxy, it should be signed and witnessed separately.

7.3.3. Notice of Disallowance

BIA Form 77

Any official notice of disallowance is final and conclusive unless appealed to the court within thirty days of being served (or such other period as the court will allow, if the creditor asks for a longer delay within the 30-day period). Therefore, caution should be used on issuing any notice of disallowance.

7.4. Creditors' rights and obligations

7.4.1. Secured creditors

BIA s. 128

A secured creditor could essentially operate outside the bankruptcy. However, the Trustee can demand that such a creditor prove his security. If the creditor fails to respond, the Trustee may apply to the court to be allowed to dispose of the property for the benefit of the estate. If the Trustee does not demand this proof, the creditor is free to do what he pleases. The BIA allows a creditor with a security right to exercise that right independent of the Trustee.

7.4.2. Security valuation

The importance of the security valuation on the claim form is twofold. It allows:

- the Trustee to redeem the security for the amount of the valuation or the amount owed the creditor, whichever is less; and
- the creditor to establish his rights to vote or receive a dividend for any unsecured portion of his claim (the difference between what is owed and what the security is worth).

7.4.3. Demand by creditor

A secured creditor may insist that the Trustee decide whether or not to redeem the security. If the Trustee fails to respond within 30 days, the creditor will be free to do as he wishes with the property in question.

7.4.4. Information request

A creditor may request information by checking the appropriate box near the bottom of the claim form. He can ask to be notified of any change in the bankrupt's financial circumstances as they relate to surplus income and a recommendation made by the Trustee, and/or receive a copy of the Trustee Report on the Bankrupt's Application for Discharge.

7.4.5. Dividend distribution

Whether in a bankruptcy or proposal, the admission of a claim establishes the creditor's right to share in the dividend distributions made by the Trustee. However, creditors may have different standings in this regard. The BIA governs the dividend distribution.

7.4.6. Preferred status

BIA s. 136

A creditor whose claim falls within any of the categories mentioned in s.136 of the BIA is referred to as a preferred creditor. This entitles him to be paid in priority to the other unsecured creditors.

7.4.7. Pro rata

After all the preferred creditors have been paid, the rest of the creditors (referred to as unsecured) share the rest of the money in proportion of what their debt is to the total amount of the unsecured debt.

Example: If a creditor is owed $1,000 and the total unsecured proven claims are $12,000, that creditor will receive 8.333% of the dividend (i.e., $1,000/$12,000 X Dividend Amount = 8.333% X Dividend Amount).

7.4.8. The Levy

BIA Rule 123

Service Fees Act

The Superintendent of Bankruptcy is entitled to a levy on the dividend a creditor receives.

The levy is used to help defray the expenses of the supervision of the Superintendent of Bankruptcy. In a summary administration, the levy consists of the first $200 of dividend available to the creditors. In all other types of insolvency appointments the levy will vary in accordance with Rule 123.

The Service Fee Act provides for the possibility of an annual adjustment. Beginning March, 31 2020 the levy will be subject to an annual adjustment. The adjustment will take place on March 31st of each year and based on the Consumer Price Index (CPI). The $200 levy will be considered as the base (up until March 30th, 2020) and then adjustments will be in effect on March 31st of each subsequent year.

8. Trustee's Preliminary Report

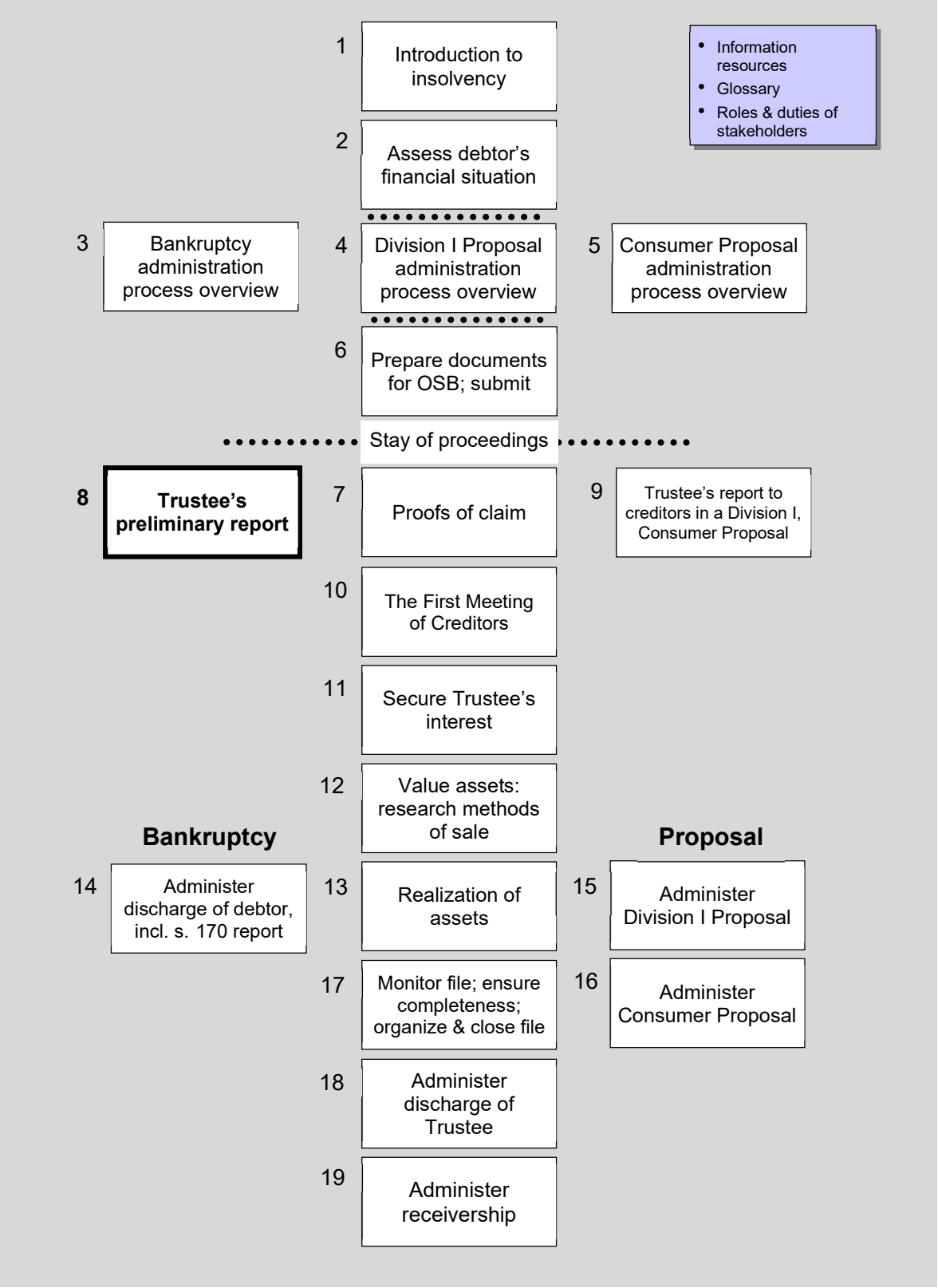


Table of Contents

8.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Determine when it is necessary to prepare a preliminary report ("report").
- Collect the information necessary for the report.
- Prepare a concise and informative report for review and signature by the responsible Trustee.

Assigned readings

- BIA s. 21, 67(2), 81, 95 - 99, 101 and 102, 102(5), 105(d.1) and 155(d.1)
- Directive 30

8.2. Determine need to prepare preliminary report

8.2.1. Creditors' meeting

BIA s.102 and 155

Directive 30

A meeting of creditors is mandatory in an ordinary administration bankruptcy. Under a summary administration bankruptcy a meeting will only be required if the Official Receiver or creditors who have in aggregate at least 25% in value of proven claims request one.

At the meeting of creditors held for an ordinary administration bankruptcy the Trustee is required to submit a preliminary report. If a creditors' meeting is required to be called in a summary administration bankruptcy, or if the administration is very simple and straightforward, the report may be made verbally.

There are separate reporting requirements for proposals which are discussed in Module 9.

8.3. Significance of the preliminary report

8.3.1. Purpose of the meeting of creditors

BIA s. 102(5)

The purpose of the meeting of creditors is to consider the affairs of the bankrupt, affirm the appointment of the Trustee or substitute the Trustee with another, to appoint inspectors and for the creditors to give directions to the Trustee with regards to the administration of the bankruptcy. A report contributes to the success of the meeting as it provides:

- information regarding the bankrupt's financial affairs;
- a review of the Trustee's initial actions;
- information for the creditors upon which to base their decisions; and
- a basis for the creditors to give directions to the Trustee.

8.4. Gather information known to date

8.4.1. Start early

The initial review required to prepare a report may identify preliminary steps that should be completed before the creditors' meeting. If the initial review is completed on the eve of the creditors' meeting, there may be insufficient time to resolve the issues so it is prudent to begin preparing the report ahead of time.

8.4.2. Potential sources of information for the report:

- Statement of Affairs
- the initial standardized data collection form
- the bankrupt's books & records, tax returns / assessments, bank records, income information and financial statements
- notes taken during initial consultation(s)
- proofs of claim filed by creditors
- if a summary administration, the creditor who requested the meeting
- inventory counts and appraisals of the assets
- insurance documents
- bankrupt's lawyer, accountants and other professional advisors
- the bankrupt (or representatives if corporate).

8.4.3. Assets

The Statement of Affairs should be a starting point for gathering the information regarding the bankrupt's assets. The BIA requires the Trustee to verify the Statement of Affairs. All assets listed on the statement, or subsequently identified by the Trustee, must be included and commented upon in the report. Actions taken by the Trustee and information obtained regarding these assets must be disclosed.

Categories of assets include but are not limited to:

- real estate;

- inventory, stock in trade;
- machinery, equipment;
- office equipment;
- accounts receivable or other debts owed to the bankrupt;
- investments;
- cash in bank or on hand;
- motor vehicles; and
- patents, copyrights, trademarks.

Actions may include:

- physically securing the assets;
- placing insurance;
- counting and documenting assets;
- liquidation of perishable or rapidly depreciating assets;
- continuing business operations;
- issuing notification letters to the account debtors to send payments to the Trustee; and
- returning third party assets.

Information obtained from others includes:

- appraisals or valuations of the assets;
- PPSA or RDPRM search;
- obtaining a legal opinion as to the validity of security/encumbrances registered against these assets;
- copies of documentation of security interests and other priority claims; and
- potential market/purchasers for the business and/or assets.

8.4.4. Financial affairs

BIA s. 95 - 99 and 101

The financial affairs of the bankrupt must be investigated and reported on. The Trustee needs to report what has been done in this regard prior to the creditors' meeting, what issues have been identified and what further action is planned/required.

In particular, the Trustee is attempting to identify and report the issues involving preferences and transfers at undervalue, pursuant to sections 95 – 101 of the BIA.

8.4.5. Debts

BIA s. 67(2), 81, 81.1, 81.2 and 136(1)

Part of verifying the Statement of Affairs is determining if the debts disclosed are complete and accurate. There are several potential types of debts/claims that may exist in a bankruptcy estate including:

- unsecured;
- secured;
- preferred;
- deemed trust claims;
- property claims;
- unpaid supplier debts; and
- rights for farmers, fisherman and aquaculturists.

The Trustee should compare the records of the bankrupt and the proofs of claim received from creditors with the debts disclosed in the Statement of Affairs. The Trustee should then comment on the completeness and accuracy of the debts in the Statement of Affairs in the report.

It should answer questions such as:

- Are they comparable?
- Are there missing creditors?
- Are there are significant variances in the amounts or types of debt disclosed?

8.4.6. Projections

The Trustee may provide a projection of the realization from various assets and project the potential distribution to creditors. There are risks involved with this type of reporting because you are essentially attempting to predict the future. Assets may not sell for the estimated value, additional costs may be incurred, unknown creditors may prove their claims, etc. Any one of these scenarios would cause a variance in the distribution to creditors.

A properly written disclaimer or qualification statement that is tailored to the specific situation should be included with any projection. This ensures that it is clear to the users of the information that the projection is not fact and that the actual results will most likely vary from the projections.

8.5. Finalizing the report

8.5.1. Initial review with the Trustee

Once you have completed a draft of the report, review it with the Trustee responsible for the file who will be attending the creditors' meeting. Focus this review on content and do this soon enough to allow for follow up on outstanding information and/or further actions which the Trustee believes to be necessary. The Trustee may wish to recommend certain actions to the creditors and request directions from creditors on certain issues in the report.

8.5.2. Final preparation

Once the content of the report is complete, its format must be your focus. The structure, layout, grammar, spelling, etc. are all very important to ensure that the report is concise and informative for the creditors. Once the report is complete, ask the Trustee to do a final review and sign the original document. The Preliminary Report must be signed by a Trustee.

8.5.3. Distribution

The Trustee is responsible for distributing the report at the creditors' meeting. Estimate the number of creditors who will be attending the meeting and make sufficient copies for them, the debtor, and any other parties attending the meeting. The other parties requiring a copy of the report could include the Official Receiver, the estate's lawyer, the debtor's lawyer, the media, etc., as allowed by the chairperson of the meeting. Finally, the report should be provided to the attendees of the meeting when they arrive so that they have an opportunity to review it prior to the start of the meeting.

9. Trustee's Report to Creditors in a Division I, Consumer Proposal

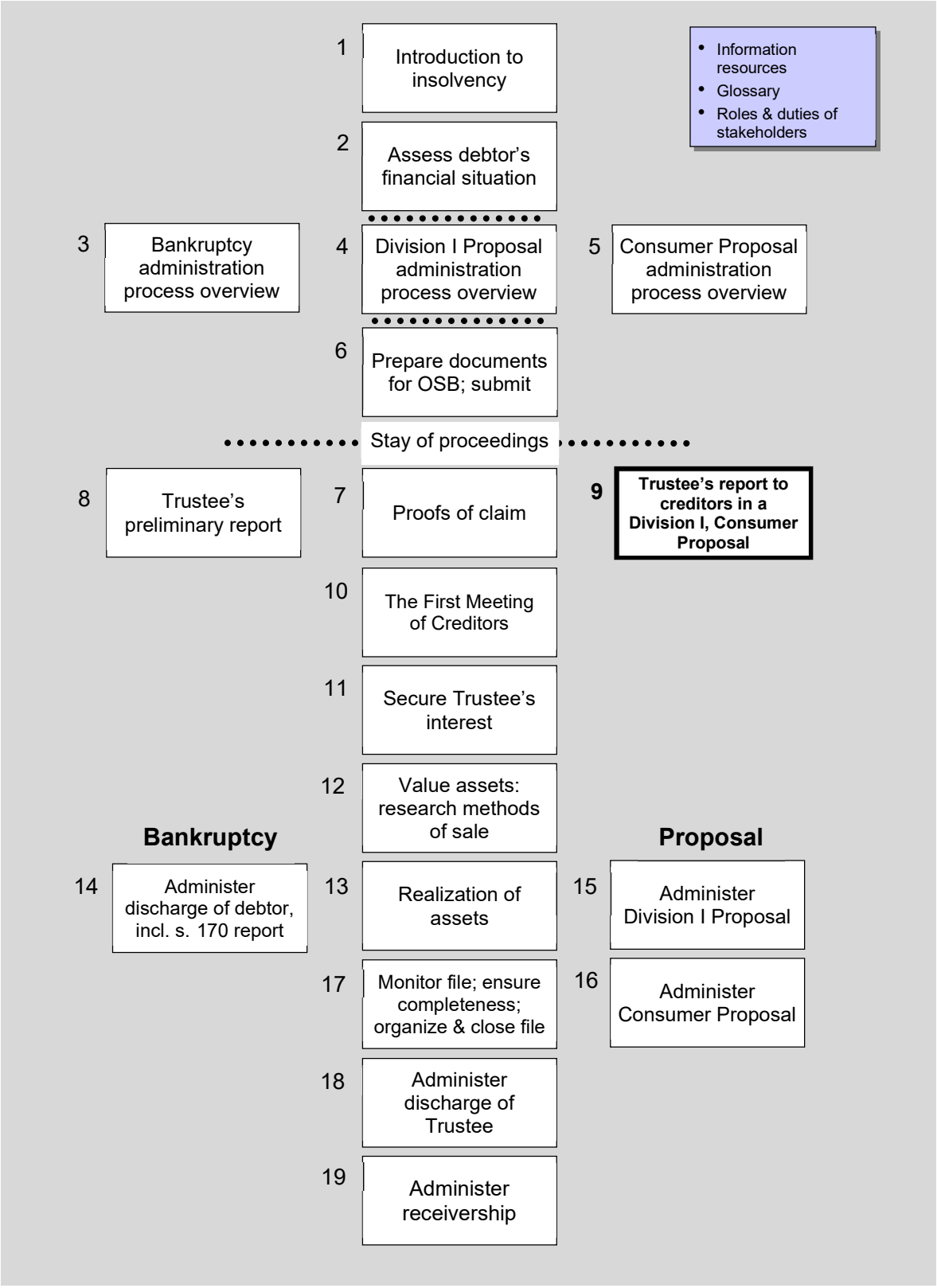


Table of Contents

9.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Determine the type of report to be completed.
- Determine when the report is to be completed.
- Collect the information required for the report.
- Prepare a concise and informative report for review and signature by the responsible Trustee.

Assigned readings

- BIA s. 50-66 and 66.11-66.4
- BIA Form 48
- Directives 24 and 30
- Standards of Professional Practice No. 8 (8.5)

9.2. Determine the report that should be prepared

9.2.1. Division I proposal

BIA s. 50(5) and 50(10)

Directive 24

The BIA requires the Trustee to:

- make an appraisal/investigation of the affairs of the debtor;
- estimate the financial situation of the debtor;
- estimate the reasons for the financial difficulties; and
- report the findings to the meeting of creditors.

The BIA also provides the Trustee with a right of access to the debtor's records to assess the business and financial affairs and requires the Trustee to report the information to:

- the Official Receiver forthwith, if a material adverse change is ascertained;
- the court, if it orders the information; and
- the creditors.

Directive 24, sets out a guideline for the preparation of the report. The appendix to the directive lays out a format. This format should be used as a starting point and be tailored to the specific proposal. While the BIA does not address the timing of the delivery of the report to the creditors (except as noted below), the directive suggests that the report should be sent to the creditors in advance of the meeting if possible, so that the creditors can make a well-informed decision. The directive suggests that the report should be sent along with the notice of the meeting (which notice must be sent at least 10 days before the meeting).

As indicated above, the BIA does not address the timing of the delivery of the report to the creditors, other than to state that the report is presented to the creditors at the general meeting to consider the proposal (section 50(5) of the BIA). There is one notable exception however. If the proposal provides that sections 95 to 101 of the BIA will not apply to the proposal (i.e., that the creditors will waive the right to contest preferential payments, transactions at undervalue, dividends, redemptions of shares or other like reviewable or void or voidable transactions), then the BIA states that the Trustee must report on the reasonableness of such a provision, and that the report must be made available to the creditors at least 10 days before the meeting.

The Trustee presents the report at the meeting of creditors. If the report was circulated prior to the meeting, it is customary to provide an updated report at the meeting. It is customary for the report to be in writing. In fact, if the proposal is a commercial proposal, Directive 24 states that the report must be in writing.

9.2.2. Consumer proposal

BIA s. 66.14

BIA Form 48

CAIRP Standard of Professional Practice No. 8

The BIA states that the duties of an Administrator include investigating the property as well as the financial affairs of the debtor. This enables assessment of the financial situation and causes of insolvency.

The BIA also states the Administrator must prepare and file a report with the Official Receiver within 10 days after filing the consumer proposal, using the prescribed Form 48 (Exhibit 1). The report is to include:

- Administrator’s findings under 66.13 of the BIA;
- Administrator’s opinion as to whether or not the consumer proposal is reasonable and fair to the creditors and the debtors and whether or not the debtor can perform it;
- condensed statement of the debtor’s assets, liabilities, income and expenses;
- list of creditors; and
- other information, as noted in CAIRP Standard of Professional Practice No.8

This report is included with the information sent to the creditors with the Notice to Creditors of Consumer Proposal, within 10 days after filing the consumer proposal.

9.3. Gather information

9.3.1. Access to information

BIA s. 50(10) and 66.13(1)

The BIA requires that the debtor provide the Trustee/Administrator with access to financial information.

9.3.2. Potential sources of information

- Statement of Affairs;
- cash flow statements or monthly income and expense statements;
- standardized data collection form;
- debtor's books and records, tax returns/assessments, bank records, income information, and financial statements;
- notes taken during initial consultation(s);
- proofs of claim filed by creditors;
- inventory counts and appraisals of the assets;
- insurance documents;
- debtor's lawyer, accountants and other professional advisors;
- debtor (or representatives if corporate), etc.; and
- a very healthy dose of common sense and skepticism to assess the relative quality of the information obtained.

9.3.3. Division I vs. consumer proposal

The amount and level of detail of information needed for a report on a Division I proposal is significantly greater than for a consumer proposal simply because of the nature and potential complexity of the engagements. The Division I proposal will be more complex; it may deal with a corporate debtor or an individual who has significant debts and assets. A consumer proposal must be an individual debtor with less than $250,000 in debt (excluding mortgage debt on the principal home).

9.4. Draft the report in proper form and with proper content

9.4.1. Form

BIA Form 48

Directive 24

Directive 24 suggests a format for a Division I proposal report to creditors, unlike the consumer proposal where the Administrator is required to use Form 48.

9.4.2. Content – Division I proposal

Directive 24

For Division I proposals, the trustee is required to report the following to the meeting of creditors:

- the findings of the appraisal/investigation of the affairs of the debtor;
- the financial situation of the debtor; and
- the reasons for the financial difficulties.

As well, if the proposal includes a provision stating that sections 95 to 101 of the BIA do not apply to the proposal, the Trustee must provide an opinion on the reasonableness of a decision to include such a provision in the proposal, and this opinion must be made available to the creditors before the meeting.

Unlike the required information under a consumer proposal, it is not a requirement of the Trustee to provide an opinion on the proposal itself and the debtor's ability to perform it. However, it is a good idea to provide a recommendation in an objective and professional manner in the report. This practice is recommended in Directive 24.

It is also recommended in the Directive to include a projection/estimate of the distribution to creditors. This projection should compare the proposal with bankruptcy to confirm that the basic requirement of a proposal is met, i.e., that the dividend distribution is better than bankruptcy.

A properly written qualification statement should be included with the projection/estimate, so that it is clear to the users that the information is an educated guess, not fact, nor a warranty of results. If the proposal is accepted, circumstances could arise such that the debtor subsequently becomes unable to fulfill the proposal, and if the proposal is rejected, the actual results of the liquidation process could be different from the estimated amounts, for a variety of reasons (for example, additional losses incurred in the interim period, adverse changes in the market for the debtor's equipment, seasonality, etc.).

The report should be concise and complete, and an executive summary may be provided. Also, the time and place of the meeting, how to vote, the approval process and result if rejected can be included in the report.

9.4.3. Content – consumer proposal

BIA Form 48

Form 48 dictates the content of report. It confirms that the Administrator has completed the work required and that the required documents are attached. The Administrator needs to identify the causes of insolvency and the reasons for the Administrator's opinion supporting (or recommending against) the proposal.

Similar to the Division I proposals, it is good idea to include a projection/estimate of the distribution to creditors, comparing the proposal to bankruptcy to confirm that the dividend distribution is better than bankruptcy. A qualification statement should be included with the projection/estimate.

9.5. Finalizing the report

9.5.1. Deadlines – Division I

BIA s. 50(10)

Directive 24 states that the report should be sent to creditors in advance, preferably with the notice of the meeting (which must be sent at least 10 days prior to the creditors meeting). The report may need to be updated for the meeting of creditors (either verbally or in writing) if additional information becomes available before the meeting.

9.5.2. Deadlines – consumer proposal

BIA s. 66.14(a)

The report must be sent to creditors within 10 days of the filing of the consumer proposal.

10. The First Meeting of Creditors

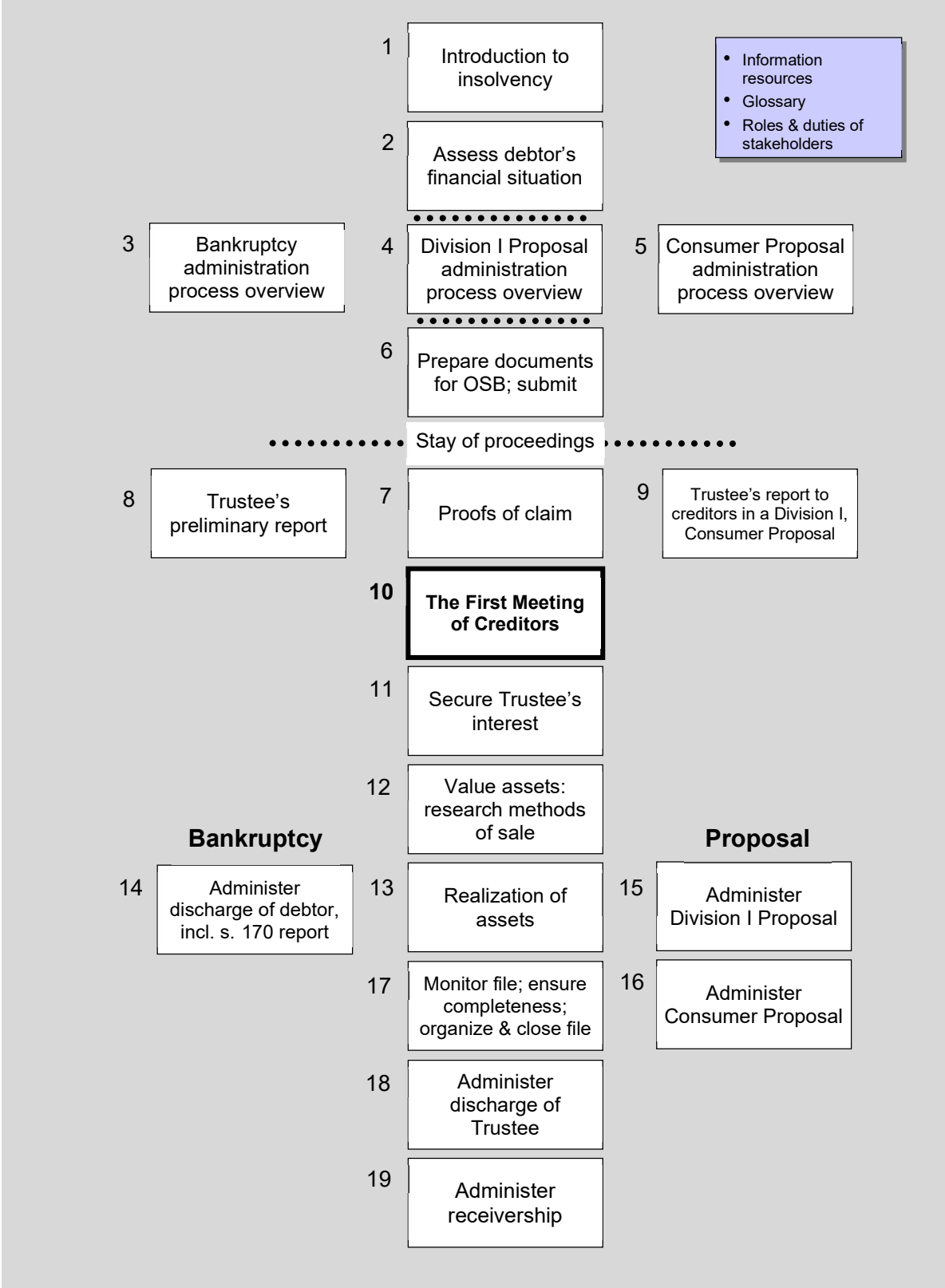


Table of Contents

10.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Describe an overview of the first meeting of creditors.
- Explain the purpose of the first meeting of creditors.
- Convene and conduct the first meeting (if a summary administration or a consumer proposal) and deal with the administration that relates to it.

Assigned readings

- BIA s. 2, 14, 36, 102 -120, 121(1), 158, 161, and 198(2)
- BIA Forms 31, 36, 37, 37.1, 41, 66-68 and 73
- BIA Rules 108 - 110
- Directives 4, 22R, 23, 24, 30

10.2. Background

Canadian bankruptcy administration is designed to give creditors as much input and control as possible. Generally, the creditors first opportunity to participate in the process begins with the first meeting of creditors should one be required. The creditors discuss the situation with the Trustee, ask questions if desired and may help make decisions that will set the later course of the administration. They can even change trustees and get actively involved in other ways. The first meeting “sets the table” for the administration.

In a proposal, whether it is Division I or Division II (or consumer proposal), the purpose of the meeting is to take a vote on the proposal.

More than one creditors’ meeting is sometimes held.

Not all bankruptcies or proposals have a meeting of creditors. Summary bankruptcies and consumer proposals only have a meeting if at least 25% of the proven creditors request it. Ordinary bankruptcies and Division I proposals always require a meeting to be held within a specified delay of the filing date.

For a proposal, the meeting needs to be held within 21 days of the filing of the proposal, unless the court authorizes a longer delay.

For a bankruptcy, the timing of the meeting of creditors itself can be extended by the Official Receiver by 10 days or, in special cases, 30 days, if the creditors’ interests will not be jeopardized. The court can authorize more time.

10.3. Bankruptcy pre-meeting administration

10.3.1. Trustee's appointment

There must be a Trustee in charge of a bankruptcy at all times. A Trustee is appointed by either the Official Receiver, when an assignment is filed, or by the court, when a Bankruptcy Order is made. Once the Trustee has accepted his appointment, he must carry out his duties until he is discharged, removed by court order for cause or replaced by the creditors.

10.3.2. Notifying the creditors

BIA s. 102(1.1)

Pursuant to the BIA, the Trustee is required to give notice of the bankruptcy to all known creditors within five days from the appointment. A copy of this notice must be e-filed with the Office of the Superintendent of Bankruptcy.

10.3.3. Certificate of Appointment

An assignment is by far the most common start to a bankruptcy. The Official Receiver reviews the assignment, issues an estate number and a Certificate of Appointment to the Trustee. This is the official document which confirms the date of the bankruptcy, appoints the Trustee and specifies the date, time, and location of the first meeting of creditors, if any, and who will be the chairperson.

10.3.4. Summary vs. ordinary assignments

Most assignments are summary administrations, where the certificate does not automatically call for a meeting. However, the Official Receiver can call a meeting in a summary administration and must call a meeting in an ordinary administration.

10.3.5. Arranging a location

If the Official Receiver hasn't set the meeting for his own offices, the Trustee's first step is to arrange a suitable location, such as his office or a hotel meeting room or convention center. The number of creditors who are likely to attend is the key factor in deciding location.

10.3.6. Notices to the creditors and bankrupt

BIA s. 102(1)

BIA Forms 66, 68, 69, 70, 71

Directive 23

Two notices are sent: one to the creditors and one to the bankrupt. They both state the date, time and location of the meeting. The creditors are also told what they must do to be eligible

to vote at the meeting. The bankrupt is reminded of his duty and the consequences of not attending.

10.3.7. The notice package

As well as the notice, the creditors also receive:

- a list of all the creditors who are owed $250 or more, along with the bankrupt's estimate of the amount that each is owed;
- a blank proof of claim form; and
- a blank proxy form.

10.3.8. Publication in newspaper

At least five days before the meeting (in an ordinary bankruptcy), the Trustee must publish a notice in the local newspaper announcing details of the meeting. This is for the benefit of any other creditors who may have been omitted from the list in the Statement of Affairs. The notice also explains the bankrupt's legal status to anyone who may do business with him.

10.4. Purpose of the meeting

10.4.1. Purpose

BIA s. 102(5)

According to the BIA, the purpose of the first meeting is to:

- consider the affairs of the bankrupt;
- affirm the appointment of the Trustee or substitute another;
- decide whether or not to appoint inspectors and, if so, appoint from one to five inspectors; and
- give specific directions to the Trustee for the ongoing administration.

10.4.2. The affairs of the bankrupt

BIA s. 161

Creditors can question the bankrupt and the Trustee. Others, like the bankrupt's accountant, may also be asked for information. The bankrupt may be examined by the Official Receiver. The responses are reported at the meeting.

10.4.3. The Trustee's appointment

The initial meeting provides a first opportunity for the creditors to consider the appointment of the Trustee. It is customary for the person chairing the meeting of creditors to ask for a motion confirming the Trustee's appointment, although the creditors could instead, if they wish, vote on a motion to replace the Trustee. At a first meeting of creditors that follows an assignment in bankruptcy or a bankruptcy order (i.e., not a bankruptcy that results from a failed proposal proceeding), the creditors can replace the Trustee through a special resolution. It requires a majority in number, holding 3/4 of the value of the claims of those present and voting.

NOTE: The creditors can substitute the Trustee at any meeting of creditors.

10.5. Roles & responsibilities

10.5.1. Inspectors

BIA s. 116

Since the bankruptcy process is intended in large part to optimize recovery for the benefit of the creditors, the Trustee will often want to consult the creditors on major decisions that could affect their recovery (e.g., sale of assets). It would be unworkable to have to call a meeting of creditors every time a decision needs to be made, so the BIA provides that the creditors may appoint up to five inspectors to advise the Trustee and generally supervise the Trustee's work. The creditors could also decide not to appoint inspectors, in which case the Trustee will have to make decisions without the benefit of the guidance of the inspectors.

Inspectors can be appointed at any meeting of creditors, but they are usually appointed at the first meeting.

The creditors can always replace the inspectors or override their decisions.

10.5.2. Specific directions

The creditors can give the Trustee specific instructions at any meeting. Sometimes such directions conflict with what the Trustee thinks should be done, or the instructions may be impractical, imprudent or counter-productive. In such cases the Trustee should seek direction from the court.

10.5.3. Chairmanship

BIA s. 105 and 51(3)

The Official Receiver chairs the first meeting of creditors but may, and often does, delegate this to his nominee who may not necessarily be a Trustee. However, in a Division I or an Ordinary Administration the nominee can only be a Trustee. All subsequent meetings in a Division I proposal or an ordinary administration are chaired by the Trustee.

10.5.4. Minutes of the meeting

BIA s. 105(4)

The chairman must keep minutes of who attended and what was discussed and decided at the meeting. A copy of the minutes must be e-filed with the Office of the Superintendent of Bankruptcy.

10.5.5. A quorum

BIA s. 106

Directive 22R

A meeting must have a quorum to be able to pass resolutions. A proven creditor present in person or by proxy constitutes a quorum. If there is no quorum in an ordinary administration, the Trustee's appointment is deemed to be affirmed and the meeting is adjourned to a later date. If there is no quorum in a summary administration the Trustee's appointment is deemed to be affirmed and the meeting is adjourned.

10.5.6. Proxies

BIA s. 109(2) – 109(4)

Form 36

A creditor can appoint someone else to be his proxy at the meeting. Anyone except the bankrupt can be the proxy for a creditor. This is often the Trustee.

10.5.7. Voting

BIA s. 109, 113, 115

All questions at the meeting are decided by a formal vote. Creditors have one vote for each dollar owed to them. All resolutions (except the substitution of the Trustee) are decided by a simple majority of the votes: 50% plus one vote.

The chairman decides who can vote. If there is a doubt, the chairman marks the individual's vote as objected to and allows the vote, subject to the vote being declared invalid in the event of the objection being sustained by the court.

Certain creditors' votes are subject to special rules. The more significant of these rules are described below:

- A creditor who did not deal with the bankrupt at arm's length is entitled to vote and the vote is recorded. If, however, the vote determines the result, the vote is recalculated to

ignore the creditor's vote, subject to the right of the court to re-determine the outcome of the vote later on if the creditor requests it.

- The Trustee, as a creditor or a proxy for a creditor, cannot vote on a motion pertaining to the Trustee's conduct or remuneration.
- A close relative of the bankrupt (father, mother, child, sibling, aunt, uncle, spouse or common-law partner) and, in the case of a corporation, the directors, officers, employees of the bankrupt corporation or of a subsidiary of the bankrupt corporation, cannot vote on the appointment of the Trustee and cannot vote on the appointment of inspectors without court authorization.
- A secured creditor can only vote for the portion of the debt that exceeds the value of the security. Moreover, the secured creditor cannot vote on the appointment of inspectors without the permission of the court.
- If a claim was originally held by one creditor but the claim was sold or assigned after the bankruptcy and in this process the claim was split, the creditor is not be entitled to vote.

10.5.8. Proofs of claims and proxies

BIA s. 109(1) and 121(1)

Directive 22R

To be eligible to vote at any meeting a creditor must have a claim provable in bankruptcy and have lodged that claim with the Trustee prior to the time appointed for the meeting. Special attention must be paid to the time a claim is presented to the Trustee.

Proofs of claim are often filed at the last minute, when the creditors arrive at the meeting. This is not ideal since the Trustee needs time to admit or disallow the claims. The chairperson must also decide their admissibility to vote. Meetings may be adjourned to provide time for the Trustee to review claims.

If the claim is filed on time and admitted by the chairperson, a proxy can be filed any time before an actual vote.

10.6. The meeting

10.6.1. Procedure at the meeting

BIA s. 105(1)

Directive 22

Everyone in attendance is required to sign the attendance sheet, noting who they represent and the amount of their claim if they are a creditor.

When satisfied a quorum is present, the chairperson calls the meeting to order, reads his authority to chair the meeting, declares the quorum, introduces the Trustee and other officials present and lists the documents which are available for creditor review.

These include:

- all proofs of claim and proxies;
- the assignment (or receiving order) and Statement of Affairs;
- the Official Receiver's notes on the examination of the bankrupt, if one has been held;
- the Trustee's preliminary report;
- proof of the mailing of the notices; and
- proof of the publication of the notice in the local newspaper.

10.6.2. Affirmation of Trustee

The chairperson outlines the purpose of the meeting of creditors and then explains the creditors' rights to affirm or substitute the Trustee. He then asks for a motion to affirm the appointment of the Trustee. After any discussion, the chairperson calls for a vote. A simple majority is enough to affirm the appointment, while a special resolution would be required to replace the Trustee in a bankruptcy administration resulting from a bankruptcy order or an assignment. If the bankruptcy results from a failed proposal proceeding, the creditors can replace the Trustee at the first meeting of creditors by ordinary resolution. For a meeting other than the first meeting of creditors, a special resolution would be required even if the bankruptcy results from a failed proposal proceeding.

10.6.3. Official Receiver examination

BIA s. 161

The chairperson reads the Official Receiver notes on the examination (or indicates that the bankrupt may yet be examined).

10.6.4. Trustee's preliminary report

Directive 30

The Trustee then discusses his preliminary report on the administration. If this report is in writing, a copy will have been distributed before the meeting started. In a summary administration this report may be given verbally. The floor is then opened to discussion. Questions are usually directed to the Trustee, but the bankrupt may be asked questions also.

10.6.5. Voting procedure

All matters at meetings of creditors are decided by a vote. First, a motion is made by an eligible voter and then seconded by another eligible voter. There can be a discussion, followed by a vote being taken on the motion. All motions, except one to substitute the Trustee, are decided by a simple majority of the votes, with creditors being entitled to one vote for each dollar of their admissible claim.

10.7. Inspectors

10.7.1. Appointment of inspectors

The chairperson explains the role of the inspectors and asks for a motion to appoint a slate of inspectors; preferably an odd number since this will avoid deadlocks at later inspectors' meetings.

Most creditors shy away from getting involved as inspectors, so the Trustee and chairperson must often make an effort to encourage at least one volunteer. Since the biggest creditors have the most at stake they can often be prevailed upon to volunteer. It is best to arrange this prior to the meeting.

10.7.2. If no inspectors are appointed

BIA s. 30(3)

In an ordinary administration if the creditors do not appoint at least one inspector, the Trustee can take the decisions that would require inspector approval under section 30(1) of the BIA (i.e., decisions to sell the assets, compromise claims, etc.).

In a summary administration, if no inspectors are appointed, the Trustee may do all things that may ordinarily be done by the Trustee with the permission of the inspectors.

10.7.3. Specific directions to the Trustee

Even if inspectors have been appointed, the creditors may give specific directions to the Trustee on any matter. Any such directions must be made by formal motion and vote.

10.8. Closing the meeting and next steps

10.8.1. Adjournment of the meeting

If there is no other business, the chairperson declares the meeting adjourned. Any meeting may be adjourned to a later time, or to another date and time, if certain information needs to be investigated.

10.8.2. Inspectors' meeting

The first meeting of inspectors usually immediately follows the first meeting of creditors, since the inspectors are usually already present.

10.8.3. Minutes

After the meeting, the chairperson must produce minutes of the proceedings. These minutes will reflect the course of the meeting and must show in detail the motions made and the results of the votes. Copies of the minutes must be e-filed with the Official Receiver and are usually made available to any creditor who asks for them.

10.9. Proposals

BIA s. 50.4(6) and 66.14

10.9.1. Proposals

In a proposal the Trustee, or "Administrator" (in a consumer proposal), is appointed by the proposal itself and the Official Receiver's certificate simply confirms this. The Trustee of a Division I proposal must send his notice of the creditors' meeting to the creditors not less than 10 days before the meeting.

The Administrator of a Consumer Proposal has 10 days to notify the creditors of the filing of the consumer proposal, advise them that a meeting of creditors may not be held unless the creditors ask for it to be held and explain the consequences if there is no requirement to hold a meeting.

The meeting of creditors is held to consider the proposal and to vote on its acceptance. In a Division I proposal, the creditors may appoint up to five inspectors at this meeting. In a Division II proposal, the creditors may appoint up to three inspectors at this meeting. In addition, other business may be discussed and the meeting may be adjourned to obtain more information or to investigate the debtor's situation.

10.9.2. Division I

A Division I proposal requires a meeting be held within 21 days. At the meeting the proposal will be accepted if a majority of the creditors holding at least 2/3 of the dollars in value are in favor of it, among the creditors who vote (i.e., an abstention by a creditor does not penalize or favor the debtor).

10.9.3. Deemed assignment in bankruptcy

If the proposal fails to be accepted by this majority, the debtor will be deemed bankrupt. The Trustee may then immediately call the first meeting of creditors of the bankruptcy estate or, depending on the circumstances, the meeting could be adjourned to a later date.

10.9.4. Consumer proposal notice

The notice to creditors of the consumer proposal explains that a meeting of creditors will be called only if 25% or more in value of the proven claims request a meeting within 45 days from the date of filing of the proposal.

10.9.5. Consumer proposal approval and court review

If, at the end of 45 days, less than 25% of the votes received request a meeting, the proposal is deemed accepted and the creditors are given 15 more days to ask for a court review of the proposal.

10.9.6. When meeting is required

In a consumer proposal process, if the Administrator must call a meeting, it must be held within 21 days of the 45 day mark. The Official Receiver may chair, but usually delegates to the Administrator.

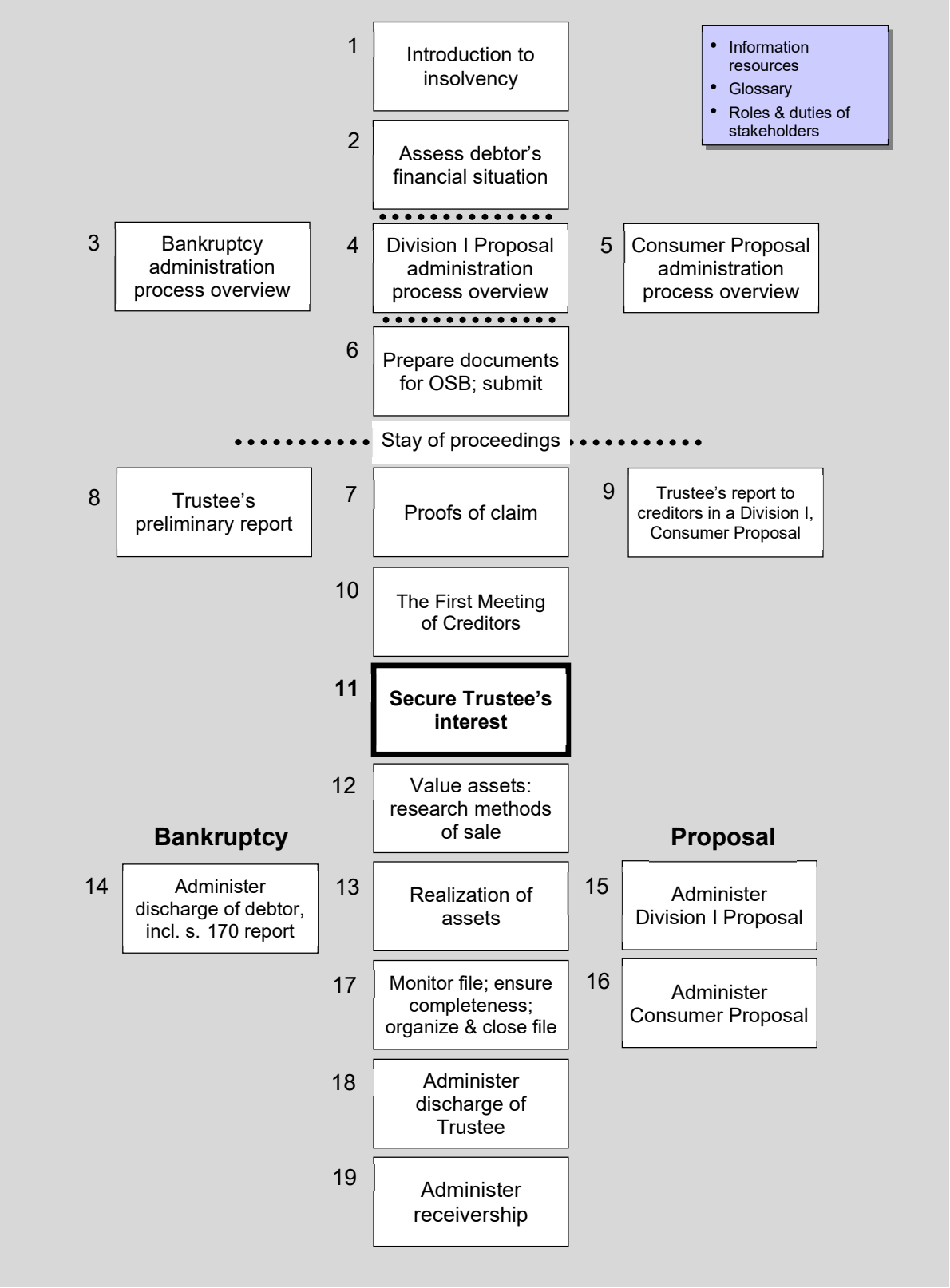
10.9.7. Refusal by the creditors

At the meeting, a consumer proposal is decided by a simple majority, with creditors being entitled to one vote for each dollar of admissible claim.

At the meeting there is no deemed vote. A specific “For” or “Against” is required in writing, but creditors could abstain (i.e., an abstention by a creditor does not penalize or favor the debtor).

If the creditors refuse the consumer proposal, there is no deemed bankruptcy. The stay of proceedings is lifted and the debtor reverts to his previous status.

11. Secure Trustee's Interest



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11.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Describe the steps required, upon the Trustee's appointment, to control and safeguard the estate assets.
- Review required documents and perform required searches to determine if there are liabilities associated with the estate assets.

Assigned readings

- BIA s. 14.06, 16(3), 18(a), 19(1), 24 (1), 35, 50.4(7), 60(2), 67, 74(1), 84.2, 164
- Directives 7 and 25
- CAIRP Standard of Professional Practice No. 16

11.2. Secure Trustee's interest in property of the bankruptcy estate

11.2.1. Reasons for securing Trustee's interest in property

Immediately upon appointment, the Trustee secures his interest in the assets/property of the bankrupt. This is done because it is the duty of the Trustee to ensure that the assets/property of the estate are not sold, transferred, damaged, stolen or dissipated before they can be realized upon by the Trustee for the benefit of creditors in general. It also ensures that the assets/property do not cause harm or incur a potential liability for the estate, e.g., create environmental concerns.

Securing the property of the bankrupt estate may take several forms depending on the type of property and the Trustee's interest. The securing may be done by:

- taking possession and storing property such as inventory or other movable or personal property;
- in certain more difficult cases, obtaining a court order to seize property, relocate it, or compel a third party to deliver it to the Trustee;
- issuing letters to people who owe money to the bankrupt advising them of the appointment and of the need to pay the Trustee;
- notifying a custodian of property of the Trustee's interest so that the custodian does not release the property to any third party without the Trustee's consent;
- obtaining insurance;
- registering on title;
- reviewing the interests of any other party in the same asset; and/or

- reviewing for and reporting on environmental exposure, if any exists.

In all cases, the Trustee is to comply with the BIA, Directives of the OSB and CAIRP Rules of Professional Conduct and to act in a commercially reasonable manner. The Trustee must take the necessary steps to ensure that the interests of the estate and the general body of creditors are protected until the property is either sold or released.

11.2.2. Taking possession, seizing and storing property

Corporate Bankruptcies

BIA s. 16(3)

Directive 7

Immediately after being appointed, the Trustee is required to take possession of the property and records of the bankrupt and make an inventory thereof. He is entitled to examine property of the bankrupt even if it is in the possession of a secured creditor and no person is entitled to withhold books of account of the bankrupt from the Trustee.

In many corporate bankruptcies, the property of the bankrupt may be situated in premises leased by the bankrupt. The Trustee has the right to take possession of the property at the leased premises and can occupy the leased premises for a period of time. The rights of the landlord are governed by the BIA and by the laws of the province in which the leased premises are situated. Be aware that the Trustee cannot enter premises occupied by a person other than the bankrupt (even if the bankrupt's property is located therein) without that person's consent or a warrant issued by the court.

In a corporate bankruptcy, there are many steps that should be taken to ensure that the property is secured. They may include the following:

- perform the inventory count in accordance with the standards set out in Directive 7;
- move inventory to a new storage facility if desired;
- change the locks on all buildings, cancel all access pass cards and control the reissue of cards to authorized personnel;
- inform the external security company, if any, of the Trustee's appointment and contact information;
- change all computer passwords;
- arrange for a back-up of the corporate records to be performed and stored at the Trustee's office;
- count any petty cash on-hand and deposit into a new estate bank account, together with any cheques;

- contact the bankrupt's bank to make arrangements to close old bank accounts in order to stop cheques from being processed on the account and arrange to have the positive balance of account (if not in overdraft) transferred to the estate account;
- review the location of any third-party storage facilities with the bankrupt. When this is done, notify the storage facility of the Trustee's appointment and perform the same actions as above. Be aware of any outstanding payments to the storage facility as there may be a lien or right of retention against the assets at that site; and
- redirect mail to the Trustee's offices to ensure continued accounts receivable collection. The Trustee can issue a notice requesting Canada Post to redirect the bankrupt's mail to the Trustee. The Trustee should only open mail addressed to the bankrupt corporation.

Personal bankruptcies

In personal bankruptcies assets may be exempt under various legislation (discussed further in Module 12). Under the BIA, the exempt assets are not property that is available for distribution to the creditors in general, and therefore no action to secure the exempt property would be required by the Trustee. However, it is incumbent upon the bankrupt to fully disclose to the Trustee all assets. The Trustee will then be able to report to the court and creditors the status of every piece of property the bankrupt owned at the time of his bankruptcy, exempt or otherwise.

There may be times where the personal bankrupt has property that is not exempt.

Note however that some of these assets, or portions of these assets, could be exempt. For example, with respect to RRSPs, contributions made within 12 months prior to the date of bankruptcy may vest with the Trustee, while the funds invested more than 12 months prior to the bankruptcy are exempt. Registered pension plans are locked in and protected under legislation such as the Pension Benefits Act. Some insurance contracts may be exempt property as well. It is therefore important to investigate the assets to find out whether they constitute exempt assets or vest in the Trustee, and to what extent.

The Trustee will immediately provide the financial institution or insurance companies administering investments, RESP's, pensions, etc. with a copy of his appointment and request that the balances in the various accounts be cashed in and forwarded to the Trustee. This will put the financial institution on notice that the bankrupt no longer has any authority over the accounts as the accounts vest with the Trustee unless exempt under the BIA, or provincial legislation (such as the Pension Benefits Act or the Insurance Act).

Performing the inventory count

Directive 7

Proper documentation of estate assets is critical to ensure that the Trustee can:

- properly account for the disposition of all estate assets;
- refer to detailed records if any third party claims are received; and

- provide the above noted information to the inspectors or OSB for review when requested.

The Office of the Superintendent of Bankruptcy has published a directive that details the standards to which all trustees, interim receivers (if required per court order) and trustees under a proposal (if holding assets to be distributed under the proposal) must comply.

These standards are outlined below:

- The inventory must be divided into three parts:
    1. all items which vest in the Trustee;
    2. all items which belong to a third party; and
    3. all items, where, in the opinion of the Trustee, ownership is in dispute. This may include, but is not limited to, 30-day goods, BIA section 81.1 claims, leased goods and goods held on a consignment basis.
- The inventory must include:
    - an accounting of all the articles of property in the possession of the debtor with sufficient information to identify each item;
    - a valuation of each item with a note explaining the means used to establish the value. Where such a valuation is not included by the person making the inventory, the Trustee is responsible for ensuring that the valuation is completed immediately and added to the inventory after receiving the incomplete inventory;
    - the name(s) of the person(s) who conducted the inventory count and the Trustee responsible for the inventory;
    - the date and time when the inventory was prepared;
    - the location(s) of the assets;
    - the details of damaged, deteriorated or perishable goods; and
    - a description of control procedure(s) employed to ensure that all assets are accounted for.
- The person preparing the inventory must initial or sign each inventory sheet. The same person must also complete and attach the form in Appendix I of this Directive.
- The debtor, or an officer of the debtor corporation, must be given a copy of the inventory sheets and must complete the written statement in Appendix II of this Directive. The completed statement must be attached to the inventory list. In the absence of such a statement, the Trustee must sign and attach a document providing reasons for its absence.
- Where the Trustee is relying on an inventory prepared by a third party, the Trustee must personally ensure that this Directive has been adhered to and must sign Appendix I of the Directive.

Handling perishable property

BIA s. 18 and 19(1)

The Trustee may dispose of property that is perishable or likely to depreciate rapidly in value. “Perishable” is usually understood to mean that it will physically spoil quickly, not that it is seasonal. The provision that allows the Trustee to take steps to realize property in case of urgency is not limited to perishable property, but also to property that is likely to depreciate rapidly in value. This will depend on the circumstances, but is usually understood to mean more than a mere seasonal fluctuation, and is intended to prevent a sharp loss in value because of a delay, a loss of value that is more than just incidental.

The Trustee may dispose of perishable property by continuing to carry on the business of the bankrupt, or he may dispose of the perishable property by another method.

If the Trustee is unsure how to proceed on the assets, authority is given to the Trustee to obtain legal advice prior to the first meeting of creditors and to institute legal proceedings for the recovery or protection of the assets, if necessary.

Obtaining insurance

BIA s. 24(1)

The Trustee must insure all insurable property of the bankrupt until inspectors are appointed and take all necessary actions to secure and protect the assets. Once the inspectors are appointed, they may determine the amount for which, and the hazards against which, the assets will be insured.

The insurer should be contacted shortly after your appointment to have the insurance policy changed to reflect the estate Trustee as the named insured and loss payee. A copy of the policy should be obtained and reviewed to determine if the level of insurance placed by the bankrupt meets the Trustee’s required level of insurance; additional insurance may have to be purchased to protect the assets.

Registering on title

BIA s. 74(1)

If the bankrupt has an interest in a physical piece of real estate, the Trustee should consider registering his interest in the real estate on title. Registering on title will ensure that the Trustee is notified if there is any attempt to sell the property. The registration process may differ from province to province.

11.3. Viewing documentation to determine the extent of the Trustee's interest

11.3.1. Documents to review

The bankrupt's records must be reviewed to determine if the assets on the inventory listing are fully paid, or if there are outstanding liabilities that may (or may not) take priority over the Trustee's interest. The records may indicate if the inventory is held by the bankrupt for a third party (consignment) and will assist the review for third party property claims and 30-day goods claims. Common documentation to review includes leases, loan agreements, purchase and sale agreements, mortgages, PPSA registrations [in Quebec, the register known through its English acronym RPMRR, or the French acronym RDPRM[6]], etc.

If the lessor, seller or lender has properly documented, published, registered and perfected its security agreement against an asset, that security agreement, and any amount outstanding on the loan, will take priority to the Trustee's interest in the asset.

11.4. PPSA searches in provinces other than Quebec

11.4.1. Search Personal Property Security Act (PPSA)

It is critical to determine whether security interests are properly perfected. Perfection is usually completed by registration. Improper registrations can result in the assets coming to the estate for distribution among the unsecured creditors as the Trustee's interest takes priority over the secured lender if the security has been improperly registered.

One method to determine whether a security interest is perfected through registration is through a search of the provincial data base. Most provinces have a PPSA, a provincial legislation intended to manage the rules pertaining to security interests in personal property. The legislation provides for a database or registry to manage the information relating to the legislation, thus creating a system whereby lenders can register their security interests in various assets and other lenders and trustees can search the PPSA registry to discover other security registrations that may exist on the same asset. The registry is often colloquially referred to as the "PPSA", as in "search the PPSA", although in fact "PPSA" refers to the legislation itself, the Personal Property Security Act.

A security interest is registered by way of a financing statement. For every bankruptcy, a PPSA search should be performed. This search should reveal most of the security interests registered against the debtor/bankrupt.

A PPSA search may not uncover all of the valid security interests, as it is possible that a security interest may be perfected by possession of the collateral, but then the asset itself

[6] RPMRR for Register of personal and movable real rights, and RDPRM for Registre des droits personnels et réels mobiliers.

would have to be in the hands of a third party. You should be able to find out about the third party's rights when contacting the third party that has the asset in its possession.

For the rights that are registered, there are two types of searches: Certified and Uncertified. The Certified search is more expensive but guarantees the accuracy of the information contained in it. If an error is made, a claim may be made against the PPSA registration system that has a fund for paying such claims. However, most Trustee practices rely on the Uncertified search.

The information contained in an Uncertified "Individual Debtor" response should show the debtor name (including middle initials), date of birth, sex, address, and the name of the secured party, the collateral (specific property/asset) secured and a general description of the collateral. When you review the search if you note that certain items are missing you should point out the omission to the Trustee(s) as this information may be critical to the validity of the registration, which would mean that the registration may be invalid. The Trustee will make the determination as to whether or not to disallow the security or to get a formal legal opinion on the validity of the secured creditor's registration.

You should note that the collateral which can be registered under the PPSA, is just as the words of the statute suggest, personal property, i.e., not real property (land).

11.5. Searches in Quebec

11.5.1. Search Registre des droits personnels et réels mobiliers (RDPRM)

As in the rest of Canada, the way to ensure that rights have duly been registered is to proceed with a search in the different provincial registers. In most provinces, there is a Personal Property Security Act (PPSA)/Loi sur les sûretés mobilières that provides for such a register. In Quebec, the Civil Code provides for a register named the Register of Personal and Movable Real Rights (RPMRR or RDPRM), in which the rights over movable or personal property may be published.

In the RDPRM lenders can publish their rights on certain property and other lenders or trustees can find out if security interests are published on this property.

A right over personal property is inscribed or registered in the RDPRM via a publication requisition which can be found on line on the RDPRM site. For each bankruptcy case, you must make a search in the RDPRM which should reveal all the security interests published against a debtor/bankrupt.

This search can be done “on line” directly from the RDPRM site. You can consult the RDPRM yourself directly and print the result of your search, or you can request a certified registration statement. This certified statement costs more but it guarantees the accurateness of the information contained therein. However, for most bankruptcy cases, the Trustee can rely on his online consultation of the register.

In order to proceed with a search, you need the following information:

For a natural person

It is necessary to have the name, usual given name and date of birth. Please note that a second initial is seldom used in Quebec so that a search may be conducted without that item.

More diligence is needed however in the case of a married woman. Since April 2, 1981, any search related to a married woman should be carried out only on her birth name. Before April 2, 1981, women may have borne different names and consequently been registered under any one of them; i.e., (a) birth name; (b) husband's name; (c) birth name followed by husband's name or (d) husband's name followed by birth name. As a result, it would be more prudent to conduct a search under these four possible names.

For an individual debtor, the address is not necessary in order to initiate a search. However, it becomes important to clearly identify the debtor.

When a search application is made, either for an individual debtor or a corporation, the register will show a result for the name submitted and any similar names.

Since registrations are entered according to the requisitions as presented, if an applicant made an error, for instance when entering the date of birth or other information, it becomes necessary to verify the list of similar names to be sure of obtaining a complete search of all the registrations related to that name.

With regard to a search for an individual debtor, it is important to note the following articles of the *Quebec Civil Code:*

"2683. Where the act constituting the hypothec is accessory to a consumer contract, it is subject to the rules on form and content prescribed by this Book or by regulation.

2684. Only a person or a Trustee carrying on an enterprise may grant a hypothec on a universality of property, movable or immovable, present or future, corporeal or incorporeal.

The person or Trustee may thus hypothecate animals, tools or equipment pertaining to the enterprise, claims and accounts receivable, patents and trademarks, or corporeal movables included in the assets of any of his enterprises kept for sale, lease or processing in the manufacture or transformation of property intended for sale, for lease or for use in providing a service.

2685. Only a person or a Trustee carrying on an enterprise may grant a hypothec on a movable represented by a bill of lading.

2686. Only a person or a Trustee carrying on an enterprise may grant a floating hypothec on the property of the enterprise.

Regulation on the register of personal and movable real rights[7]:

15.01 In addition to where they pertain to property acquired or required for the service or operation of an enterprise, reservations of ownership, rights of redemption and rights under a lease of more than one year, as well as any transfer of those reservations or rights, require publication in the register in accordance with articles 1745, 1750 and 1852 of the *Civil Code* where they pertain to the following property:

- a road vehicle included in one of the classes referred to in subparagraphs 1, 2, 9, 10 and 11 of the first paragraph of section 15[8];
- a caravan or a fifth-wheel;
- a mobile home;
- a boat;
- a personal watercraft;
- an aircraft.

15.02 The property on which a natural person who does not operate an enterprise may grant a movable hypothec without delivery pursuant to article 2683 of the Civil Code is:

a) the property listed in section 15.01,

b) precious property within the meaning of the Taxation Act (Chapters I-3);

c) incorporeal property, particularly property that constitutes a form of investment within the meaning of the Securities Act (chapter V-1.1), securities and security entitlements referred to in the Act respecting the transfer of securities and the establishment of security entitlements (chapter T-11.002), derivatives referred to in the Derivatives Act (chapter I-14.01), claims, rights arising from an insurance contract and intellectual property rights, excluding in all cases property constituting a registered retirement savings plan, a registered retirement income fund, a registered education savings plan or a registered disability savings plan within the meaning of the Taxation Act.

For the purposes of the first paragraph,

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[7] Except where he operates an enterprise and the hypothec is charged on the property of that enterprise, a natural person may grant a movable hypothec without delivery only on *road vehicles and other movable property determined by regulation and subject to the conditions determined by regulation*

[8] Classes listed in subparagraph 1, 2, 9, 10 and 11 of section 15: 1: a passenger vehicle; 2: a motorcycle; 9: a motor home; 10: a snowmobile of a model year more recent than 1988; and 11: a motorized all-terrain vehicle equipped with handlebars and at least 2 wheels, that is designed to be straddled and whose net weight does not exceed 600 kilograms.

1: the road vehicles listed in subparagraphs 1 to 7 are those defined in section 4 of the Highway Safety code; and

2: the road vehicles listed in subparagraphs 8 to 10 are those defined in section 2 of the Regulation respecting road vehicle registration (chapter C-24.2, r. 29).

A descriptive file shall be opened for a road vehicle included in one of the classes referred to in subparagraphs 1 and 3 to 9 of the first paragraph only where the vehicle's identification number has 17 characters and has been validated by the Registrar using the control algorithm."

For a corporation

It is necessary to have the exact name of the company; for this purpose, it is always more prudent to have on hand a Return of Information issued by the Inspector General of Financial Institutions pertaining to the company under search.

When a natural person acts for a company he operates, or when a corporation acts under a name other than its own (i.e., a numbered company) and its designation in the requisition also comprises the name of the company or the other name, it is important to conduct a search for each of the names and carefully check the list of similar names. At this stage, it is useful to know the postal code for this corporation's address in order to confirm that the information sought after truly relates to that corporation.

Frequently, in the list of names showing similarities, registrations have been made under a name combining both English and French versions of the corporation (e.g., XYZ & Company Ltd./XYZ & Compagnie Limitée), so it is very important to carefully check the list of similar names.

For a road vehicle

It is possible to search for rights published against a particular road vehicle. To access this information, you only need to know the vehicle identification number (serial number) given to the vehicle under the *Highway Safety Code*. This number has 17 characters; caution should be used in order not to mistake the letter "O" for the number "0", or the small letter "l" or "I" (capital i) for the number "1".

11.6. Obtain co-operation from joint owners of the bankrupt's property (if applicable)

There may be cases where the bankrupt has an ownership interest in an asset, e.g., by owning 50% of a company, 25% of a cottage or 75% of a boat. Any partial interest in an asset still vests with the Trustee.

The Trustee should be informed of any assets for which the bankrupt does not own 100%, as the Trustee will need to form a strategy for the safekeeping and eventual realization of this asset. The Trustee will need to satisfy himself as to whether the joint asset is properly secured and insured by the joint owner. In some cases, such as assets which are mobile

(e.g., cars, boats etc.), the Trustee may need to seek the co-operation of the joint owner to have the asset moved to a secure facility for protection.

The Trustee will usually approach the co-owner of the asset to determine if the co-owner would consider purchasing the Trustee's interest in the asset, as this is usually the solution that presents the least amount of complications and execution risks. If so, the Trustee must ensure that the purchase price represents a fair value and that the inspectors approve the sale. If not, the Trustee will review copies of the purchase documentation, as provisions for the asset's sale may be provided therein. In difficult circumstances, the Trustee may need to go to court to obtain a sale order. Any sale of an asset to a related party must be approved by the court.

11.7. Securing the Trustee's interest in property under a proposal

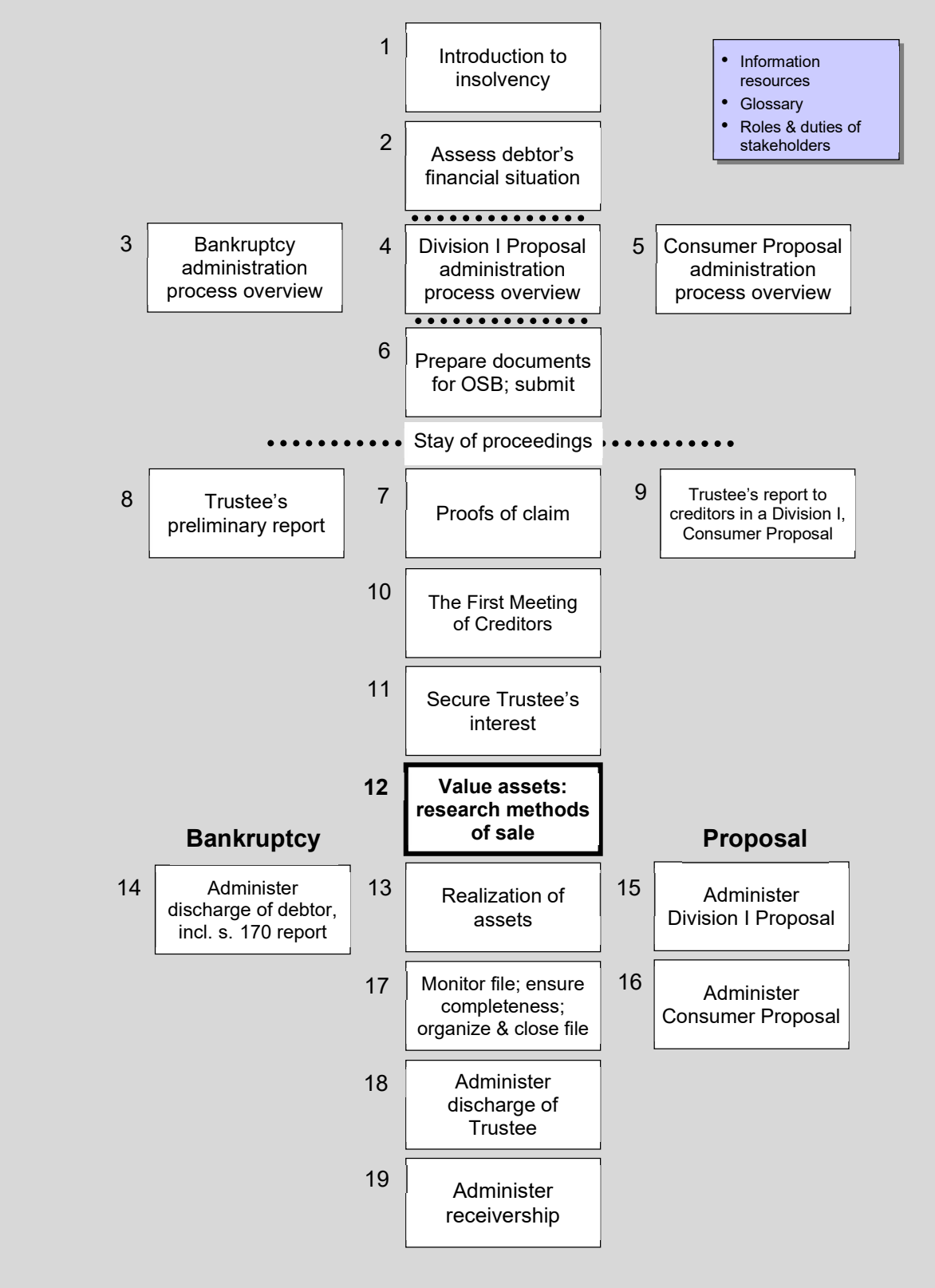
11.7.1. Non-vesting of assets in a proposal

BIA s. 50.4(7)

When a debtor files a proposal (Division I or consumer), or a Notice of Intention to File a Proposal, the debtor usually remains in control of his assets. Usually, the Trustee does not take possession of the debtor's assets, save for exceptional circumstances (for example, if the Trustee is appointed as interim receiver or, if for some reason, the proposal contemplates that the Trustee will have the possession of the assets).

The Trustee is required to monitor the debtor's business and financial affairs and report to the creditors and the Official Receiver thereon and to report any material adverse change in the debtor's affairs. A "material adverse change" is necessarily a change that is significant, that is not trivial, and that would cause a person to change a decision or behavior in a meaningful way.

12. Value Assets: Research Methods of Sale



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12.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Identify the assets of the bankrupt.
- Report to the Trustee on assets that may belong to, or be encumbered by, third parties.
- Report to the Trustee the results of your review of the bankrupt's claim regarding assets that are exempt from the bankruptcy process.
- Prepare a report for the Trustee as to the estimated net value of the estate assets and prepare a recommendation of the sales process(es) that will best obtain this value.
- Prepare a report for the appropriate party seeking approval for the sales processes.
- Monitor the bankrupt's financial status to determine if the bankrupt is in receipt of assets prior to his discharge that should form part of the estate.
- Calculate the amount of income the bankrupt should remit to the estate from his wages, salary and other remuneration during his bankruptcy period.

Assigned readings

- BIA s. 2, 16(3), 30, 38, 40(1), 67, 68, 71(2), 81, 99 and 158
- BIA Form 75
- BIA Rule 59
- Directives 11R and 16R
- CAIRP Standards of Professional Practice Nos. 4, 14, 17 and 18
- Ontario Execution Act, s.2, OR similar Act applicable to student's home province
- In Quebec, sections 552 and 553 of the Code of Civil Procedure (or sections 694, 695 and 696 of the new Code of Civil Procedure enacted on February 21st, 2014 and in force in 2016)

12.2. Bankrupt's Property

12.2.1. Definitions per BIA s. 2 and 67

BIA s. 2, 67 and 71

Upon filing an assignment in bankruptcy, all property of the bankrupt vests in the Trustee and the bankrupt ceases to have any capacity to deal with his property. The Trustee "stands in the shoes" of the bankrupt.

Property is defined in extremely broad terms and includes property of every description: real or personal, moveable or immovable, tangible or intangible, legal or equitable, in Canada and elsewhere, and includes interests, whether present or future, vested or contingent.

All property owned by the bankrupt on the date of bankruptcy and all property he may acquire after his bankruptcy but prior to discharge, form part of the estate.

This definition sounds clear; everything the bankrupt owns or will own before he is discharged, anywhere in the world, vests in the Trustee for the benefit of creditors, but is it not that simple:

- the BIA and certain federal and provincial legislation exempt certain property from the definition of property in Section 67 of the BIA; and
- the “future” property does not vest automatically in the Trustee, but rather the Trustee must take steps to obtain this property. The bankrupt can deal with this property in the normal course until the Trustee intervenes (see section 99 BIA).

The reason why some property does not form part of the estate, or does not automatically form part of the estate, is to meet the rehabilitation objective of the BIA. The BIA is not meant to be overly punitive, and aims (among other things) to allow an honest but unfortunate debtor an opportunity to get rid of an unmanageable debt burden subject to reasonable conditions. In order to allow a possibility for the debtor to become rehabilitated and to allow him to fulfil his family obligations, the bankruptcy process cannot leave him destitute. As such, the bankruptcy process is designed to leave the bankrupt with some assets and some control over future assets to allow him to have a reasonable standard of life, i.e., beyond being destitute or merely subsisting.

The sections that follow explain how the bankruptcy process allows the bankrupt to retain control over certain assets described as “exempt”.

12.3. What is not property of the bankrupt?

12.3.1. Overview

The BIA has defined property that does not form part of the bankrupt's estate, i.e., that is exempt. This exempted property includes certain specific assets as defined in the BIA and property that is exempt from seizure or execution proceedings under federal and provincial statutes. These exemptions, defined under federal or provincial law, relate, in effect, to where the property is located and where the bankrupt resides.

12.3.2. Definition per the BIA s. 67(1)

BIA s. 67(1)

"The property of a bankrupt divisible among his creditors shall not comprise:

(a) property held by the bankrupt in trust for any other person;

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides";

(b.1) goods and services tax-credit payments that are made in prescribed circumstances to the bankrupt and are not property referred to in paragraph (a) or (b)"

(b.2) prescribed payments relating to the essential needs of an individual that are made in prescribed circumstances to the bankrupt that are not property referred to in (a) or (b); or

(b.3) property in a registered retirement savings plan or registered retirement income fund, other than that which was contributed to the plan or fund in the twelve months before the date of bankruptcy.

but shall comprise (…) (the remainder of the section is intentionally omitted as it deals with an interpretation of what is included in the property, not what is exempt).

12.3.3. Exempt assets – Provincial Execution Acts

BIA s. 67(1)

BIA Rule 59.1 and 59.2

Ontario Execution Act s. 2 OR similar Act applicable to your home province. In Quebec, the Code of Civil Procedure

Each province has a provincial statute that outlines the chattels exempt from seizure by a Trustee or any creditor. In Ontario, for example, it is the *Execution Act* that determines certain assets that are exempt from seizure. In Quebec, it is the *Code of Civil Procedure* that deals with exemptions from seizure. These exemptions do not exist for corporate debtors.

As each provincial execution act differs, you should be familiar with the statutes applicable in **your province**.

Most pensions and annuities are exempt from seizure along with "cash surrender value" for specific types of insurance policies, depending on the beneficiary.

The BIA and the (Bankruptcy and Insolvency) General Rules provide that RRSPs and DPSPs (deferred profit sharing plans) are exempt, subject to a claw back for contributions made in the twelve months preceding the bankruptcy. This means that, under the exemption provided for in the BIA itself, a portion of the RRSP or DPSP would be exempt, and a portion would not be exempt. However, the exemption provided for in the BIA does not supersede the general exemption for assets that are exempt under provincial laws applicable in the province where the assets are located and where the bankrupt resides. As a consequence, where provincial legislation exempts RRSPs from execution, the provincial legislation will apply.

You should recognize that the bankrupt makes the claim for exempt property and in certain circumstances it may be appropriate to obtain an affidavit from the bankrupt in support of a claim for exempt property (see Module 2).

12.3.4. Assets held in trust

BIA s. 67(1)(a)

Assets held in trust by a bankrupt do not form part of the estate. Some bankrupts may have assets which they claim are 'held in trust' for a third party. In order for these assets to be exempt, the bankrupt must provide a copy of the formal trust documents setting out the creation of the trust and the named beneficiary. In Common Law provinces and in Quebec, there are specific conditions that must be met before a valid trust is created, and the failure to meet one or more of these conditions could render the trust invalid and make the property that was thought to be "in trust" available for distribution. The Trustee will review these documents and, if appropriate, determine the assets to be exempt. Unless such documents are provided the bankrupt's claim for exemption will not be allowed.

Trusts created by statute will serve to remove trust funds from the bankruptcy administration. Claimants against trust funds are not treated as creditors because the property held by the bankrupt in trust for another person is excluded from property divisible amongst his creditors.

12.3.5. Deemed trusts

BIA s. 67

There are legislative provisions that aim to protect certain creditors by creating, through the law, a type of trust, referred to as a "deemed trust", in favour of a third party. The provision is referred to as a "deemed trust" because, typically, the legislative provision creates a trust of sorts by presuming, or deeming, that something has occurred or exists even though it did not. This "deeming" replaces some of the requirements to create a trust, in particular without a need for any agreement or formal documentation establishing the trust.

The "deemed trust" is not a real trust but is a statutorily created mechanism to protect a third party. Typically, a "deemed trust" will be provided in a law to protect the amounts due to the government, for payroll source deductions, sales, goods and services taxes or harmonized sales taxes, to protect amounts due to employees for vacation pay (in Ontario), or to protect amounts due to pension plans for employer or employee contributions not remitted to the plan. The deemed trust provision in the law typically aims at "deeming" some property of the debtor to be held separate and apart, i.e., in trust, and to be owned beneficially by the creditor sought to be protected (typically, the government, employees or pension plans).

For example: ABC Co. collected GST/HST/PST from its customers in the amount of $5,000 in the month of May. In addition, it paid its employees and withheld $7,000 in taxes/EI/CPP in the month of May. Neither of these amounts was remitted to the respective governments. The total deemed trust liability to the government is $12,000.

The governmental agencies, or the beneficiaries of the deemed trust, will make a claim for the deemed trust amounts. It depends, however, upon the type of appointment as to whether the deemed trust amounts are paid in full or become part of the unsecured creditor claims and share pro-rata in the overall dividend.

In a receivership, all proceeds realized by the receiver will first be to the benefit of the deemed trusts until the liability has been fully extinguished. If the receiver realized $20,000 from the company's assets, $12,000 would be paid to the deemed trusts and the remaining $8,000 would be remitted to the secured creditor.

In a bankruptcy, substantially all of the deemed trust provisions of any law where the beneficiary of the deemed trust is the government are considered invalid. The more notable exception is the deemed trust for employee source deductions, for both the federal deductions at source (income taxes, EI and CPP premiums), and the Quebec deductions at source (income taxes and Quebec Pension Plan). As such, the deemed trust for GST/HST/PST does not apply and the claim by the government agencies will be an unsecured claim and will receive a pro-rata dividend of the estate realizations. The deemed trust portion of source deductions, however, is considered a "property" claim and has first charge on any assets.

12.3.6. Statutory trusts and liens

There are other types of legislation that encumber the property, such as the *Construction Lien Acts*, and the *Storage and Repairman's Lien Act*. These Acts state that certain creditors can make a claim on the bankrupt's property for payment of arrears. If you become aware of any claim of this nature, the Trustee should be informed immediately. The Trustee will be unable to complete any sale of the property until these claims are resolved.

In Quebec, there is the legal hypothec in favor of persons having taken part in the construction or renovation of an immovable (sections 2726 to 2728 C.C.Q) and the right to retain movable property (section 2651 C.C.Q).

12.3.7. Property held by the bankrupt for a third party

BIA s. 81(1)

There are times when a person claims the bankrupt or the Trustee is in possession of property belonging to him, such as property loaned to the bankrupt. The third party must, if the Trustee will not readily acknowledge the ownership right and return the property, file a proof of claim. The claim form to be filed is not a "proof of claim" in the ordinary bankruptcy sense, as is required to be filed by unsecured creditors. Rather, it is a "proof of claim of property", or claim for possession of the property which is being held by the Trustee. The onus is on the claimant to prove his entitlement to the property, and the claim must be made through a sworn or solemn declaration (contrary to the "ordinary" proof of claim that only needs to be witnessed, not sworn).

The Trustee must respond to the claimant either within 15 days of the claim's receipt or within 15 days after the first meeting of creditors, whichever is later. The Trustee must either admit the claim and surrender the property to the claimant or reject the claim and give reasons. If the claim is rejected, the claimant has 15 days to lodge an appeal. Should he neglect to do so, he will be deemed to have relinquished any interest in the property to the Trustee. The Trustee can then sell the property without regard to this claim.

For example, a debtor may run a business and have a coffee machine that was loaned by the coffee supplier to facilitate the sale of its coffee. The coffee machine would not be considered property of the bankrupt. However, due to uncertainty or incomplete records of the bankrupt, the Trustee may be unsure whether the coffee machine used every day in the business belongs to the bankrupt or the coffee supplier. In such a case, it would be prudent for the Trustee to ask that the coffee supplier submit a proof of claim of property. The coffee supplier would have to prove his ownership of the coffee machine before it is released to him.

12.3.8. Recently delivered merchandise (30 day goods claims)

BIA s. 81.1

BIA Form 75

CAIRP Standard of Professional Practice No. 18

Under certain conditions unpaid suppliers can recover their goods that were recently delivered (colloquially referred to as "30 day goods"). The relevant sections of the BIA are very specific and the procedures which must be followed for recovering goods require rapid and properly documented notification of the Trustee and/or receiver. Note that BIA sections 81.1 and 81.2 do not take effect unless there is a bankruptcy or when a receiver has been appointed.

To make a claim, an unpaid supplier has to demand possession of goods delivered within the 30 days prior to a bankruptcy or receivership, in writing. The supplier will have 15 days from the date of the bankruptcy, or the date the receiver is appointed, to demand possession. However, in order for the claim to be accepted, the following conditions must be met:

- the goods must be identifiable and not yet been fully paid for;
- they must be in the same state as they were on delivery;
- they cannot have been resold at arm's length, or be subject to agreement for sale at arm's length; and
- the Trustee/receiver must be in possession of the goods at the time the demand is received.

The last two points are very important. The Trustee/receiver has the power to continue to carry on the debtor's business. If, by the time a 30-day claim is received, the goods have already been sold then the claim is invalid and the proceeds of the sale are retained by the Trustee/receiver.

If the goods have been partially paid for, then the repossession is allowed only for the portion of the goods in proportion to the unpaid amount. Alternatively, if the supplier returns the partial payment to the purchaser, Trustee or receiver, the supplier can then recover all of the goods. The Trustee also has the option of remitting the unpaid balance owing and keeping the goods.

CAIRP Standard of Professional Practice No. 18 sets out the Trustee/receiver's responsibilities in respect of written documents for 30-days goods claims by unpaid suppliers.

12.3.9. Rights of farmers, fishermen, aquaculturists

BIA s. 81.2

In addition to the right to recover the recently delivered property (as described in the section above), suppliers who are farmers, fishermen or aquaculturalists have an additional protection in the form of a superpriority over inventory, under BIA s. 81.2. This right applies in addition to, and not in replacement of, the right discussed above. The farmer, fisherman or aquaculturist can make a claim under both of the sections, and chose the one that is most advantageous. However, in practice, the right to recover property (as described in the section above) is not very useful for farmers, fishermen and aquaculturists, because of the nature of the product (it tends to be consumed or spoil very quickly, so the product is usually not in the possession of the bankrupt, Trustee or receiver by the time a claim is made, or if it is, it is usually not identifiable). For the alternative right, namely a right to a superpriority over inventory, the suppliers who are farmers, fishermen or aquaculturalists must make a claim within 30 days from the date of bankruptcy/receivership and must have supplied goods to the debtor within the fifteen-day period preceding the day of bankruptcy or receivership. Every valid claim is secured by a charge on all the inventory and ranks above every other claim against that inventory (other than a BIA s. 81.1 claim, i.e., the claim for repossession of recently delivered merchandise discussed in the section above). If the Trustee/receiver has disposed of the inventory, the Trustee is liable for the amount of the claim to the extent of the net amount realized, less costs of realization. The BIA affords greater protection to farmers, fisherman and aquaculturists.

12.3.10. GST tax credit payments

BIA Rules 59, 59(1), 59(2) and 59(3)

Personal GST tax credit payments can contribute to the payment of Trustee fees but can never be used to produce a dividend. They may be exempt from the property of the estate depending on the circumstances:

- When a dividend is payable without taking into account the GST credit payment, it is exempt from seizure. The total amount of GST/HST collected is returned to the bankrupt.
- When a portion of the GST credit payment would provide a dividend to creditors, that part is exempt and that portion returned to the bankrupt.

- When there is no dividend payable to the creditors, the GST credit payment is fully seizable.

12.4. After-acquired property

12.4.1. Definition

BIA s. 99(1)

All property owned by the bankrupt, both on the date of bankruptcy and acquired after the filing, forms part of the estate until he is discharged from bankruptcy. The property that a bankrupt may acquire after his bankruptcy but before his discharge is called 'after-acquired property.' Examples of after-acquired property include a lottery win, an inheritance, a gift, etc.

In cases involving after acquired-property, it is important that the Trustee intervene to exercise the right of possession. Until this happens, the debtor may deal with the property as he sees fit.

Accordingly, it is important for the Trustee to keep himself informed of the financial situation of the bankrupt throughout the bankruptcy and whether there are new developments, as the Trustee may lose the ability to claim such property afterwards.

It is also important to ensure that the bankrupt is aware of his duty to advise the Trustee of any after-acquired property he may receive prior to his discharge. While a failure to disclose new developments may mean that the Trustee might lose the ability to claim the property and the bankrupt will have the benefit of it, the failure to disclose would also be a bankruptcy offense that could have dire consequences on the ability to obtain a discharge, or on the conditions of discharge.

If the Trustee learns of any after-acquired property, he must intervene by requesting the bankrupt turn over the property or monetary funds immediately.

12.4.2. When the Trustee refuses or neglects to act

BIA s. 38

When the Trustee refuses or neglects to take a proceeding for the benefit of the estate, BIA s. 38 permits a creditor to take the proceeding under specific conditions for its own benefit and at its own expense. A number of creditors may join together to take such proceedings. This is a complex process that should that only be dealt with by the Trustee.

12.5. Surplus income

12.5.1. Trustee's actions

BIA s. 68(1), 68(3), 68(6), 68(7), 68(10), 68(13), 170.1(1) and 173(1)

BIA Rule 105

Directive 11R2

If the bankrupt is in receipt of wages, salary or other remuneration, the BIA requires that the bankrupt contribute to his estate, taking into consideration standards developed by the Superintendent of Bankruptcy to establish the amount of income the bankrupt must be able to retain to support himself and his family. He is allowed to maintain a reasonable standard of living during the bankruptcy period, but must remit the required surplus income payment as established by the OSB Standards. Directive 11R sets out such standards.

The Trustee will fix the amount the bankrupt is required to pay according to the Directive and the family situation of the bankrupt. The Trustee will notify the Official Receiver of the amount of surplus income payment. The Official Receiver will advise if he feels the amount is not substantially in accordance with the standards.

When the bankrupt disputes the amount recommended, or if he so requests, mediation will occur. Mediation may cause a change in the amount of surplus income as originally fixed by the Trustee. Rule 105 sets out all the mediation procedures.

If the mediation does not resolve the dispute, the Trustee can apply to the court to have surplus income payments determined.

If the bankrupt either refuses or neglects to pay the required amount, the Trustee can go to court to obtain an order pursuant to BIA s. 68 that can be served upon the employer of the bankrupt to pay the amount directly to the Trustee. The Trustee should also report the bankrupt's refusal or failure to pay in its report on the bankrupt's discharge under BIA s. 170.

If the discharge of a bankrupt individual is opposed by a creditor or the Trustee solely on grounds referred to in either one or both of paragraphs s. 173(1)(m) and (n), the Trustee must send an application for mediation, in the prescribed form, to the Official Receiver within five days after the day on which the bankrupt would have been automatically discharged had the opposition not been filed with the Office of the Superintendent of Bankruptcy, or within any further time after that day that the Official Receiver may allow. If the issues submitted to mediation are not resolved by the mediation, or if the bankrupt failed to comply with the conditions that were established as a result of the mediation, the Trustee must, without delay, apply to the court for an appointment for the hearing of the matter.

12.6. Asset value assessment

12.6.1. Why value assets?

To ensure that the assets of the bankrupt estate are not sold for less than what they are worth, reasonable steps are taken to determine the value prior to the Trustee making a sale. This typically includes commissioning professional appraisers to provide valuations.

Early valuation of the assets of the bankrupt estate provides:

- a basis for reporting to creditors on anticipated realizations; and
- supporting documentation for amounts that are eventually realized.

12.6.2. Valuation assumptions

CAIRP Standards of Professional Practice No. 17 and 20

There are many different ways to value the same asset – liquidation value, private sale, retail sale, going concern, etc. The Trustee should obtain a valuation of the asset so that he can report to the approving parties the basis of the sale price.

When requesting a valuation assessment, the value can differ significantly depending upon the assumptions used in the valuation process and the type of asset being valued.

If you are using a third-party appraiser, the assumptions used to value the asset must be clearly set out in the valuation report so that you can challenge the assumptions and, if required, compare the valuation to another valuation. For instance, if you were to value an industrial rental property, the property could be valued based on:

- using the discounted rental value of the rents on the existing rent roll, or
- on future rent increases using the current vacancy rate or a lower vacancy rate;
- using different discount rates (for example, using 5% vs. 7%);
- assuming that the building becomes vacant and the use of the property changes or the property is rezoned for residential uses;
- using market comparisons using recent sales of similar properties in the area;
- using the cost of construction of a similar property, with an allowance for depreciation.

Similarly, if you were to going to value inventory you could value it:

- based on selling it at retail through the debtor's business;
- at liquidation value through auction; or
- as a private sale to a competitor based on a negotiated value of the cost of the inventory.

The assumptions should be logical, supportable and clearly set out in the valuation report.

The Trustee can perform certain valuations himself (e.g., valuing inventory based on retail prices), however, qualified third parties should perform the majority of the valuations (e.g., real estate appraisals, equipment and machinery valuations). This will protect the Trustee from claims that the values actually achieved were too low. Note that CAIRP Standard of Professional Practice No. 17 sets out certain actions the Trustee/receiver should perform regarding valuations.

12.6.3. Perform cost/benefit analysis for each type of valuation

Each valuation method will yield a different gross realization amount and each method will have a different cost structure for the costs of realizations. The aim of the Trustee is to achieve the best net realizations in a reasonable time frame. The concept of "best realization" does not necessarily mean the highest proceeds, but rather a delicate balance between maximizing proceeds, minimizing costs, controlling the time frame and reducing execution risk. The concept of "best realization" involves professional judgement and assessment of risk and rewards. For example, there is very little point in getting a fantastic price for the assets from someone who ultimately does not pay the sale price. Similarly, there is little point in getting a great price from someone who will destroy the building in the process of taking the assets away, leaving the Trustee with complications and claims from the owner of the building.

It is critical to perform a cost/benefit analysis to present all the information to those who will approve the method of sale. For example, if you were to value a retail chain's inventory based on an auction versus selling the inventory through the retail store network, the gross realizations of the retail value would most likely exceed the gross realizations from an auction. However, the costs of maintaining the store network (rent, employees) may exceed the costs of the auction (moving to central location, no employees, commission).

12.7. Mode of realizations

12.7.1. Sales methods

BIA s. 30

There are many different sales methods that the Trustee may use. The court, secured creditor or inspectors, as appropriate, must approve the method chosen to sell assets. Different methods are appropriate in different circumstances and the method recommended should be supported by explanation.

The BIA states that the Trustee may, with the permission of inspectors, sell or otherwise dispose of, any of the bankrupt's assets including the following:

- all or any part of the property of the bankrupt;
- goodwill of the business; and
- book debts.

Such price or other consideration must also be approved by inspectors.

The sale might be done by one of the following means:

- sale by tender;
- public auction;
- private sale;
- retail; or
- bulk sale, or
- sale as a going concern.

12.7.2. Private sale

Since the Trustee's aim is to obtain the best net realization, a private sale should only be conducted when there is a compelling reason to do so. This might be advisable when the value is well known and established (for example, selling gold to a trader), or when the asset(s) to be sold are no longer part of a competitive market or it is urgent to dispose of them. Private sales may create the appearance of preference to the purchaser. The assets available for sale should be exposed to the market so that every interested party knows the asset is available and can contact the Trustee for information. A private sale does not allow for this exposure.

The Trustee always possesses the right to carry out a private sale or sale by mutual agreement. It is his duty to evaluate and estimate reasonably if a private sale would be more profitable than a sale by tender or a public auction sale. An appraisal should be obtained to support the selling price.

In many cases, private negotiations are not likely to be appropriate. However, when assets not commonly sold on a competitive market or assets of a highly specialized nature are involved, the Trustee may declare himself satisfied with being able to identify potential buyers without having to call for tenders.

12.7.3. Tender

CAIRP Rule of Professional Conduct No. 1

CAIRP Standards of Professional Practice No. 14 and 19

Sales by tender establish all prospective buyers on an equal footing by specifying the terms of sale beforehand. So long as the call for tender is properly advertised, it is a very defensible method of sale.

When the Trustee prepares a tender sale document, it should be sufficiently complete so that only the purchaser's name and the selling price need to be filled in. When accepted and signed by the Trustee, it constitutes a binding purchase and sale commitment. Consequently,

the Trustee should foresee and include all possible conditions and clauses necessary to such an agreement.

The organization of assets into lots for purposes of sale constitutes one of the most important factors, and should be prepared in such a way that the assets will be displayed to their best advantage to attract the bidders' interest and maximize the realization.

When the Trustee has decided which assets should be sold and how they should be organized into lots, the terms and conditions of sale can then be decided upon. Since the terms and conditions incorporated into a public tender are legally binding, the lawyer who will complete the contract should be consulted so that no legal technicality is overlooked.

When the Trustee has identified and grouped the assets to be sold into lots, he should prepare all the other conditions to be included in the tender document and which may appear in the notices to be published.

Items which should be addressed include:

- the amount of the deposit which must accompany a bid, indicating conditions under which it will be forfeited;
- whether there will be a bulk sale or a sale by separate lots;
- the way of indicating the purchase price; in block or by lot;
- sales taxes;
- disclosure that there are no warranties and an appropriate disclaimer to that effect;
- inventory lists;
- the dates on which visits of the premises can be made so that prospective purchasers can examine the assets before making their offer;
- the time period fixed for a physical count and the adjustments which may be made, either up or down, to the dates when the purchase and sales agreement must be signed;
- the payment of the selling price;
- the time when the assets sold should be removed from the premises;
- the insurance coverage and entitlement in case any assets are damaged between tenders being submitted and closing;
- special problems regarding various agencies and governmental authorities; and
- the receiver's or the Trustee's right to accept or refuse the tenders submitted.

In addition to the terms and conditions that the Trustee determines, he should determine the time limit for the receipt of bids and how the tender sale should be advertised.

The terms and conditions will always contain a caution to the prospective tenderers that the highest, or any bid, will not necessarily be accepted. In the event that no bid is acceptable, the Trustee would reject all the bids.

The method of sale following an unsuccessful call for tender is usually decided after reviewing the reasons for rejection of all the bids. The Trustee is at liberty to call a second tender and/or negotiate with any of the unsuccessful tenderers. It is unethical and risky, however, to “shop tenders” prior to the rejection of all of them. This does not preclude private negotiations with the highest tenderers or negotiation of the terms and conditions of the highest tender, after rejection of all the bids.

CAIRP’s Rule of Professional Conduct No. 1 requires members to conduct themselves at all times in a manner which will maintain the good reputation of the Association and Rule 34 of the BIA requires trustees to maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act. To “shop tenders” is unfair to the tenderers who have followed the rules of the tender, and furthermore it is risky because a member who would negotiate with tenderers while they are still bound by their offers would likely find out that prospective purchasers no longer want to present him with offers for future engagements, and would likely find out that prospective purchasers would band together to make a single offer as a cohesive group, thereby eliminating the advantage of having several prospective purchasers as a method of ensuring that a reasonable price is obtained.

12.7.4. Auction

Professional auctioneers are selected by the Trustee to run the auction. The Trustee could request proposals from several public auctioneers and award the contract to the public auctioneer who has the best plan to sell the assets, or has the most experience with the type of assets being sold. The Trustee could award the contract to the auctioneer who commits himself to selling the merchandise for the highest net price. To establish this net price, a listing of the assets is given to the auctioneers who will review it and estimate what the final realization at auction would be based on prior experience. The auctioneer may then bid for the contract by establishing a ‘net minimum guaranteed price’. This is the amount which the auctioneer will guarantee to the Trustee. If the actual auction proceeds are less, then the auctioneer will pay the difference. If the proceeds are greater, there is normally a percentage sharing between the Trustee/receiver and the auctioneer.

Once the public auctioneer has been chosen, the Trustee should determine the following details with him:

- the date, time and place the auction will be held;
- how the sale will be advertised;
- the arrangements for inspection;
- the physical control of assets including insurance;
- the control of receipts at the time of sale, credit terms and method of payment;

- accounting reports and accountancy work;
- the auctioneer's commission;
- whether costs of moving, storage, advertising, etc. are absorbed by the auctioneer from his commission or whether there is a cost to the receiver or Trustee; and
- the minimum guarantee that the auctioneer can offer.

Notices are usually published in newspapers, and circulars may be distributed in some cases, listing the lots of goods to be sold, the date and the location where they may be examined and the date and the location where the auction will be held.

At the time of the auction sale, the assets will be sold piece by piece, lot by lot, whether it is a factory, machinery or goods.

12.7.5. Retail

In bankruptcies where the debtor is a retail store, the Trustee can continue to carry on the business of the debtor and sell the assets such as inventory through retail channels. This will require the Trustee to continue to employ enough employees, have strong controls over cash receipts and negotiate with landlords to ensure that the liquidation can be held at the location, as the lease may contain restrictions that affect how the retail sale can be conducted.

The Trustee should review the inventory composition at each location and may determine it is wise to consolidate the inventory to fewer locations to reduce the number of employees/locations needed. This decision needs to be considered at the onset of the sale, but is also usually a dynamic process. The Trustee that carries on a retail sale would continuously reassess in-store performance – to close stores, consolidate inventory and review pricing discounts over time, to wind down operations efficiently, limit costs and allow each remaining store to have sufficient inventory to attract consumers.

12.7.6. Going concern / bulk sale of enterprise

There are times where the Trustee determines that the operations of the insolvent company are worth more if sold as a whole, than if the assets were sold individually. This is usually the case if there is a strong employee base, established customers or the company is providing a needed product or service. The Trustee should ensure that there are sufficient funds available to operate the business until a sale can be concluded.

12.8. Notice requirements

12.8.1. General

The *Personal Property Security Acts (*PPSA*)* in many provinces also impose duties and obligations on receivers. These duties and obligations typically include a requirement to file, and sometimes publish, a notice of appointment. This provides notice of the appointment to

the debtor and other creditors, notice of an intended disposition of assets, and the preparation and filing of financial statements by the receiver.

In the province of Quebec, it is Book 9 of the Civil Code of Quebec (CCQ) which governs the publication of rights.

Section 2934 of the QCC mentions that "*the publication of rights is effected by their registration in the register of personal and movable real rights (RPMRR) or in the land register, unless some other mode is expressly permitted by law."*

The first is for rights pertaining to immovable property, the latter is for rights pertaining to moveable property.

Consulting these registers enables the reader to be aware of all securities or prior notices published against the asset, e.g., the exercise of a hypothecary right.

Similarly, if a security was given under section 427 of the Bank Act, in most cases on inventories, a registration of a notice of intention to give such a security must be registered with the appropriate agency of the Bank of Canada. The registration of other notices is also required to take possession of property covered by the security.

You should consult the relevant legislation to identify the duties imposed by these Acts.

12.9. Approvals required

12.9.1. Inspector / court / secured creditor

BIA s. 30(4)

Once the Trustee has completed his analysis of the different methods of valuation, performed a cost/benefit analysis and determined the expected time to conclude a transaction, approval must be obtained by the inspectors to initiate the sales process.

The Trustee will prepare a report for the inspectors setting out the benefits and net realizations of each sales method that has been researched for the assets. The Trustee will recommend the sales method he feels will result in the highest net recovery in a reasonable time frame.

Note, in the case of related parties, section 30(4) of the BIA states:

"The Trustee may sell or otherwise dispose of any of the bankrupt's property to a person who is related to the bankrupt only with the court's authorization."

12.9.2. Confidentiality agreement

CAIRP Standard of Professional Practice No. 17

Prior to allowing an interested party to review the debtor's books and records or to view the assets, the Trustee will commonly require that he receives a signed confidentiality

agreement. CAIRP Standard of Professional Practice No. 17 suggests a form be used. Certain information may be proprietary to the debtor company and should not be released to the general public. The confidentiality agreement will control the release of information.

12.9.3. Purchase and sale agreement

Competing offers to purchase may be received by the Trustee containing not only different purchase prices, but also different terms and conditions. The Trustee must review the transaction documents carefully to ensure that they possess the right to sell the asset (i.e., they are not selling third-party property and have the power to sell property as set out in a court order or under a security agreement). In addition, the Trustee must be sure that the transaction documents release the estate from future liability. Generally, the assets are sold 'as is, where is'.

In order to avoid the receipt of offers using different terms and conditions, the Trustee could prepare a standard form of offer. Legal counsel should review the standard form of offer so that once the amount and purchaser's name are inserted, the agreement would become legally binding.

If the potential purchaser wished to change or add any other terms, they would be clearly noted on the standard form of offer.

12.9.4. Auction agreement and other service agreements

CAIRP Standard of Professional Practice No. 17

The CAIRP Standard of Professional Practice No. 17 sets out considerations that should be included in all written agreements with parties who are assisting in the sales process.

13. Realization of Assets

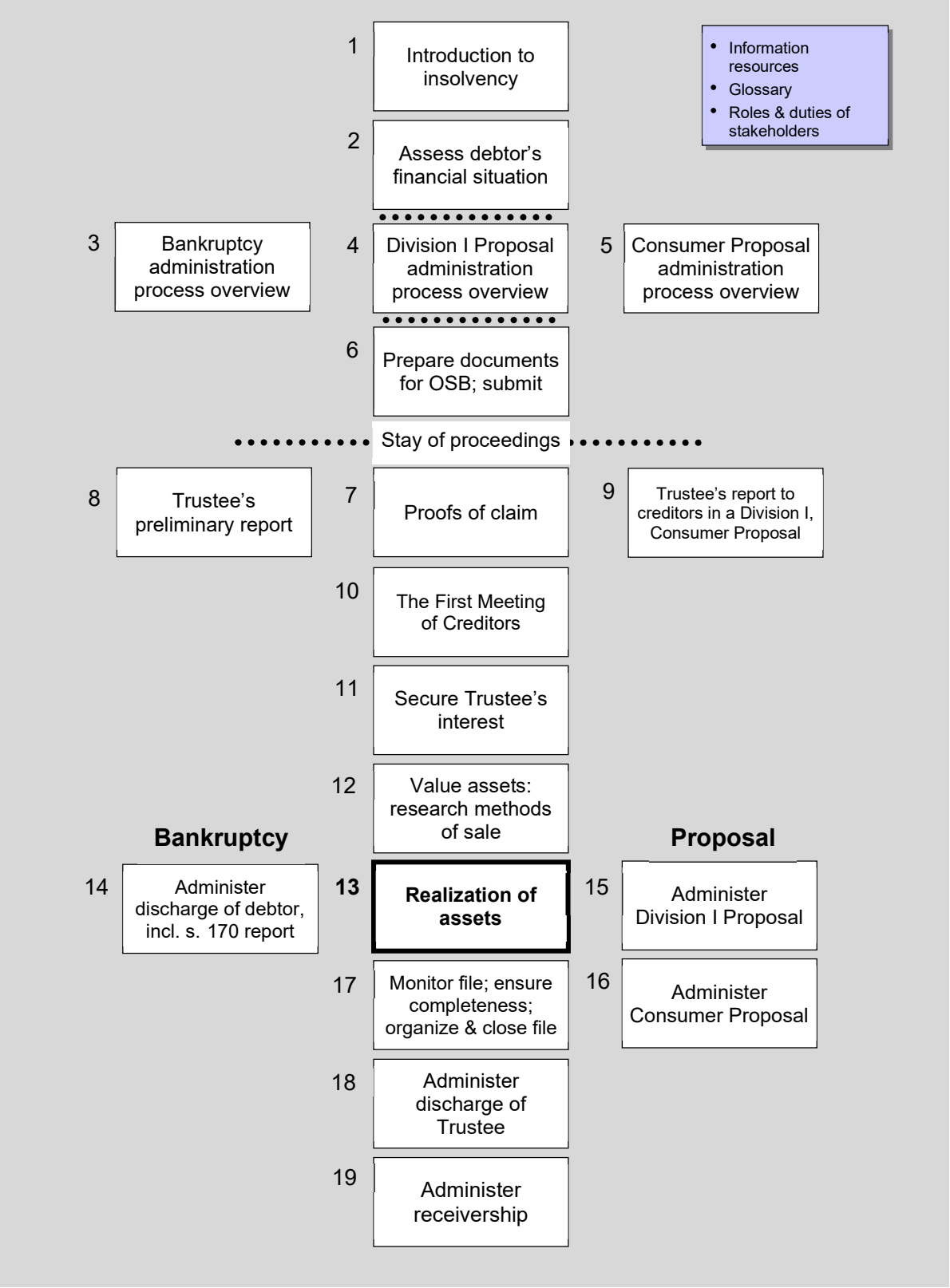


Table of Contents

13.1. Introduction

Module objective

At the end of this module, you will be able to describe the process for realization of assets.

Assigned readings

- BIA s. 17(1), 20, 22, 30, 67(1)(c), 69, 74, 97, 98, 117(2), 120 (1), 127-134, 147 and 170.1
- BIA Rules 34-53, 121
- BIA Circular 2R2
- Directives 10R, 16R and 25
- CAIRP Standard of Professional Practice No. 17
- CAIRP Rules of Professional Conduct
- ITA s. 128 and s. 782-785 of the Taxation Act (Quebec)

13.2. Sale authorization

13.2.1. General

Both a Trustee and receiver generally require the approval of certain parties, such as inspectors, secured creditors, court, etc. in order to sell assets.

As discussed in Module 12, the Trustee requires approval for the realization or sales method that would be used to sell an asset. Once the results of the sale methods are known, the Trustee will then require prior written approval from the inspectors, after passing a resolution at an inspectors meeting, to actually enter into a sale or other agreement.

The Trustee will prepare the report to the approving party detailing the following:

- summary description of the process undertaken;
- description of offers received;
- analysis of the offers, in terms of:
    - purchase price;
    - closing dates;
    - post purchase adjustments;
- any other pertinent information; and a
- recommendation as to which offer to accept.

There are times when the approval for the sales method and the actual realization are one and the same, e.g., when selling inventory through the bankrupt's retail stores. In these cases, only the approval for the sales method is required.

The Trustee/receiver must obtain written approval prior to entering into a purchase and sale agreement. The approving party differs according to the type of appointment:

- a court-appointed receiver must obtain prior written court approval;
- a privately appointed receiver must obtain approval from the appointing secured creditor; and
- a Trustee must obtain prior written authorization of the inspectors.

13.2.2. Inspectors' approval

BIA s. 30, 117(2) and 120(1)

The BIA states that the Trustee may sell assets with the permission of the inspectors. If there is more than one inspector of the estate, the approval from the majority of the inspectors is required. If there is a tie, the BIA indicates the method to resolve the issue. To begin with, the opinion of the inspectors not in attendance (if any) should be sought. If that fails to resolve the issue, the Trustee can resolve the tie as long as the issue under discussion does not involve the conduct or remuneration of the Trustee.

Be aware that no inspector may acquire property of the estate, except with the prior approval of the court.

13.2.3. Secured creditors

BIA s.127- 134

In cases where there is equity is an asset, over and above the value owed to the properly secured creditor, the Trustee may wish to redeem the security and realize on the asset. Unless the Trustee is confident that he can redeem the security by paying the full redemption price to the secured creditor, the Trustee must seek the approval of the secured creditor prior to the asset's sale. In some cases, the secured creditor may not respond to such requests, and the BIA provides the Trustee with a process to sell the asset. This process is covered in more detail later in this module in the section "Dealings between Trustee and secured creditors".

13.2.4. Deemed trust

If the estimated proceeds of the sale of the estate's inventory and accounts receivables will not fully extinguish the liability for the payroll source withholdings deemed trust, the Trustee should enter into an "Administrative Agreement" with Canada Revenue Agency ("CRA") to determine the amount of Trustee's fees which are to be paid ahead of the deemed trust. Directors of the company may be personally liable for the unpaid balance of the payroll

source withholdings liability and the CRA or other tax authorities may actively pursue these amounts. Obtaining the government's prior approval along with careful documentation of the sales process may help protect the Trustee/receiver from claims of improvident realization or from a dispute regarding the reasonableness of the remuneration claimed.

A similar agreement should also be entered into with the Quebec Revenue Agency.

13.3. Notice requirements

13.3.1. Methods

When an asset is being realized, certain legislations (PPSA and the Bank Act, for example) require notices of the upcoming sale to be either published in a newspaper or sent via registered mail to a defined mailing list.

13.3.2. Procedure in Quebec

Under the Quebec Civil Code, a secured creditor who intends to enforce his security outside of a bankruptcy event must send the debtor a 20-day notice to repay the debt, for a movable, and a 60-day notice for an immovable asset. When the contract is governed by the Consumer Protection Act, the delay is 30 days, and in the case of taking possession for administrative purposes the delay is 10 days.

The secured creditor must state in this notice the method considered for realizing his security (taking as payment, sale by the secured creditor, sale under judicial authority, possession for administration purposes).

Such a notice is often sent with the Notice of Intent to Enforce a Security under section 244 of the BIA.

13.4. Rules of Professional Conduct

13.4.1. General

Every sales transaction performed by the Trustee/receiver could be subject to an objection by a person affected by the insolvency. Claims against the Trustee/receiver could range from selling the asset at too low a price, to not following a tender process correctly, to the Trustee/receiver negligently performing his duties.

To ensure that the Trustee and receiver protect themselves from such claims, they must ensure that they have obtained all required approvals and they must also comply with the CAIRP Rules of Professional Conduct and the rules set out in the BIA. They must also be aware of court decisions.

13.4.2. Rules of ethics regarding sales of assets

Every Trustee/receiver is required to follow the CAIRP Rules of Professional Conduct. These rules are based on CAIRP's principles that each member must conduct himself at all times in

a manner which will maintain the good reputation of the Association and each member must perform his professional engagements with integrity and due care. With respect to the sale of assets, CAIRP Rule of Professional Conduct No. 6 and its interpretation prevents a member, his partners/associates, his staff or their families, from purchasing assets from an estate unless they meet certain conditions.

BIA Rule 43 has similar provisions regarding to whom and on what conditions a Trustee may sell assets. BIA Rules 42 and 43 also have provisions restricting a Trustee from acquiring assets from another estate that is not under his supervision, except under certain conditions.

13.4.3. Duties and responsibilities of receivers

The duties and responsibilities of a receiver consist of selling the assets in his possession (or the interest therein) for the best realization he can obtain in the circumstances (as discussed in Module 12). To do so, the receiver should take all the necessary measures and means for obtaining the best (usually, but not always the highest) price in order to safeguard the interest not only of the secured creditor who appointed him, but also of the lower ranking secured creditors and the ordinary creditors.

If a receiver can demonstrate that he has taken all reasonable steps to obtain the best realization, no one will likely be able to successfully contest his decisions. It is therefore important for the receiver to properly document the decisions made and the reasoning behind these decisions.

13.4.4. Duties and responsibilities of the Trustee

BIA s. 30

BIA Rules 34-53

The BIA states that "The Trustee may, with the permission of the inspectors (...) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels."

The Trustee is also bound by the BIA Rules which deal with the ethical questions. Rule 42 sets out the rules under which a Trustee may purchase assets from an estate.

13.5. Recovering proceeds if conveyed to a third party

13.5.1. Power of Trustee to recover monies

BIA s. 98

The BIA gives the Trustee power to recover monies or other proceeds from a person who acquired property from the bankrupt through a transaction that is void or voidable. This power may be exercised even in situations where the person that acquired them had resold or disposed of the property. The Trustee is even allowed to recover monies or other proceeds from third parties unless the transaction was conducted in good faith.

13.6. Income tax returns[9]

13.6.1. Trustee must file certain returns if not yet filed by the bankrupt

BIA s. 22

Income tax refunds can represent a major source of recovery for trustees, not only in personal bankruptcies, but also in corporate bankruptcies and receiverships. The BIA provides as follows:

> "The Trustee is not liable to make any return that the bankrupt was required to make more than one year prior to the commencement of the calendar year, or the fiscal year of the bankrupt where that is different from the calendar year, in which he became a bankrupt."

As an example, an individual becoming bankrupt on September 30, 2009, would result in the Trustee being obligated to file the 2007, 2008 and 2009 (pre- and post-bankruptcy) tax returns The Trustee would be obligated to file the 2007 return if it has not been filed, because that return was due to be filed by April 30, 2008, and that date is less than one year before the commencement of the calendar year in which he became bankrupt (i.e., 2008).

Obviously, the Trustee is allowed to file income tax returns for earlier years as well, and this would be prudent where tax refunds are available. However, you should be aware that the *Income Tax Act* has provisions that limit the number of prior year tax returns for which Canada Revenue Agency (hereafter "**CRA**") can issue refunds. Use of the fairness provision may allow for filings beyond the prescribed number of years.

You must recognize those situations where the filing of the income tax returns is important. Where funds are available for distribution, it is important to ensure that the proper tax indebtedness is established in order not to prejudice other creditors (by diluting any dividends

[9] The text here makes reference to the Income Tax Act and the Canada Revenue Agency (or CRA), however you should know that the practice and rules are very similar as regards the Quebec Income Tax Act, the Quebec Tax Administration Act and the Quebec Revenue Agency (or QRA).

paid). Also, you should be aware of those situations where losses of the bankrupt are available to "carry back" to prior years in order to recover previous taxes paid.

The income tax situation of an individual should be addressed at the initial interview stage. Many trustees utilize a checklist in order to properly assess the status of the income tax returns and the possibilities for recovery.

13.6.2. Deemed taxation year end in year of bankruptcy

During the year in which an individual files an assignment in bankruptcy or if a bankruptcy order is made, there is a deemed year-end at the date of the bankruptcy. This generally results in two income tax returns being filed by the Trustee. These returns are commonly referred to as the pre- bankruptcy and the post-bankruptcy income tax returns. When filing the returns the following items should be addressed:

- Tax debts incurred in the pre- or prior years' returns represent a provable claim in the bankruptcy estate. This debt is only known upon the filing of the return. Therefore, it is critical to obtain all tax information early in the administration to establish the claim, if any. Tax debts in the post-bankruptcy period are the responsibility of the bankrupt.
- Losses of the bankrupt up to the date of the bankruptcy are available to be used or carried back to prior years. Losses cannot be carried forward into the post-bankruptcy period.
- Pre-bankruptcy refunds can legitimately be offset by CRA for prior years' taxes unpaid or to debts to federal government programs (i.e., Canada Student Loan Program or Employment Insurance Commission) because of overpayments. Also, CRA may offset a pre-bankruptcy refund against other amounts due, e.g., unremitted source deductions or GST refunds. Post-bankruptcy refunds cannot be offset against pre-bankruptcy indebtedness but in some circumstances may be withheld. Should CRA offset against a post-bankruptcy tax return, the Administrator should bring this to the attention of the Trustee.

13.6.3. Income Tax Returns

It is important to know the proper process for preparing tax returns and the importance of good relationships with CRA.

CRA has set-up an Insolvency Division in some offices and has teams specialized that are familiar with bankruptcies and insolvencies available to deal with trustees for administrative purposes. They will file proof of claims, voting letters and participate in the administration process (meeting of creditors, etc.) if needed. This can be a good source of assistance to the Trustee when creditor input is needed.

13.6.4. Tax refunds for pre- and post-bankruptcy returns

BIA s. 67(1)(c)

ITA s. 128 and s. 782-785 of the Quebec Tax Act

When a debtor files for bankruptcy, the Trustee will notify CRA through the DC905 form. This will update the CRA file and prompt CRA to send any tax refunds to the Trustee resulting from the returns filed for prior years, pre-bankruptcy and post-bankruptcy.

In the event that a bankrupt personally receives a prior, pre or post-bankruptcy tax refund, he is required to turn this refund over to the Trustee.

In Quebec, the Quebec Revenue Agency considers tax returns to be non-transferable and non-seizable and refuses to send them to the Trustee.

13.6.5. In bankruptcy tax return

There is another income tax return that the Trustee may be required to file. This return is often referred to as the "In Bankruptcy Tax Return." The provisions for preparing this return are set out in the *Income Tax Act* and *the Quebec Tax Act*.

Generally, this return relates to dealings in the estate of the bankrupt or acts performed in the continuation of the bankrupt's business by the Trustee. For instance, a Trustee who receives contributions made within the last 12 months from the RRSP of a bankrupt is required to file an In Bankruptcy return that would reflect the RRSP funds as income as well as any tax deducted. No personal credits or exemption are allowed. Any refund on this return is an estate asset, and any balance due would be payable by the estate.

As previously indicated, income tax refunds can be a major area of recovery in bankrupt estates. However, they can require a significant amount of the time necessary to administer the bankruptcy. Tax returns should be completed on a timely basis as outstanding tax refunds can result in an estate remaining open for longer than is required under the *Act*.

13.7. Secured creditor

13.7.1. Dealings between the Trustee and secured creditors

BIA s. 69 and 84.2

Directive 10R

Module 11 discusses the need to review the debtor's records for indications of encumbrances. During this review, identification of secured creditors will be made. A secured creditor is a person holding a mortgage, pledge, charge, lien or privilege on or against the property of the debtor as security for a debt due from the debtor. These creditors are free to

deal with their security and realize upon it in the ordinary course of business, unless specifically prohibited from doing so by an order of the court.

Accordingly, a secured creditor may request from the Trustee the return of any property subject to its security. This is a common occurrence with regard to a vehicle owned by the bankrupt but subject to a security agreement.

Although the secured creditor can deal with his security, he also has a duty to obtain a commercially reasonable price for the property subject to the security. He is required to provide the Trustee with a full accounting of the sales transaction and any surplus proceeds are to be remitted to the Trustee for the general benefit of creditors. The exception to this is where a secured creditor has foreclosed on a mortgage or, in Quebec, where a secured creditor has exercised the hypothecary right of “taking in payment”, or where the secured creditor has put the Trustee on notice to elect to redeem the security and the Trustee has not elected to redeem the security or to cause the asset to be sold (discussed later in this section).

The secured creditor may prove an unsecured claim in three ways:

- he can prove the balance owed to him after deducting the net amount realized from the sale of the asset under the security; or
- he can prove the full amount owing if the asset under the security agreement is surrendered to the Trustee; or
- he can prove the balance owing to him after valuing his security without selling it and making a claim as an unsecured creditor for the difference between his total claim and the value at which he assesses his security.

If the secured creditor assesses the value of the asset, the Trustee is given the right to:

- redeem the secured creditor at the valued amount;
- elect to have the asset sold on terms and conditions as agreed between the creditor and the Trustee if dissatisfied with the value at which the security is assessed.

The BIA also permits the secured creditor to take the initiative and attempt to dispose of the Trustee's interest without realizing on his security. This may be done by requiring the Trustee to decide whether or not to redeem at valuation or realize the security. If the Trustee fails to do so, the interest that was vested in him must vest with the creditor.

13.7.2. Dealings between the debtor and secured creditors

As previously noted, upon filing the assignment, all the bankrupt’s assets vest in the Trustee, including assets subject to a security interest (such as a car with a lien on it or real estate with a mortgage). In some cases, the value of the asset is not sufficient to repay the loan. The Trustee reviews the security position of the secured creditor and, with permission of the inspectors and sometimes after receiving legal advice, will "release" the asset to the secured creditor.

In some cases, the secured creditor chooses to continue dealing with the bankrupt by allowing him to keep his property (for example, a vehicle or a house) and continue with the payment. This is very often the case with a house, as the bankrupt continues to live in the house and make the mortgage payments. If the Trustee is of the opinion that there is equity in the assets for the estate (and the house or equity is not exempt property), it is the Trustee's obligation to obtain that equity for the creditors by taking possession of the asset, selling it and then paying off the secured creditor's lien. The remaining funds will then be available to the creditors.

13.8. Exempt assets

13.8.1. Provincial Legislation

Pursuant to provincial legislation, certain assets are exempt from seizure by the creditors and the bankrupt is allowed to claim these assets as exempt and request that the Trustee not take possession of same. The exempt assets vary from province to province and you should be very familiar with the legislation that provides for exemptions in your province. You should review the notes in Module 12 that explain what is exempt property.

13.9. Some notes on common assets

13.9.1. Monetary assets

BIA s. 17(1)

Assets, such as monies paid into court pursuant to a garnishee order, contributions to RRSP's within 12 months of the assignment, RESP's, stocks, bonds, mutual funds, cash surrender values or loan value of life insurance policies not exempt from seizure and bank account balances, can be recovered by a Trustee by sending a letter to the relevant party. The letter should include: a certified true copy of the bankruptcy order or assignment, a copy of the Trustee's Certificate of Appointment and a demand that the property be delivered to the Trustee.

13.9.2. Motor vehicles

BIA s. 30(4)

Motor vehicles may be exempt from seizure in many provinces depending upon the value of the vehicle. If a motor vehicle is not exempt, the Trustee should immediately take possession of the motor vehicle or make arrangements for the bankrupt or a third party to provide fair value for the vehicle. The Trustee should ensure that the vehicle is properly insured. Note, in the case of related parties, Section 30(4) of the BIA states:

"The Trustee may sell or otherwise dispose of any of the bankrupt's property to a person who is related to the bankrupt only with the court's authorization."

To determine value, the Trustee could inspect the vehicle noting general condition, cleanliness, mileage, options and accessories and/or may refer to `blue book' (retail) or `black book' (wholesale) references to estimate the value of the vehicle. The Trustee should have a secure facility in which to store the vehicle until the sale. Once the Trustee has decided on the value and method of sale, he should proceed to sell the vehicle with the inspectors' approval. Once sold, he should arrange for a refund of any unexpired insurance premiums and a refund of any motor vehicle registration fees if sold to a third party.

13.9.3. Houses

BIA s. 74

Exemption laws dealing with a bankrupt's principal residence vary considerably from province to province. The Trustee should immediately determine if there is non-exempt equity in the property for the estate. The Trustee should obtain an opinion of value or an appraisal from an accredited appraiser, as is appropriate in the circumstances. If the estate has an equitable interest in the property, the Trustee should register that interest. In the event the Trustee is going to sell the property, he should ensure that the property is properly insured and have the estate listed as named insured and loss payee on the insurance policy.

The Trustee will have to estimate the estate's equity in the property by determining the amount of taxes, mortgages, liens, etc., are outstanding and deduct this from the appraised value.

If the property is owned jointly, the other owner(s) may wish to purchase the estate's interest. If the other owner is not in a position to purchase and is not co-operative in selling the property, the Trustee may apply to court for an order under the applicable provincial legislation (where applicable) to force a sale of the property. If there is no way to terminate the co-ownership, the Trustee may have to wait until the property is sold to collect the bankrupt's share of the equity in the property, or may try to sell the interest in the joint ownership.

The Trustee and inspectors will have to decide on a method of sale. If it is decided to list the property for sale with a realtor, care should be taken to ensure that a commission is payable only upon closing of a sale. The Trustee and inspectors should reach an agreement on:

- list price;
- period of the listing;
- commission rate;
- realtors to be used;
- any items to be included in the sale, such as window coverings or appliances; and
- whether or not the listing is to exclude any identified potential purchasers.

The Trustee should ensure that a disclaimer is included with the agreement of purchase and sale stating that the property is being sold “as is, where is” with no warranty of any kind whatsoever.

In most circumstances the Trustee will insist that the listing be registered with a multiple listing service.

Once an acceptable offer has been received and accepted by the Trustee with the inspector's approval, the Trustee should employ a solicitor to handle the closing of the sale. The Trustee must carefully review all closing documents, particularly the statements of adjustments, and execute them. Insurance policies should then be cancelled and refunds of unexpired premiums requested.

13.9.4. Accounts receivable

BIA s. 67(1) and 69.3(1)

A common responsibility of a receiver, Trustee or agent is to collect the accounts receivable of a debtor.

On taking possession, initial demand letters should be sent by registered mail. As there are likely transactions not posted in the records of the debtor, it is important to recognize that the actual balance at date of appointment may differ from that initially shown in the records. Therefore, the initial demand letter should refer to a "preliminary review of the records" or "the records of the debtor" and indicate a particular amount of money is outstanding. If a Statement of Account can be provided at this time, it assists the addressee in reconciling the balance demanded to his records.

The demand for immediate payment and request that you be contacted if payment cannot be made will prompt the addressee to respond with information on the account regarding payment terms extended, unprocessed payments or credits, claims of set-off or other disputes. By putting the addressee on notice that "payment to any other party will not discharge (his) liability to (the debtor)," you reduce the risk of payment being made to a garnishing unsecured creditor or the debtor himself.

At the time of your appointment, the debtor's accounts receivable records are unlikely to be up to date. Therefore, the last transactions processed should be identified and the records updated for all unrecorded pre-appointment transactions. Ensure all shipments have been invoiced and that all invoices, payments and credit notes have been posted.

Where a receiver or Trustee continues operations, it is important that post-appointment sales and related payments be recorded in separate records, including separate ledger cards.

All records in support of pre-appointment receivables should be found. This will include invoices, ledger cards, purchase orders or contracts, signed bills of lading or other delivery receipts and details of any security held. The pre-appointment accounts receivable ledger should be regularly updated as payments are received, credits are issued or write-offs are made during the collection process.

Other potential receivables should be identified and notified. Such receivables may arise from security deposits, refunds of taxes and duties, refunds of insurance premiums (do not cancel any existing insurance policies without senior approval), suppliers with credit balances, bank accounts, life insurance with cash surrender value or loan value, supplier rebates, etc.

In the collection of receivables, the debtor's customers will raise valid and invalid issues in an effort to reduce or eliminate their payments. Common issues raised by customers include the following:

- Lack of warranty, service or parts supply. Where such support was included in the terms of the sale and such support will not be provided in the future, an adjustment is warranted and would have to be negotiated or settled before the court.
- Set-off against other debts or losses. Whether a right of set-off exists or not can be a complex issue and legal advice should be sought.
- Goods or services not supplied to promised standard. Each situation must be investigated to determine the facts. If the customer's claim is correct, an adjustment will have to be negotiated or the deficiency remedied.
- Return goods for credit. Unless the terms of sale provide for a `buy back' at the customer's discretion, there is normally no requirement to accept returned goods for credit.
- Conflicting demands. A debtor's customer may have received demands from other parties in respect of their debt. CRA may have issued third party demands to recover income taxes, employee income tax withheld but not remitted, federal sales tax or excise owed. Unsecured creditors may have served garnishing orders to collect an outstanding judgement. In some provinces, sub-contractors or trades may have put an owner or general contractor on notice that they have a trust claim on the amounts due pursuant to provincial Construction or Builders Lien Acts. Consult your Trustee immediately for further instruction if the customer is making such a representation.

In any of the situations above, the customer will require assurance that he is making payment to the correct party. If he is not satisfied on this aspect, the customer will refuse to pay anyone or pay the court the amount due less his costs in so doing. Garnishing orders are the easiest to deal with. If you are collecting as a Trustee, there is a stay of proceedings against unsecured creditors and, consequently, such garnishing orders are stayed. The Trustee can recover any monies paid into court pursuant to garnishing orders.

Similarly, if collecting receivables pursuant to a security interest, it should not be difficult to provide an explanation and evidence of the priority of your demand to an unsecured creditor's garnishing order.

Third party demands by CRA are difficult to have retracted and the Trustee should be consulted with respect to such demands. Similarly, the advancement of trust claims should be referred to the Trustee for a decision on how to proceed.

While collecting receivables, it is important to fully document all discussions and keep copies of all letters. Such documentation is invaluable where legal proceedings are necessary to effect collection.

During the collection process, any steps required to preserve any security interests should be performed. For example, in Ontario, pursuant to the *Construction Lien Act*, the supplier of products or services to a job site has 45 days from substantial completion in which to file a lien against the title of the real property improved. Other security agreements executed by the debtor and his customers may have to be registered pursuant to provincial legislation in order to be effective against third parties.

At some point after mailing the initial demand letter, usually between 10 and thirty days, a second registered letter should be sent to customers having unpaid balances with an analysis of the account. It should also give notice that, if payment or an explanation of why the amount is not being paid is not received within a certain number of days, then appropriate legal remedies will be sought.

After the deadline for response has passed, a decision must be made on each outstanding account as to what follow-up method is appropriate. Options include: further follow-up by you, referral to a collection agency or referral to a lawyer.

13.9.5. Registered Retirement Savings Plan

Directive 25R

Under section 67 of the BIA, property in a registered retirement savings plan (“RRSP”) or a registered retirement income fund (“RRIF”) are not considered to be property of the bankrupt and are exempt unless contribution was made within 12 months of the date of bankruptcy. Note however, that if the RRSP is in an insurance product, the entire RRSP may be exempt

RRSPs or RRIFs may be estate assets to the extent of contributions to the plan or fund made in the 12 months before the date of bankruptcy. If so, the Trustee will contact the financial institution holding the RRSP and request investment contribution information. The Trustee will request that all contribution of funds within 12 months be remitted to the Trustee, net of withholding taxes. The estate will then necessarily have to file an income tax return.

Some RRSPs, with a named beneficiary and considered to be an annuity, may be exempt from execution under certain provincial legislation or jurisprudence.

Other RRSPs may be set up in a way that they cannot be terminated, e.g., locked-in RRSPs. Pension rollover from RRSP to a locked-in retirement account (“LIRA”) is exempt.

13.9.6. Life insurance policies

Directive 25R

Insurance legislation varies from province to province. Generally, the Trustee is entitled to realize on the proceeds of a life insurance policy if it is payable to the estate of the bankrupt.

If the policy is payable to a designated beneficiary, it is necessary to check with the Trustee whether the policy is considered exempt property or can be considered an asset of the estate. The determination of whether the policy is exempt property will depend on a number of factors such as the specific provisions applicable to insurance contracts in your province, whether the designation of the beneficiary is revocable or irrevocable, or the identity of the named beneficiary.

Life insurance policies which are ‘whole life policies', or otherwise have a cash surrender value, can usually be liquidated in two ways, if they are not considered exempt property. The easiest method is to simply cancel the policy and request the cash surrender value. However, this can be particularly damaging to the bankrupt if he cannot replace the policy due to age or health. In such circumstances, the Trustee might request the maximum loan value of the policy (perhaps 60% - 80% of cash surrender value). Then he would have the bankrupt contribute the difference between cash surrender value and the loan proceeds.

13.9.7. Other assets

The Trustee can also realize on Canada Savings Bonds that are purchased by payroll deduction or burials plots owned by the bankrupt, to name a few.

13.10. Trust accounts

13.10.1. Not property of the bankrupt

BIA s. 67

The BIA provides that property held by the bankrupt in trust for another person is excluded from property divisible amongst his creditors. As discussed in Module 12, trusts created by statute will serve to remove trust funds from the bankruptcy administration.

13.10.2. How to identify

The bankrupt must disclose proper documentation of the establishment of the trust and a listing of the assets held by the trust. If you are unsure whether the assets are under a trust, you should refer the matter to your Trustee and delay the realization of the assets until the matter is resolved.

13.11. Property incapable of being realized

13.11.1. What to do with the property?

BIA s. 40(1)

Directive 16R

There may be situations where the Trustee cannot find a buyer for a particular estate asset, e.g., contaminated real property, obsolete technology, etc., and the Trustee is unable to realize upon this asset. There may be other cases where, in the opinion of the Trustee, there would be no financial benefit to the estate to sell an asset as the costs of realization would exceed or equal the realizable value of the asset.

Since all property legally vests with the Trustee upon bankruptcy, the Trustee must conclude all matters relating to the estate. The Trustee, with the permission of inspectors, shall return to the bankrupt any property that the Trustee was incapable of realizing on when the Trustee is discharged. Before discharge, the Trustee could have other options, such as disclaiming his interest in real property, or asking the court to make an order if the Trustee is unable to dispose of the property.

The Trustee should document the reasons why the property was incapable of realization.

Directive 16R provides direction on what and how information should be listed on the Statement of Affairs.

14. Administer Discharge of Debtor, including s. 170 Report

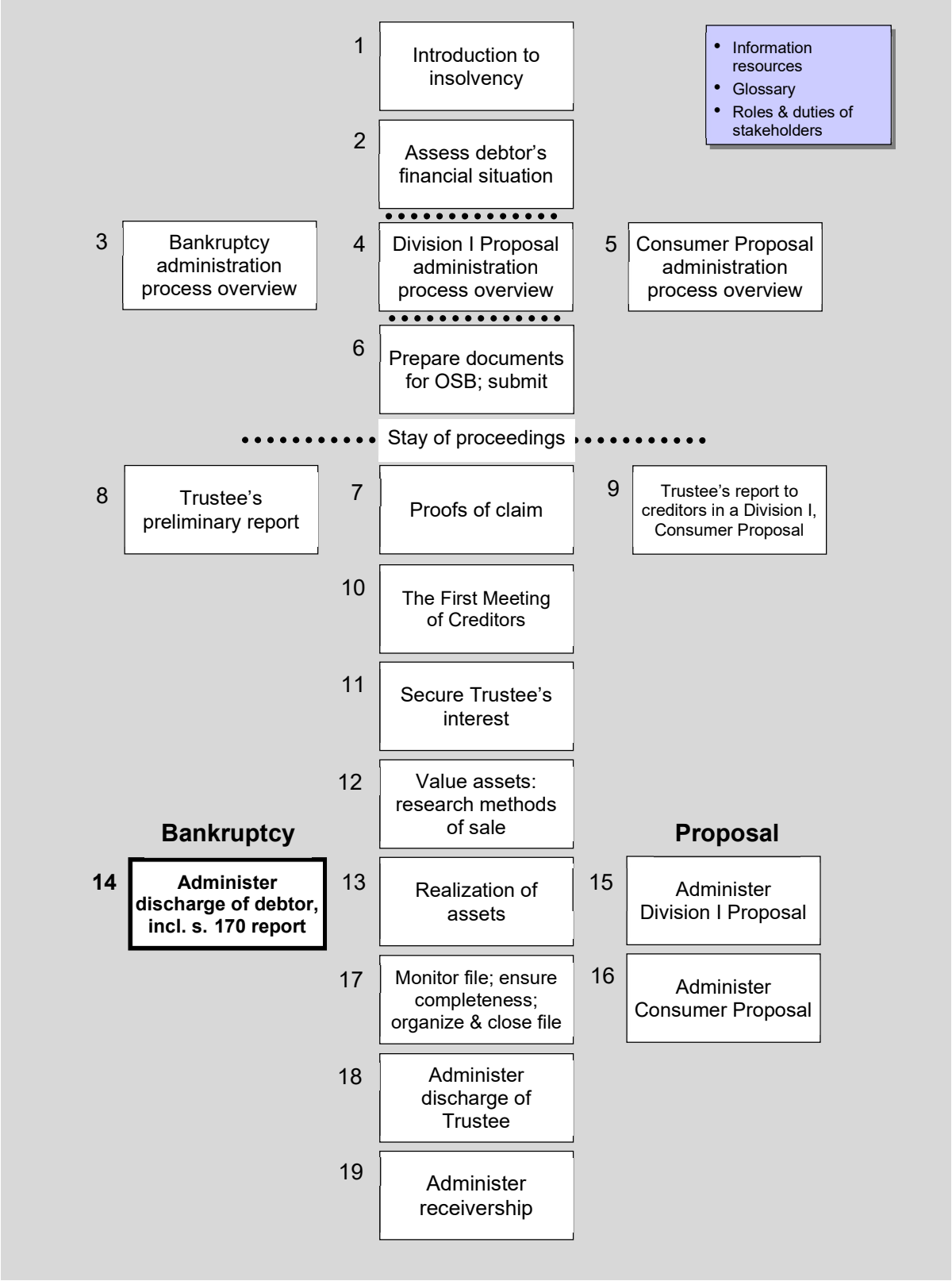


Table of Contents

14.1. Introduction

Module objectives

At the end of this module you will be able to:

- Describe the different conditions that can affect the administration of the discharge of a debtor.
- Identify the expectations of the Trustee's office in assisting a debtor in obtaining a discharge.
- Advise the debtor of all relevant information relating to the discharge.

Assigned readings

- BIA s. 51(b), 52(b), 59(2), 62(2), 68, 158-159, 161-168.1(1), 168.2, 169(6), 170(1), 170.1(4-6), 172-173 (1), 176, 178 and 198-200
- BIA Form 82
- BIA Rules 15-16, 105, 115-117 and 121-121.1
- Directive 26

Please note that the word 'debtor/bankrupt' will be used interchangeably throughout.

14.2. Proposal and bankruptcy

14.2.1. Examination of debtors

BIA s. 161-167

BIA Rules 115-117

Upon filing an assignment or a proposal, a debtor may be required to attend an examination. Depending on the circumstances, the examination can be held by:

- the OSB;
- the Trustee;
- the creditors; or
- other interested persons.

The BIA states that the OSB must examine the debtor under oath prior to obtaining a discharge from bankruptcy. In practice, the OSB only requires the debtor to attend an examination if it is determined to be necessary. The Trustee and the creditors can also request that the OSB conduct an examination of the debtor if there are specific concerns that should be addressed.

The creditors have the authority to adjourn a meeting of creditors to review a proposal in order to have the debtor examined. Creditors and other interested parties can also make an application to court for an order giving them the right to examine a debtor.

Failure to attend an examination is a violation of the debtor's duties and has serious consequences for the debtor.

14.2.2. Debts not released

BIA s. 62(2.1), 178 and 179

There are certain classes of debts that may qualify as claims provable, but are not released in a bankruptcy or proposal. Debts not released include:

- fines, penalties or restitution orders;
- damages awarded in a civil proceeding for bodily harm or sexual assault;
- alimony, maintenance and support arrears;
- debts or liabilities resulting from fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity;
- debts or liabilities for obtaining property or services by false pretences;
- liability for a dividend that a creditor would have been entitled to receive had he been advised of the bankruptcy;
- student loans (if it has been less than 7 years since the debtor stopped attending school); and
- any debt for interest owed in relation to an amount referred to in any of the paragraphs above.

Whether or not a debt will be released is not determined at the discharge hearing or upon court approval of a proposal. The onus is on the creditor to prove that the debt should not be released. Otherwise, the debt will be discharged.

Although a Certificate of Completion does not release these debts in a proposal, some exceptions apply. If the proposal specifically provides that these debts will be discharged and the affected creditor votes for the proposal, the debt will be released upon completion of the proposal.

The list above addresses the effect of an order of discharge (or completed proposal) as regards the claims against the debtor or the bankrupt, or the ability of a creditor to continue efforts at collecting a claim against the debtor or bankrupt after the discharge or after a certificate of completion of a proposal has been issued. As well, there is another category of debts that is not released by an order of discharge or a completed proposal. This is the claim that a creditor has against someone who is jointly responsible with the debtor for a debt, as described in section 179 of the BIA. The fact that the principal debtor may no longer be

responsible to repay a debt does not release from liability a co-debtor, partner or surety, except in special circumstances.

14.3. Duties of the insolvent person

14.3.1. Duties

BIA s. 158 and 198 - 200

Directive 26

The BIA imposes certain duties on a bankrupt which apply during bankruptcy and others which continue after discharge.

The principal duties are found in BIA s. 158. Sections 198-200 refer to what constitutes a bankruptcy offense, which further serves to codify what constitutes proper conduct of a bankrupt (or insolvent person) within the meaning of the BIA. The duties under section 158 can be summarized as follows:

- deliver all non-exempt property to the Trustee;
- deliver credit cards to the Trustee;
- deliver books and records to the Trustee (including tax information);
- attend examination with OSB as required;
- prepare and submit a Statement of Affairs to the Trustee within the appropriate delay;
- assist Trustee with making an inventory of the assets;
- advise Trustee of all property disposed of in the past year;
- advise Trustee of all gifts and settlements in the past five years;
- attend the first meeting of creditors and answer proper questions from the creditors;
- attend other meetings of creditors or inspectors, as required;
- submit to examinations under oath, as required;
- aid in the realization of property;
- execute power of attorney, conveyances, deeds and instruments, as may be required;
- examine the correctness of proofs of claims, if requested;
- advise Trustee if he is aware that a filed claim is false;
- advise Trustee of any material change in his financial situation;

- do all such acts in relation to property as may be reasonably required by the Trustee, prescribed by the rules or ordered by the court; and
- keep Trustee advised of his current address.

A director of an insolvent corporation, or an officer that executed the assignment (or that is designated by the Official Receiver), is also responsible to perform these duties as they relate to the corporation.

Directive 26 requires the Trustee to explain the duties to the bankrupt. Failure to comply with the duties without reasonable cause can result in the bankrupt either being charged with a bankruptcy offence or in having his discharge delayed or annulled.

It is important that you are familiar with the duties and can adequately explain them to a bankrupt.

14.3.2. Offences

BIA s. 59(2), 173 (1), 198-200 and 205

A debtor found guilty of an offence under the BIA can face several consequences:

- the discharge from bankruptcy may be refused, suspended or granted conditionally;
- the court may refuse to accept a proposal;
- the debtor could be imprisoned or fined up to $10,000, or both; and,
- depending on the severity of the transgression, the debtor could face criminal proceedings.

Actions that constitute an offence are found in the BIA. A Trustee is required to ensure that a debtor has:

- received a copy of these sections of the BIA;
- acknowledged receipt of these sections of the BIA; and
- acknowledged that these sections have been adequately explained.

14.3.3. Arrest of bankrupts

BIA s. 168

BIA Rules 15 and 16

The BIA outlines certain situations where the court may, by warrant, have a debtor arrested. A warrant may be issued when:

- the court has reasonable grounds to believe that the debtor has absconded or is about to abscond from Canada with a view of avoiding payment, appearance in court or examination with regard to the debts;
- the court has reasonable grounds to believe that the debtor is about to remove, conceal or destroy property;
- the debtor removes property without leave of the court or Trustee; and/or
- the debtor fails to obey an order of the bankruptcy court.

14.3.4. Trustee's report (BIA s. 170)

BIA s. 170(1)

BIA Form 82

BIA Rule 121.1

The BIA requires a Trustee to prepare a report pursuant to section 170 (1) of the BIA.

Note that the Trustee does not need to file a report in a first time bankruptcy where there is no surplus income payment requirement and no court hearing is required.

The deadlines for filing the report vary as follows:

Bankrupt	Surplus Income	Deadline for s.170 Report
First time bankrupt entitled to an Automatic Discharge	No surplus income, no opposition to discharge (no court)	No report required
	Opposition to discharge	During the 8th month after the date of the bankruptcy
	Surplus income	During the 20th month after the date of bankruptcy
Second time bankrupt entitled to an Automatic Discharge	No surplus income, no opposition to discharge (no court)	During the 23rd month after the date of bankruptcy
	Opposition to discharge	During the 23rd month after the date of bankruptcy
	Surplus income	During the 35th month after the date of bankruptcy
Other bankrupt, including a tax debtor		Not less than 10 and not more than 60 days before the hearing of the discharge application

This report must be sent to:

- creditors requesting it on their proof of claim form;
- the OSB;
- the court (if applicable); and
- the bankrupt.

The report must include:

- Trustee's comments on the causes of bankruptcy;
- information on the bankrupt's conduct;
- other facts, circumstances or factors that should be considered by the court; and
- resolution of inspectors approving the report, or (as the case may be) the areas where the inspectors are in disagreement and the reasons therefor.

Although it is not provided for in section 170 of the BIA (and not binding on the court), it is customary for the Trustee to provide a recommendation on the type of discharge that might be appropriate in the circumstances.

The bankrupt has a right to oppose statements in the report by giving written notice to the Trustee prior to the hearing specifying the statements that are in dispute.

14.3.5. Mediation

BIA s. 170.1

BIA Rule 105, Forms 61, 62 and 63

This module will cover mediation relating to the discharge of a bankrupt. See Module 12 for mediation relating to the requirement to pay under BIA s. 68.

Mediation must be held where the Trustee opposes the discharge of the bankrupt based on:

- failure of the bankrupt to comply with requirement to pay for first or second-time bankrupts; or
- failure of the bankrupt to make a proposal where the bankrupt could have made a viable proposal.

A discharge must be heard by the court and therefore mediation is not an option if:

- dealing with a third-time or more bankrupt;
- required counselling sessions have not been held; or
- discharge has been opposed on grounds other than unpaid surplus income payment requirements.

The bankrupt, Trustee, creditors and their representatives may all be part of the mediation process.

A representative of the OSB will act as mediator and notify the parties involved of the date of the mediation. If someone is unable to attend in person, he can attend by phone. When mediation is successful, all the parties sign the mediated agreement and that becomes the bankrupt's conditional order of discharge. If the mediation is unsuccessful, the parties will proceed to court to have the matter of the discharge determined at a discharge hearing. In practice, different regions deal with mediation in a streamlined fashion such as by email. Check with your local OSB office for their required procedures.

These are the time frames for dealing with mediation:

Time frame	BIA **action**	**Responsibility**
Prior to expiration of 21 or 36 months	File opposition	Trustee or creditor
Within 5 days after the day on which the bankrupt would have been automatically discharged	Request mediation	Trustee
Within 45 days of the request	OSB will schedule mediation date and time / expedited mediation will take place between the bankrupt and the trustee	OSB-mediator or trustee
15 days prior to mediation	Notify all relevant parties	OSB-mediator
Upon successful completion of mediated agreement	Issue Form 84, Certificate of Discharge	Trustee

14.4. Bankrupt's discharge

14.4.1. First time bankrupt

BIA s. 168.1(1)

The BIA provides that a first time bankrupt is eligible for an automatic discharge nine months after the date of the bankruptcy if there is no surplus income or twenty-one months if there is surplus income. The effect of the automatic discharge is the same as if the bankrupt had received an absolute order of discharge from the court.

The bankrupt is ineligible for an automatic discharge and an actual discharge application must be made to court if:

- an objection to the discharge is filed prior to the expiration of the nine months (or twenty-one months if there is surplus income) by either the OSB, creditors or the Trustee; or
- the bankrupt has not attended the required counselling sessions.

14.4.2. Facts for which a discharge may be refused, suspended or granted conditionally

BIA s. 173(1)

The BIA outlines facts for which a discharge may be refused, suspended or granted conditionally. If one of the facts listed below is proven, the court cannot order an absolute order of discharge.

A creditor who wishes to oppose the discharge of a bankrupt must send notice of his opposition along with the grounds therefor to:

- the OSB;
- the bankrupt; and
- the Trustee.

A court fee must accompany the creditor opposition. The amount of the fee varies by province.

Some of the more commonly used grounds for opposition can be summarized as follows:

- Assets of the debtor are not of a value equal to fifty cents on the dollar.
- The bankrupt continued to do business while knowing himself to be insolvent.
- The bankrupt has failed to adequately account for loss or deficiency of assets.
- The bankrupt brought on or contributed to the bankruptcy by rash and hazardous speculations, unjustifiable extravagance in living or gambling.

- The bankrupt has on a previous occasion made a bankruptcy or a proposal to creditors.
- The bankrupt has failed to comply with a requirement to pay under BIA s.68.
- The bankrupt has failed to perform duties imposed on him by the BIA.

A complete list of the grounds for opposition can be found under s. 173 of the BIA.

Farmers are exempt from paragraphs 1(b) and 1(c) of BIA s. 173. Their discharge cannot be opposed if the only grounds for opposition are that they have not kept adequate books and records for the three years prior to bankruptcy or that they continued to trade after becoming aware of being insolvent.

14.4.3. Court application for discharge

The court has the authority to determine whether or not a bankrupt qualifies for a discharge from bankruptcy. An application to court for the discharge of a bankrupt occurs when:

- an individual is not eligible for an automatic discharge; or
- a bankrupt requires a discharge sooner than the automatic discharge date and waives his right to an automatic discharge.

The timelines required for making the court application are as follows:

Action	**Deadline** **(Time prior to hearing unless otherwise specified)**	**Responsibility**
Notify the bankrupt of application to court for hearing date	Before the Trustee's discharge and not earlier than 3 months and not later than 12 months after the date of bankruptcy	Trustee
Set hearing date	Usually within 30 days of the Trustee's request for a hearing, but may be flexible if requested by the Trustee or the bankrupt.[10]	Court
Notify creditors/ bankrupt/ OSB of the hearing	At least 15 days	Trustee
Submit Trustee's BIA s.170 Report	OSB/ bankrupt/ creditors who requested a copy: at least 10 days	Trustee

[10] In practice, the date is set by the court based on availability

	Court: at least 2 days	

The court will read the Trustee's BIA s. 170 report and hear from the Trustee, the bankrupt and any other party who has appeared. Unless a creditor has filed an opposition prior to the hearing, the creditor will not have a voice at the hearing.

The court will make one of the following orders:

- Absolute Order of Discharge;
- Order Suspending Discharge;
- Order Setting Conditions for Discharge; or
- Order Refusing Discharge.

The court may also adjourn the hearing until additional information is obtained or grant no order and the Trustee can proceed to close the estate.

If the bankrupt is not satisfied with the court order, he has the opportunity to appeal the order within 10 days. Otherwise, an application to vary the order cannot occur until one year has passed from the granting of the order.

An application to vary the order is not an automatic right. The court will only entertain such a request if more than one year has elapsed, and if the bankrupt can demonstrate that he has tried to comply with the terms of discharge, but there is no reasonable expectation that he will be able to comply with the terms of the order. In such a case, the court has discretion (but no obligation) to modify the terms of discharge.

14.4.4. Absolute discharge

BIA s. 178

An absolute order of discharge releases a debtor from all unsecured debts except for those listed under BIA s. 178. As a result, the debtor is released from all financial obligations to the bankruptcy estate creditors.

Once a bankrupt has received an automatic or absolute discharge, any assets that the bankrupt becomes entitled to after the date of discharge, including inheritance and lottery winnings are protected from pre-bankruptcy creditors other than the debts that survive due to the application of section 178 of the BIA.

14.4.5. Suspended discharge

A suspended order of discharge suspends the effective date of the absolute discharge to a future date. On the effective date, the bankrupt is absolutely discharged.

There is no further requirement to pay surplus income to the Trustee during the time of suspension unless so ordered by the court. The Trustee has the power to seize any after-acquired assets for the benefit of creditors until the date of the actual discharge.

14.4.6. Conditional discharge

A conditional order of discharge imposes a condition on the bankrupt that must be complied with before the absolute order will be granted. The most common condition is that the bankrupt pay a certain amount of money to the Trustee for the general benefit of the creditors. Once the bankrupt has satisfied the terms of the conditional order, the bankrupt is entitled to an absolute order of discharge. The Trustee will file a report to the court advising that the conditions have been met and an absolute order of discharge is granted.

The debts of the bankrupt will not be discharged until the bankrupt has received an absolute order of discharge.

The bankrupt can also consent to a judgement for the amount on the conditional order and receive an absolute discharge immediately. Pursuant to s. 180 of the BIA, should the bankrupt default on the terms of the judgement, the Trustee could apply to the court to have the discharge annulled.

14.4.7. Refused discharge

The court may refuse to grant a bankrupt a discharge. The bankrupt can appeal the order. Once a discharge is refused the Trustee would likely proceed to his discharge which would effectively lift the stay of proceedings, which was put in place at the date of the assignment. This would revive the ability of the creditors to pursue their debts.

Some instances where a court may refuse to grant a discharge would be as follows:

- third time or more bankruptcy;
- bankrupt displayed flagrant and callous disregard for the rights of creditors;
- bankrupt was uncooperative, evasive, untruthful and fraudulently disposed of assets;
- bankrupt completely ignored his duties and responsibilities and took a casual attitude toward bankruptcy; and/or
- bankrupt lacked proper respect for his obligations to creditors and the Trustee and disposed of assets.

14.5. Proposal only

14.5.1. Compliance of Division I and consumer proposal

Form 46

The Trustee or Administrator of a proposal is responsible for ensuring that the terms of the proposal have been satisfactorily completed. Once completed, the Trustee must issue a Certificate of Full Performance and forward a copy of it to the OSB and the debtor. The Certificate of Full Performance has the same effect as a discharge from bankruptcy.

15. Administer Division I Proposal

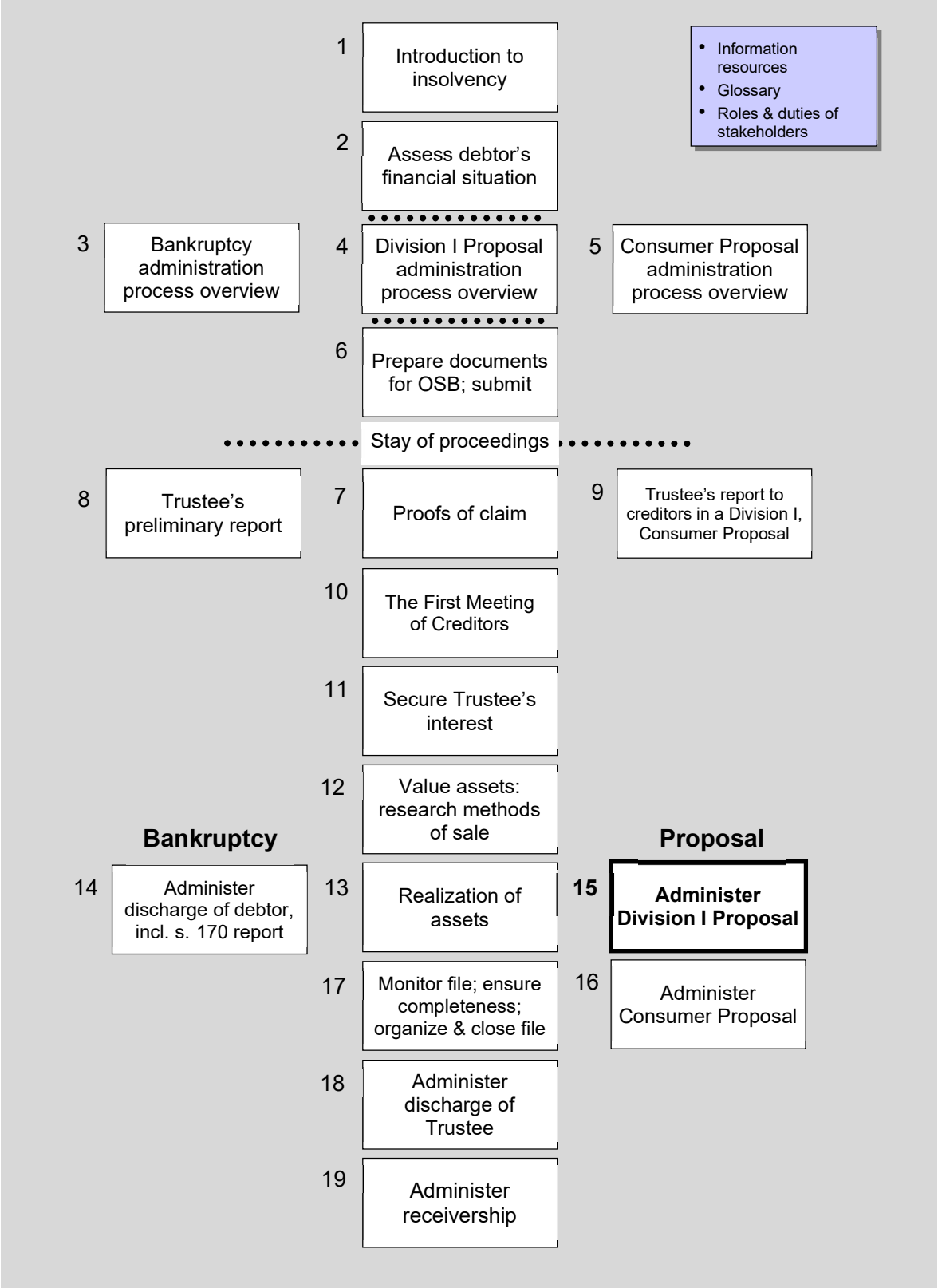


Table of Contents

15.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Describe in detail the acceptance of proposals by both creditors and the court.
- Explain what happens when a proposal is not accepted by the creditors, or there is a default.

Assigned readings

- BIA s. 54(1), 57-59 and 61-63
- BIA Forms 38, 39, 40, 40.1, 41, 43, 43.1, and 43.2
- BIA Rule 92
- Directive 24

15.2. Acceptance of a proposal by the creditors

15.2.1. Meeting of creditors

Voting on the proposal is held at the first meeting of creditors, which must be held within 21 days after the filing of the proposal unless the court extends the delay.

It is not necessary for creditors to be present in person or by proxy as long as they have proven their claim and filed a voting letter with the Trustee.

To be accepted by creditors, a majority in number and 2/3 in dollar value of each class of creditors must accept the proposal.

15.3. Approval by the court

15.3.1. Procedure

BIA s. 58

BIA Forms 40 and 40.1

Once the proposal has been accepted by the creditors, the Trustee will:

- apply to court for a hearing for the application of the court approval within five days after the acceptance;
- send a notice of the hearing at least 15 days before the date of the hearing to:
  - the insolvent person;

  - every proven creditor; and
  - the Official Receiver;
- complete and forward a copy of the report of the Trustee on the proposal to the Official Receiver at least 10 days before the date of the hearing; and
- send a copy of the report to the court at least two days before the hearing.

15.3.2. Factors that the court considers before approving the proposal

Even though the Trustee has recommended the proposal and the creditors have approved it, there is no guarantee that the court will approve the proposal. The court will only approve the proposal if the court believes it is reasonable in the circumstances. Factors that the court takes into consideration are:

- the interests of the debtor in making a settlement with his creditors;
- the interests of the creditors in procuring a settlement that is reasonable and does not prejudice their rights;
- the interests of the public to preserve the integrity of the bankruptcy process; and
- if it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200 of the BIA.

15.4. Refusal/default of the proposal

15.4.1. Refusal of the proposal

BIA s. 57

BIA Forms 38, 39 and 73

If the creditors refuse to accept the proposal, the insolvent person is deemed to have made an assignment into bankruptcy as of the date of the meeting.

If there is a quorum present the Trustee may hold the first meeting of creditors in the bankruptcy right then and there. However, if no quorum is present, the Trustee, within five days, must send notice calling a meeting of creditors, which meeting must be held within 21 days (unless the delay is extended by the Official Receiver or by the court, as is permitted under sections 102 and 187 of the BIA).

The Trustee will file a report with the Official Receiver immediately after the meeting of creditors held in the proposal is over, and the Official Receiver will then issue a Certificate of Assignment.

15.4.2. Annulment of proposal

BIA s. 63(1) and (3)

The court may annul a proposal in four different scenarios, namely when:

- default is made in the performance of any provision of the proposal;
- it appears to the court that the proposal cannot continue without injustice or undue delay;
- it appears to the court that the approval of the proposal was obtained by fraud; or
- after approval of the proposal, the debtor has been convicted of an offence.

Default under a proposal does not necessarily annul it. In order for the actual annulment to occur, a court order is necessary.

15.4.3. Default in performance of the proposal

BIA s. 62.1

BIA Form 43.1

BIA Rule 93

The Trustee must inform all creditors and the Official Receiver by notice:

- when a default is made in the performance of any proposal and the default is not remedied by the insolvent person within 30 days; and
- when the default is not waived by the inspectors (or by the creditors).

The Trustee must advise the creditors of the default if the above conditions occur, but is not obligated to ask for an order annulling the proposal. After the proposal has been declared in default, however, any interested party could ask the court to annul the proposal.

At this point, if the Trustee should choose not to have the proposal annulled, the Trustee can proceed to his discharge leaving the insolvent person without protection of the BIA.

15.4.4. Annulment order

In a proposal by an insolvent person, the effect of the annulment order is that the debtor is deemed to have made an assignment into bankruptcy as of the date of that order.

The Trustee must then file a copy of the order with the Official Receiver who will issue a Certificate of Assignment. The Trustee is required, within 5 days, to call a meeting of creditors.

15.4.5. Effect of annulling a proposal

An order annulling a proposal does not affect the validity of any sale, disposition of property or payment duly made or anything else done under the terms of the proposal.

Where a proposal has been annulled, any funds in the hands of the Trustee are considered funds of the proposal and are paid to the proposal creditors less the Trustee's fees and disbursements.

15.5. Amendments

15.5.1. Amendments at the first meeting

The power to make alterations and amendments at the first meeting of creditors is very broad. Circumstances do change from the time of filing the proposal to the meeting of creditors and the amendments can be voted upon as long as the insolvent person is in agreement.

If creditors have voted for the acceptance of the proposal by voting letter, then these letters can only be used to vote for an amendment if it is to the betterment of the proposal, i.e., more money, or sooner, or better guarantees, etc. If the proposal has changed dramatically, it may be in the best interests of all parties that the meeting be adjourned and that the Trustee call a new meeting. In that case, the amended proposal can be sent to all creditors along with new voting letters within an appropriate amount of time for the creditors to review the amended proposal.

There is no provision under the BIA for an amendment to a Division I proposal once accepted at the first meeting of creditors. If, after acceptance, a Division I proposal is amended, it is, in effect, a new proposal.

15.5.2. Court approval of amended proposals

BIA Rule 92

During an application for approval of a proposal, the court has limited powers to make any alterations or amendments. The BIA states that, when approving a proposal, the court may correct any errors or omissions that do not constitute an alternation of substance.

15.6. Bankruptcy assignments

15.6.1. Bankrupt filing a proposal

BIA s. 61(1)

A bankrupt has the ability to file a Division I proposal, provided however that the inspectors of the estate must approve the proposal before it is filed with the Trustee. The approval of a

Division I proposal by the court made after bankruptcy serves to annul the bankruptcy and re-vest in the debtor the right, title and interest of his property.

15.6.2. Refusal, non-approval or default of proposal by a bankrupt

The effect of the refusal by creditors or non-approval by the court is that the bankrupt remains bankrupt and the assets remain vested in the Trustee. The effect of an annulment of the proposal is that the debtor is deemed to have made an assignment. The Trustee must inform the Official Receiver, who shall then issue a Certificate of Appointment.

16. Administer Consumer Proposal

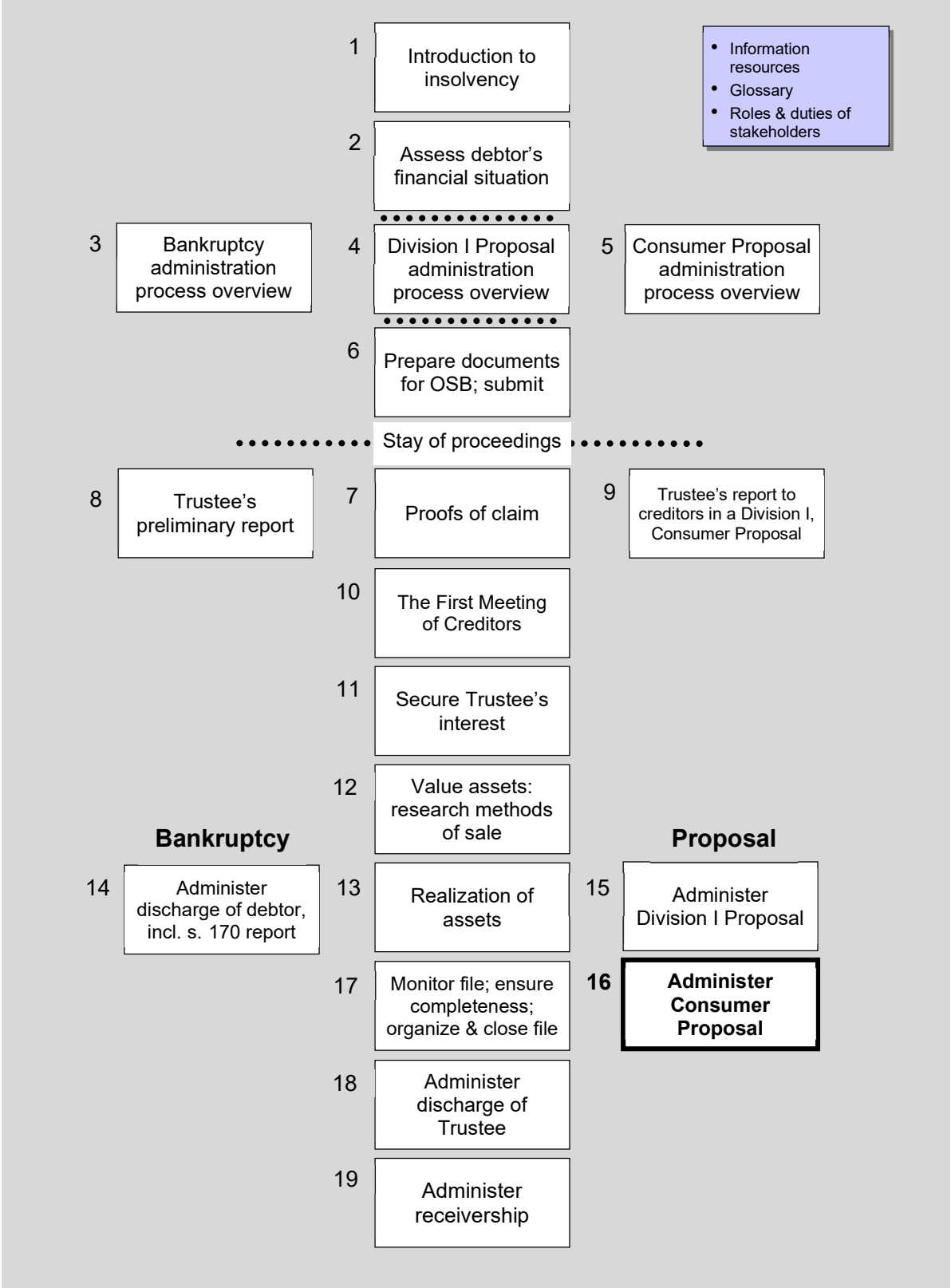


Table of Contents

16.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Describe in detail the acceptance of proposals by both creditors and the court.
- Explain what happens when a proposal is not accepted by the creditors, or there is a default.

Certain processes and procedures may be identical for both Division I and consumer proposals and will be discussed in this module. Similarities in the consumer proposal module will refer back to Module 15.

Assigned readings

- BIA s. 66.15-66.33, 66.37, 66.38, 66.4 and 69.2
- BIA Forms 47, 48, 49, 50, 51, 51.1, 52, 53, 53.1, 54, 54.1 and 56

16.2. Deemed acceptance of a proposal by the creditors

16.2.1. Creditors may indicate assent or dissent

BIA s. 66.17(1)

Any creditor who has proved a claim with the Administrator in the proposal may indicate either assent to or dissent from the proposal. In order for their vote to be counted this decision must be made:

- before the expiration of the 45 day period following the filing of the consumer proposal; or
- at or prior to the first meeting of creditors, if one is called.

Also, in order for the vote of a creditor to be counted, there must be a requirement to hold a meeting of creditors (as described below). Even if all of the creditors vote against a consumer proposal, it will be deemed approved by the creditors if they did not also request a meeting.

16.2.2. Calling of a meeting of creditors

BIA s. 66.15(1) and 66.17(2)

There are two situations where the Administrator must call a meeting of creditors to discuss the proposal:

- if directed by the Official Receiver; or

- if, at the expiration of the 45-day period following the filing of the consumer proposal, creditors having an aggregate of at least 25% of the value of proven claims have requested that a meeting be held.

16.2.3. Deemed acceptance

BIA s. 66.18(1-2)

As mentioned above, if there has been no request to call a meeting of creditors at the end of the 45 days, the consumer proposal is deemed to have been accepted by the creditors.

Also, if a meeting has been called but there is no quorum, the consumer proposal is deemed to be accepted.

16.3. Approval by the court

16.3.1. Request for an application

BIA s. 66.22(1)

If the Administrator receives a request to make an application to court from either the Official Receiver or an interested party within 15 days from the acceptance or deemed acceptance of the proposal, he must do so immediately.

16.3.2. Procedure for application

Where an Administrator is required to make an application, he must:

- send a notice of the hearing at least 15 days prior to the date of the hearing to:
  - the consumer debtor;
  - every proven creditor; and
  - the Official Receiver;
- file a report with the court at least two days before the date of the hearing on the consumer proposal and the conduct of the debtor; and
- forward a copy of the report to the Official Receiver at least 10 days prior to the date of the hearing.

16.3.3. Court application

BIA s. 66.24(1)

If a court application is required, the court must hear any of the following;

- the Official Receiver;

- the Administrator;
- the consumer debtor;
- any opposing, objecting or dissenting creditor;
- any other interesting party; and
- any further evidence as the court may require

before making a decision on the proposal.

16.3.4. Deemed approval

BIA s. 66.22(2)

If the Administrator does not receive a request for an application to court within 15 days after the acceptance or deemed acceptance, the consumer proposal is deemed to have been approved by the court.

16.4. Completion of the proposal

16.4.1. Administration

Once the creditors and the court have approved the consumer proposal, it is the insolvent person's responsibility to meet the terms of the proposal.

The Administrator has a responsibility to ensure the terms of the proposal are being met regarding the insolvent debtor's payments and any distribution of funds.

16.4.2. Payments and deposit of monies

BIA s. 66.26

All funds payable under the consumer proposal must be paid to the Administrator. After the payment of all fees and expenses, the Administrator must distribute the available monies to creditors in accordance with the terms of the proposal.

The BIA allows the Administrator, with the approval of the Superintendent, to deposit all monies relating to the administration of consumer proposals in a single consolidated trust account. This is similar to the consolidated bank accounts operated in summary bankruptcy administrations.

16.4.3. Certificate of Full Performance

BIA s. 66.38

Once the insolvent person has met all of the terms of the proposal, the Administrator will issue a Certificate of Full Performance to the debtor and to the Official Receiver.

16.5. Default of the proposal

16.5.1. Deemed annulment

BIA s. 66.31(1)

A consumer proposal is deemed to be annulled:

- In the case when payments are to be made monthly or more frequently, the day on which the debtor is in default for an amount equivalent to at last payments.
- In the case when payments are to be made less frequently than monthly, the day that is three months after the day on which the debtor was in default of any payment.

16.5.2. Court annulment of consumer proposal

BIA s. 66.3(1)

The court also has discretion to annul the proposal when:

- the proposal is in default;
- the debtor was not eligible to make a consumer proposal when the consumer proposal was filed;
- the consumer proposal cannot continue without injustice or undue delay; or
- approval of the court was obtained by fraud.

This is not done of the court's own initiative, but rather on application by an interested party, and on such notice as the court may direct.

16.5.3. Notification of annulment

BIA s. 66.3(4) and 66.31(1)

BIA Forms 53, 53.1 and 56

When a court annulment or a deemed annulment has occurred, the Administrator has a duty to immediately inform creditors of the annulment and file a report in prescribed form with the Official Receiver.

16.5.4. Validity of actions during term of proposal

BIA s. 66.3(2) and 66.31(3)

An annulment or deemed annulment of a consumer proposal does not affect the validity of any sale, disposition of property or payment duly made or anything duly performed during the term of the consumer proposal.

16.5.5. Effects of annulment

BIA s. 69.2

Where a consumer proposal has been annulled or deemed annulled, the consumer debtor:

- cannot make another consumer proposal without leave of the court; and
- will not be entitled to any relief provided by Section 69.2 of the BIA

until all claims of the proven creditors have either been paid in full or extinguished by the operation of sub-section 178(2).

Also, the rights of creditors are revived for the amounts of the claim, less any dividends received once the consumer proposal is annulled or deemed annulled.

16.5.6. Automatic revival

BIA s. 66.31(7)

In the case of a deemed annulment of a consumer proposal made by a person other than a bankrupt, notice is sent to the Official Receiver and the creditors. The Administrator may, if deemed appropriate, with notice to the Official Receiver, send a notice to all creditors, within 30 days after the date of the deemed annulment, informing them that the consumer proposal will be automatically revived 60 days after the day on which it was deemed to be annulled, unless an objection is received.

If the notice is sent and no notice of objection is filed the proposal is automatically revived on the expiry of 60 days from the date of deemed annulment.

If a notice of objection is filed prior to the expiration of 60 days the Administrator is to send, without delay, a notice to the Official Receiver and to each creditor informing them that the consumer proposal is not going to be automatically revived.

At the date of the automatic revival the proposal cannot still be in default. For example, if on March 1st the debtor was three months in default and May 1st is the automatic revival date, the debtor has to make up one of the defaulted upon payments in addition to maintaining the April and May payments so that, at the 60th day, the proposal is not three months in default again.

16.5.7. Application to court for revival

BIA s. 66.31(9)

The Administrator may, at any time, apply to the court, with notice to the Official Receiver and the creditors, for an order reviving any consumer proposal of a consumer debtor who is not bankrupt that was deemed to be annulled. If the court considers it appropriate to do so, it may make an order reviving the consumer proposal on any terms the court considers appropriate.

After a consumer proposal is revived, the Administrator must, without delay, file a report with the Official Receiver in relation to the revival and send a notice to the creditors informing them of the revival.

16.5.8. Withdrawal of consumer proposal

BIA s. 66.25

The BIA gives the consumer debtor the ability to withdraw a consumer proposal:

- any time before its deemed approval by the court where no court review is requested; or
- when a court review is requested, at any time before the actual approval or refusal by the court.

There is a consequence for the debtor of withdrawing a consumer proposal, so this step should not be taken lightly. The consequence is that if another consumer proposal is filed within the next 6 months following the withdrawal, the debtor will not benefit from a stay of proceedings.

16.6. Amendment to consumer proposal

16.6.1. Amendment

BIA s. 66.37

In certain situations consumer proposals may be amended. The amended proposal must include the same procedural provisions stipulated in BIA s. 66.37 as in the original proposal.

As is the case for a withdrawal of a consumer proposal, there could be consequences to an amendment, so the step should not be taken lightly. If an amendment is filed within 6 months of a previous amendment, the stay of proceedings will terminate.

16.7. Bankruptcy assignments

16.7.1. Consumer proposal filed by a bankrupt

BIA s. 66.4(2)

When a bankrupt wishes to file a consumer proposal, the following conditions are required:

- the consumer proposal must be approved by any inspectors of the bankrupt estate; and
- the consumer debtor must obtain the assistance of a Trustee who will act as Administrator in the proposal. In most, but not all, cases the debtor would seek the assistance of his current Trustee in order to file a proposal.

All creditors must prove their claims as at the date of the bankruptcy, rather than the date of the consumer proposal.

The approval or deemed approval by the court of the consumer proposal annuls the bankruptcy and re-vests all the rights, title and interest to any of the property back to the formerly bankrupt consumer debtor.

16.7.2. The effect of annulment

BIA s. 66.3(5)

When a consumer proposal made by a bankrupt is annulled, the consumer debtor is deemed to have made a new assignment into bankruptcy.

The Trustee must:

- send notice of the meeting of creditors under Section 102 within five days;
- affirm the appointment of the Trustee or appoint another Trustee in lieu at the meeting of creditors; and
- file a report with the Official Receiver who will issue a Certificate of Assignment in prescribed form.

17. Monitor File; Ensure Completeness; Organize & Close File

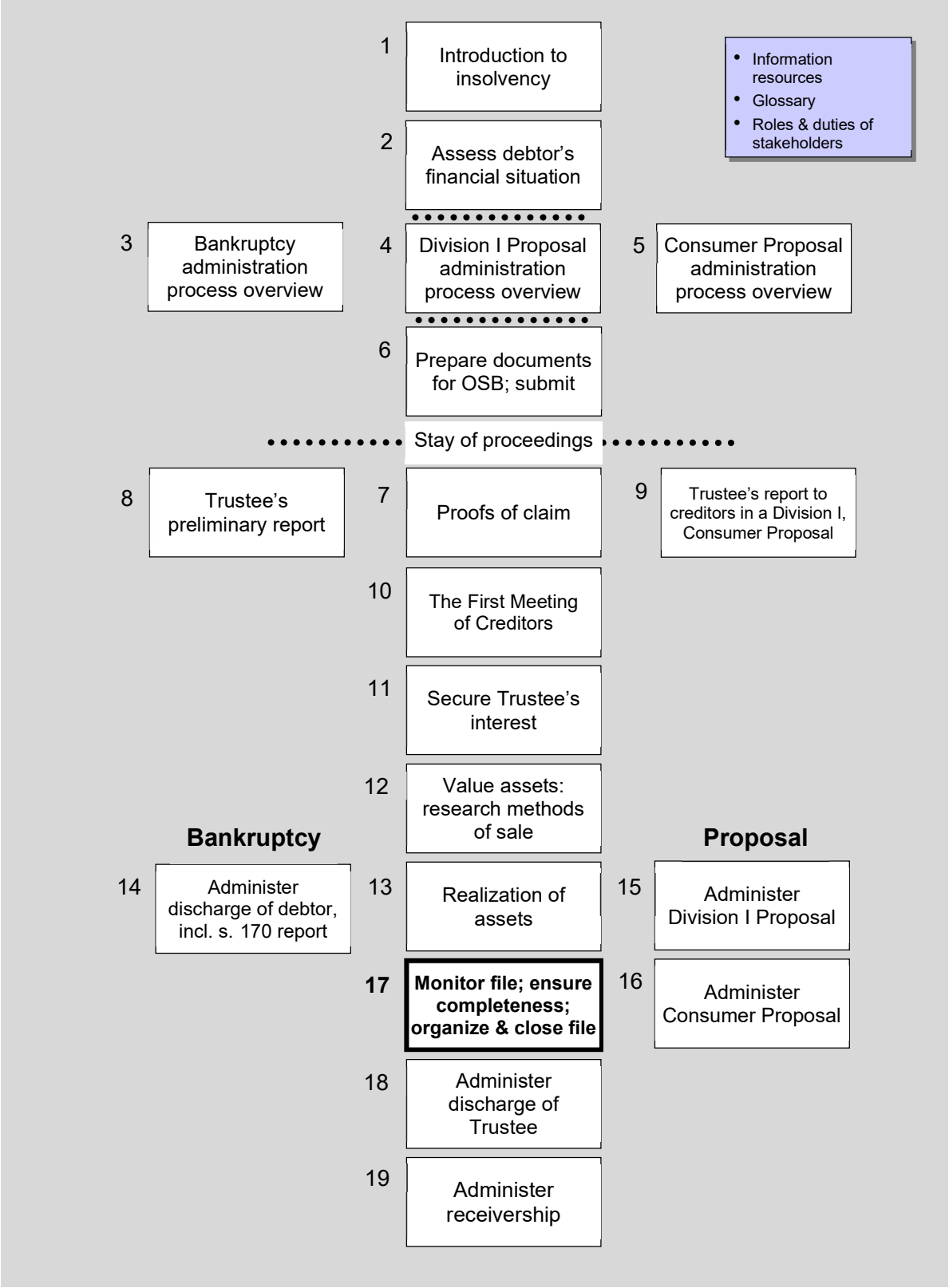


Table of Contents

17.1. Introduction

Module objectives

At the end of this module, you will be able to:

- Review a file to determine completeness.
- Ensure the file is properly organized.
- Determine steps required to close the file.

Assigned reading

- BIA s. 15, 25, 26, 27, 39 (3), 40, 62.1, 62.1(c), 63(1), 66.12 (6) (b), 66.26 (2) (3), 66.31(1), 68 (1), 120 (3), 154, 155 (g), 157.1(3), 168.1(1)(f), 170(1) and 197
- BIA Form 4
- BIA Rules 18 - 27, 93(a)&(b), 48, 61(2)(e), 101(1), 128 and 129
- Directives 1R, 5R, 7, 18 and 27R
- CAIRP Rules of Professional Conduct No. 4 and 7; CAIRP Standard of Professional Practice No. 16

17.2. Mechanism to track status of the administration of the file

17.2.1. Different methods

It is important to use an accurate, consistent method of tracking and follow-up on the status of the administration of the bankruptcy or proposal. You should review with the Trustee the standard practice for your office. Ensure that time lines are met and that the estate is administered in a timely fashion.

1. **Notes kept in file**

   Notes of all telephone conversations, emails, decisions made and reasons therefore should be documented in the estate file and should be reviewed to ensure that nothing is overlooked. These will provide evidence should problems arise.

2. **Software program**

   Depending on the software your office uses there may be a feature within this program which will allow you to enter follow-up notes on an individual estate. Programs such as Uberbase or Ascend allow you to enter notes and follow-up required date, which can be reviewed on a daily basis to ensure that follow-up items are dealt with in a timely manner.

17.3. Bankruptcy

17.3.1. Debtor's income

BIA s. 170(1)

Prior to the bankrupt's discharge, it is necessary:

- to review income on a monthly basis to ensure that surplus income payments, if required, are being made;
- should a bankrupt have a material change (or loss) of employment, this should be reviewed to determine whether there should be a change to surplus income payments being made; and
- if the bankrupt has not met the surplus income payments required or has not honoured the agreement for the payment of the Trustee's fees, an objection to discharge should be filed.

17.3.2. Third parties

BIA s. 197

BIA Rules 18 - 26

If outside services were commissioned on an estate (e.g., counselling services, legal services, appraiser, auctioneer, etc.), your review should include (but is not limited to) the following:

- Review the invoice to ensure that it is reasonable and correct.
- Review a solicitor's bill of costs to see if it should be approved by the inspector (if applicable) and taxed by the court.
- If utilities were put in the name of the Trustee, ensure that the appropriate letters have been sent to stop the service and a final reading and bill have been submitted by the utility.
- Ensure that all invoices have been received, paid and the cheques have cleared the bank prior to closing the file.

17.4. Proposal

17.4.1. Monthly payments

BIA s. 62.1, 63(1), 66(3) and 66.31(1)

BIA Form 43, 43.1

BIA Rule 93

When monitoring a proposal, you should ensure that:

- payments are being made as per the terms of the proposal;
- if the debtor is in default by two payments in a consumer proposal, the debtor has been contacted to remind him that, in the event of the third payment being in default, the proposal will be deemed to be annulled;
- where the debtor defaults in any of the terms of a Division I proposal, the default must be waived by the inspectors or creditors or remedied within 30 days;
- if a default in a Division I Proposal is not waived by the inspectors or creditors and not remedied within 30 days, the Trustee must notify the OSB and the creditors within 30 days after the expiry of the 30 day period for remedying the default. There is no deemed assignment in bankruptcy unless the Trustee or a creditor brings an application to the court to annul the proposal; and
- the Certificate of Full Performance is issued once the proposal has been performed in its entirety.

17.5. Counselling sessions

17.5.1. Non-compliance in a bankruptcy:

BIA s 66.38(2) and 157.1(3)

Directive 1R

Should a bankrupt neglect or refuse to attend counselling sessions as outlined in the BIA and the Superintendent's Directive 1R, the bankrupt is not entitled to an automatic discharge.

17.5.2. Non-compliance in a consumer proposal:

A consumer debtor who refuses or neglects to attend the requisite counselling sessions is not entitled to receive a Certificate of Full Performance when the terms of the proposal have been met.

17.6. Handling of trust funds

17.6.1. Property held in trust

BIA s. 25

Directive 5R

CAIRP Rule of Professional Conduct No. 7; CAIRP Standard of Professional Practice No. 16

During the administration of an engagement, a licensed Trustee in insolvency will hold money and property of the debtor in trust for the benefit of creditors.

17.6.2. Rules

The BIA, including the General Rules and Directives, the CAIRP Rules of Professional Conduct, and the CAIRP Standards of Professional Practice, collectively provide rules and guidelines in connection with the control, custody and investment of funds and property held by a Trustee or receiver for the benefit of others.

17.6.3. Record keeping

BIA s. 26

BIA Rule 48

A Licensed Insolvency Trustee is required to hold and administer the money or other trust property with due care in accordance with the laws, regulations and terms applicable to the trust. The Licensed Insolvency Trustee is also required to maintain adequate records to properly account for trust funds under his control.

17.7. Banking / trust accounts

17.7.1. Maintaining trust accounts

BIA s. 25, 27, and 120(3)

Directive 5R

CAIRP Rule of Professional Conduct No. 4

CAIRP Standard of Professional Practice No. 16

A Trustee is required to deposit all receipts of an estate into a separate trust account for each estate. All funds received from third parties to guarantee the Trustee's fees and expenses must be deposited to a separate trust account maintained specifically for third party funds.

The summary administration provisions allow the Trustee, with the approval of the Division Assistant Superintendent, to operate a consolidated bank account for all estates under summary administration.

The Trustee is prohibited from depositing estate funds into his general operating account or a personal account.

The Trustee is required to open estate trust accounts only in deposit-taking institutions where deposits are insured by Canada Deposit Insurance Corporation or provincial insurance corporations against loss of money on deposit with that institution.

The Trustee is required to keep proper books and records that sufficiently account for the receipt and disposition of all estate funds.

The inspectors have a duty to periodically examine the Trustee's accounts and verify the bank balance, to ensure the funds are used only for the intended purpose and that all disbursements are properly made.

The Superintendent of Bankruptcy has issued directives establishing strict standards for the operation and control of estate trust accounts, addressing in particular:

- internal control systems;
- banking and accounting records;
- treatment of estate funds;
- treatment of third party deposits;
- delegation of tasks; and
- operation of consolidated trust accounts.

The Trustee is obligated to notify the Superintendent of Bankruptcy of any changes to a banking or accounting system.

CAIRP members are required to handle trust property and funds in accordance with the terms of the trust and the applicable laws relating to the property or funds and to maintain the necessary books and records to properly account for the property and funds.

17.7.2. Withdrawal of funds from trust accounts

BIA s. 25(1.3)

BIA Rule 128 and 129

Directive 27R

In an ordinary administration, the Trustee is not permitted to withdraw any funds from the estate as an advance towards his remuneration without the written permission of the

inspectors, or a court order. The Trustee is allowed to pay disbursements in the ordinary course of the administration of the estate.

The provisions for summary administration and Division II proposal estates stipulate the amounts and timing of withdrawals for fees and certain administrative expenses.

17.7.3. General

BIA s. 15, 25(1) and 66.26(2)

Directive 5R

CAIRP Standard of Professional Practice No. 16

The setup and maintenance of trust accounts is identical for all appointments. The Trustee is to maintain a separate interest-bearing trust account for each estate, except as specifically provided for otherwise in the BIA. The account must be held in the name of the Trustee in its particular capacity (e.g., "the Trustee *in re* the proposal of John Doe or Joan Smith). The only exceptions to the rules are where:

- the service charges and related costs exceed the amount of interest earned on the funds; or
- the Trustee holds a consolidated trust account for consumer proposals or summary administration bankruptcies and the particular estate is one for which the accounting can be done through the consolidated account.

An adequate internal control system must be set up for the safekeeping and day-to-day management of the funds and the recording of receipts and disbursements. The Trustee or an authorized representative may authorize transactions, however, only a Trustee may sign cheques issued on any trust account.

17.7.4. Third party deposit

Directive 16

In certain proposals, a Trustee may receive a third-party deposit to secure recovery of the administrative costs of the proposal. A written agreement must be signed between the Trustee and the depositor to evidence the terms of the agreement. The agreement must contain the following minimum disclosures:

- amount or method of calculation of remuneration;
- declaration by the depositor that the funds are third party and do not directly or indirectly come from assets that belong to the debtor;
- declaration that the deposit is an indemnity for the costs of the administration;

- undertaking by the Trustee to provide the depositor with a draft copy of the Statement of Receipts and Disbursements when submitted to the Official Receiver, notify depositor of the date and time of taxation and provide a copy of the taxed Statement of Receipts and Disbursements when available;
- name and address of the depositor; and
- any other conditions that may be negotiated between the depositor and the Trustee.

17.7.5. Consolidated trust account

BIA s. 66.26(2)

Directive 5R

A Trustee may, subject to approval by the Superintendent of Bankruptcy, use one trust account for all summary estate bankruptcies and one trust account for all consumer proposals. In practice, a single consolidated account is convenient where there is a moderate to large volume of consumer estates.

17.7.6. Banking and accounting records

BIA s. 26

BIA Rule 68(1)

Directive 5R and 7

Throughout the administration, the Trustee must maintain adequate banking and accounting records to support all receipts and disbursements through the trust account. These records will include, but are not limited to:

- deposit slips;
- cheques;
- supporting documents for the receipts and disbursements;
- bank statements and reconciliations; and
- correspondence respecting account set-up and closure.

In the case of a consolidated trust account, documentation supporting the interest calculation and allocation to each estate is also required.

The banking and accounting records are part of the administrative records of the Trustee which must be maintained for at least four years after the Trustee's discharge.

17.7.7. Fees and expenses of Trustee – Division I Proposal

BIA s. 25(1.3) and 39(3)

Directive 27R

The fees and expenses of a Trustee in a Division I proposal, as is the case for the fees and expenses of a Trustee in a bankruptcy (ordinary administration), are not subject to a specific tariff, but rather are the amounts that may be approved by the court.

The Trustee may not withdraw interim Trustee fees and administrative expenses in a Division I proposal without the prior written approval of the inspectors, creditors or the court. The remuneration in a proposal is not necessarily restricted to the 7 ½ % standard for a bankruptcy but may be a special remuneration agreed to by the debtor or approved by the court.

17.7.8. Fees and expenses of Administrator – Consumer Proposal

BIA s. 66.12(6)

BIA Rule 129

The amount and timing for the fees and expenses of the Administrator in a Division II (consumer) proposal are restricted to the prescribed tariff:

- $750 payable on filing the proposal;
- $750 payable on approval or deemed approval by the court;
- 20% of the distribution to the creditors payable on distribution;
- costs of counselling when completed;
- reimbursement of the filing fee;
- reimbursement of Registrar's fee where applicable; and
- applicable federal and provincial taxes for goods and services taxes, harmonized sales tax or provincial sales tax.

17.7.9. Access to banking and accounting information

BIA s. 26(2-3)

All banking records form part of the estate books and records which may be examined by the Official Receiver, debtor and any creditor or agent of a creditor, subject to reasonable notice.

17.8. Undistributed funds and unpaid dividends

17.8.1. Unrealized assets

BIA s. 40 and 154

BIA Rule 61(2)

When the Trustee is unable to dispose of property, or the property is of little or no value, the property can be returned to the bankrupt. This provision eliminates any unnecessary delay in finalizing the administration of an estate. With the permission of the inspectors, the Trustee can apply for an order directing the disposition of the property.

17.8.2. Undistributed funds / immaterial amounts

BIA Directive 18

The Trustee is expected to distribute substantially all amounts, even relatively small sums, except where a distribution to a large number of creditors or the amount to be distributed make the distribution minuscule. The guidelines for determining immaterial payments are based on the amount available for distribution and the number of creditors with proven claims:

- one creditor – distribute if gross amount exceeds $5;
- two to five creditors – distribute if gross amount exceeds $50; and
- five or more creditors – distribute if the average dividend will exceed $10.

17.8.3. Additional interest

When additional bank interest is received after taxation of the Final Statement of Receipts and Disbursements, the amount will be distributed to creditors if it exceeds the materiality guidelines. If the funds are to be distributed, the Trustee will prepare a Supplementary Statement of Receipts and Disbursements and dividend sheet. The Supplementary Statement of Receipts and Disbursements will need to be taxed only if the Trustee claims remuneration in connection with the mailing of the supplementary dividend.

If the funds do not exceed the materiality guidelines provided in the Directive on Unclaimed Dividends and Undistributed Assets, the Trustee will remit the funds to the Superintendent of Bankruptcy.

17.8.4. Unclaimed dividends

BIA Directive 18

The unclaimed dividends (usually uncashed dividend cheques) must be remitted to the Superintendent of Bankruptcy with a list of the names, last known addresses and amount payable to each creditor.

The creditors must contact the Superintendent of Bankruptcy directly to request payment thereafter. The Superintendent will forward the dividends directly to the creditors upon request.

17.8.5. Undistributed funds

BIA s. 154

BIA Rule 101(1)

Directive 18

In a bankruptcy estate, if there are funds remaining after payment of all proven claims plus the prescribed interest to the date of payment, then the remaining funds should be returned to the bankrupt.

In a proposal, it is possible that surplus funds should be returned to the debtor, e.g., where a disallowance of a claim becomes final after the dividend has been funded, or where interest accumulates on uncashed dividends. The terms of the proposal must be respected and funds that the creditors are not entitled to receive should be returned to the person who advanced the funds (usually the debtor).

17.9. Follow-up items

17.9.1. Summary and ordinary administration for an individual

BIA s. 22

Income Tax Act s. 128, 150(1) and 150(3) and s. 782-785, 1000 (2) a) and s. 1002 of the Loi sur les impôts (Quebec)

A review of the Statement of Affairs of the bankrupt should be conducted to ensure all assets listed have been accounted for. These may include, but are not limited to, the following steps:

- Conduct a PPSA search to confirm/determine if there are any encumbrances registered against any of the debtor's assets (the RDPRM for assets located in Quebec).
- Review the estate file, to ensure that a letter(s) has been sent to the bankrupt's banking facility(s) to enquire as to the balance in the accounts and whether the bankrupt has any other accounts or holdings with the bank.

- Ensure that letters have been sent to any institution holding funds in an RRSP or other investment to confirm the investment is exempt or to collapse, if not exempt, and forward any non-exempt funds to the Trustee for the estate.
- Review file for the receipt of responses to all correspondence sent and ensure that any funds received have been deposited to the estate bank account and taxes paid thereon if applicable.
- If a vehicle was listed on the Statement of Affairs, review the file to confirm that any equity over and above the exemption amount allowed has been received and deposited to the estate account.
- If a property was listed on the Statement of Affairs, ensure that an appraisal or opinion of value was obtained and that any equity has been realized and the funds have been deposited to the estate bank account.
- Ensure that the pre, post and prior bankruptcy tax returns have been completed and the notices of assessment and refunds, if any, have been received from the tax authorities.

17.9.2. Ordinary administration - corporate

Review the estate file to ensure that all assets listed on the Statement of Affairs have been disposed of and all receipts have been recorded and deposited to the estate bank account. The variations in the type of assets owned by a corporation are too numerous to detail here. If you are unsure about the realization of an asset, review this with the Trustee in charge of the estate.

17.9.3. Consumer proposal

A review of the file for a consumer proposal should be conducted on a regular basis to ensure that the proper payments by the debtor are being made and that the debtor is not in default. All payments received from the debtor should be deposited into the estate bank account for the debtor's proposal.

17.9.4. Division I proposal

A review of the file for a Division I proposal should be conducted to ensure that the terms of the proposal are being met and that all receipts are deposited into the estate bank account. If there are assets that are to be sold, ensure that all assets have been realized upon and the funds have been deposited into the estate bank account.

17.9.5. Ordinary administration disbursements

BIA s. 25(1.3)

Disbursements permitted in an ordinary administration include, but are not limited to, the following:

- travel expenses;
- hotel and meals;
- long distance telephone calls;
- notices to creditors;
- photocopies;
- bank service charges;
- storage costs for the bankrupt's records;
- filing fees paid to the Superintendent of Bankruptcy;
- solicitor's fees;
- Trustee's discharge fee;
- occupation rent;
- insurance on assets;
- appraisal costs;
- costs of disposing of assets;
- notice of the bankruptcy in the local paper;
- advertising costs of sale by tender; and
- all applicable sales taxes.

Disbursements which are not allowed from an estate bank account include the following:

- office equipment and furniture of the Trustee;
- telephone system;
- computer equipment;
- general costs of administration; and
- storage costs of the Trustee's own records of the administration of the bankrupt estate.

Interim Trustee fees and applicable sales taxes cannot be drawn from an estate bank account without prior approval of the inspectors of the estate or the court.

Final Trustee fees must be approved by the inspectors and the court before they may be drawn from the estate bank account (together with all applicable sales taxes).

Interim and final dividends to creditors may be made with inspector approval.

17.10.WEPPA

BIA s 81.3 - 81.4

Wage Earner Protection Program Act

Although they are often confused with one another, the WEPPA is not the same as section 81.3 or 81.4 of the BIA. The WEPPA and the priority rights to protect employees' claims found at section 81.3 and 81.4 of the BIA are meant to work in a coordinated manner. There is some degree of interrelation between the two, which is why they are often confused with one another. The WEPPA, or Wage Earner Protection Program Act, is a distinct law, separate from the BIA or CCAA. It creates a safety net to protect employees who are losing wages due to the bankruptcy or receivership of their employer.

The WEPPA allows employees to claim up to four times the maximum weekly insurable earnings amount under the Employment Insurance Act from the federal government for unpaid wages and vacation pay in the six months prior to their employer's bankruptcy or receivership, and for termination and severance pay. When the bankruptcy or receivership was preceded by a proposal or a CCAA proceeding, the six months is extended to cover the period that starts 6 months before the date of the proposal or initial order under the CCAA and ends with the bankruptcy or receivership, but the relief under the WEPPA is only available if the employer is bankrupt or in receivership.

The protection under the WEPPA aims at accomplishing three things with regards to the employee claims, namely:

1. providing protection in the event that the superpriority provided for in the BIA is not available because the assets are not sufficient;
2. providing protection for amounts that are not protected by the superpriority provided for in the BIA, namely the severance or termination pay; and
3. providing faster payment to the employees, by advancing the funds even if the Trustee or receiver is not yet ready to make distributions.

As indicated above, there is some interrelation and coordination between the provisions of the WEPPA and the superpriority found in sections 81.3 and 81.4 of the BIA. These sections of the BIA provide that the wage and vacation claims are secured against the employer's current assets (cash, accounts receivable and inventory), enjoying priority rights over all other creditors (secured or unsecured), to a maximum of $2,000 per employee. Any claim for termination and severance is an unsecured claim with no priority.

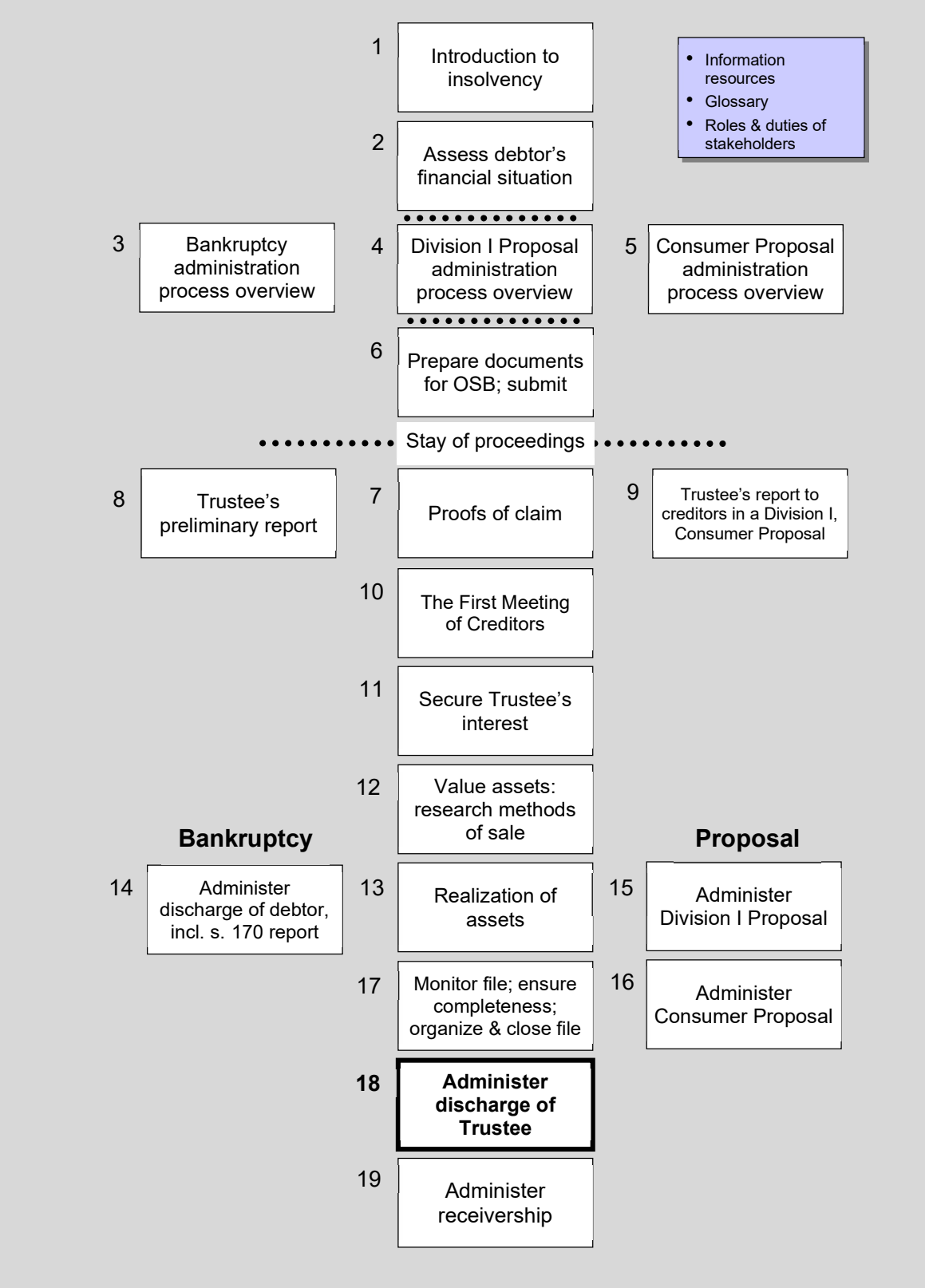
The Trustee and receivers have an important role to play in the coordination between the WEPPA and the BIA. In particular, they have the responsibility under WEPPA to:

- identify workers who are owed wages;
- determine the amounts owed to workers;
- inform workers of the existence of the WEPP; and

- provide Service Canada and employees with information necessary to establish eligibility for payment.

It is therefore crucial to obtain the debtor's payroll information and liabilities very early in the administration of a file.

18. Administer Discharge of Trustee



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18.1. Introduction

Module objectives

Upon completion of this module, you will be able to:

- Prepare a Final Statement of Receipts and Disbursements (R&D)
- Calculate the appropriate dividends
- Calculate the Trustee's and Administrator's fees
- Follow the procedures required in applying for taxation
- Follow the procedures required for obtaining a Trustee's discharge.

Assigned readings

- BIA s. 39(2), 40-41(1), 70, 136 – 140, 147 - 148 (3), 150-151, 152(1), 154(1), 178
- BIA Insolvency Circular No. 2R
- BIA Rules 58, 60 – 67, 96-103, 123 and 128-129
- Directives 10 and 18

Preparing the Final Statement of Receipts and Disbursements is one of the final steps toward obtaining a Trustee's discharge. It is at this time that the Trustee must account to the creditors, the OSB and, in some cases, the court for how the estate was administered.

18.2. Prepare interim Statements of Receipts & Disbursements

18.2.1. Bankruptcy

BIA s. 148

When there are funds in the estate in excess of the anticipated costs of the administration of the estate, an interim dividend can be paid. It is often difficult to estimate what the cost to complete the administration of the estate will be. Use extreme caution before paying out any interim dividends to creditors! Once money has been disbursed to the creditors it will not come back, and once a Trustee has accepted to act in a file he is not allowed to resign if there is not enough money to pay his fees.

The BIA anticipates that inspectors will determine when an interim dividend should be paid. The inspectors can apply to court and request that the court order the Trustee to pay out an interim dividend should the Trustee refuse.

When paying dividends, the Trustee is obligated to pay a dividend to creditors who have proven their claims. The distribution to creditors must be in accordance with the order of priority set out in the BIA. This order of priority will be discussed later in this module.

In calculating the amount available to pay dividends, the Trustee must retain such sums as may be necessary for the costs of completing the administration of the estate and enough funds to pay out any claims which are in dispute.

18.2.2. Proposal

Due to the length of time of many proposals, interim dividends are anticipated and the proposal generally sets out when interim dividends will be paid. The interim dividend payout schedule is usually one of the terms of the proposal which must be approved by the creditors and/or the court.

All other rules and regulations in preparing interim Statements of Receipts and Disbursements in proposals are the same as for a bankruptcy.

18.3. Preparation of Trustee's Final Statement of Receipts and Disbursements

18.3.1. When to proceed with Final Statement of Receipts and Disbursements

Upon completion of the administration of an estate the Trustee is required to prepare a Final Statement of Receipts and Disbursements (R&D). This occurs when the Trustee has:

- realized on all of the property of the bankrupt;
- dealt with the discharge of the bankrupt;
- reviewed and either admitted or disallowed claims filed by creditors;
- considered whether or not to send 30 day notices to those who have not filed a claim; and
- completed the filing of all statutory returns.

In the case of a proposal, the Trustee proceeds with the final R&D upon completion of the terms of the proposal, or (as the case may be) after the proposal has been declared in default.

18.3.2. Preparing the Final Statement of Receipts and Disbursements

BIA s. 152(1)

The BIA requires that in completing the final R&D, the Trustee must account for:

- all funds received, including interest;
- all funds disbursed;
- the Trustee's fees and expenses;
- levy and dividends to creditors;

- disposition of assets; and
- the status of bankrupt's discharge.

It is important to include notes that would benefit the reader in understanding the administration of the estate (e.g., why certain assets were not able to be realized upon).

If inspectors have been appointed, the Trustee must obtain inspector approval of the R&D. A copy of the R&D must be sent to the OSB for comment. The OSB issues a letter of comment which indicates if the Trustee is to make application to court for taxation of its fees. Taxation is discussed in more detail further in this module.

After receiving a letter of comment which does not require taxation, the R&D, in prescribed form, a dividend sheet, and a notice, in the prescribed form, of the Trustee's intention to pay a final dividend must be sent to:

- the OSB;
- every proven creditor;
- the bankrupt; and
- the court, where applicable.

18.4. Trustee's fees and expenses

18.4.1. Summary administration

BIA Circular No. 2R

BIA Rule 128

Summary administration estates with realizable assets not exceeding the prescribed amount

The fees of the Trustee for services performed in a summary administration are calculated on the total receipts remaining after deducting necessary disbursements relating directly to the realization of the property of the bankrupt and the payments to secured creditors, according to the following percentages:

a) 100 % on the first $975 or less of receipts;

b) 35% on the portion of the receipts exceeding $975 but not exceeding $2,000; and

c) 50% on the portion of the receipts exceeding $2,000.

The Trustee is also permitted to make the following disbursements:

- OSB filing fee;
- counselling fees;

- Registrar fee;
- GST on Trustee's fees and counselling fees, as well as provincial taxes if applicable; and
- a lump sum of $100 in respect of administrative disbursements.

Summary administration bankruptcies are generally intended for files where the total receipts will not exceed the prescribed amount. Should the actual receipts exceed the prescribed amount, the OSB or the Trustee can request that the file be converted to an ordinary administration. This should be considered where the Trustee has incurred considerable disbursements in realizing on assets, etc. The Trustee also has the option of capping fees based on the prescribed amount. The Trustee calculates fees as though only the prescribed amount has been received in the estate even though the total receipts are higher.

18.4.2. Consumer proposal

BIA Rule 129

The Administrator's fees in a consumer proposal are based on a tariff pursuant to the BIA. They are as follows:

a) $750 payable on filing a copy of the consumer proposal with the Official Receiver;

b) $750 payable on the approval or deemed approval of the consumer proposal by the court; and

c) 20% of the moneys distributed to creditors under the consumer proposal, payable on the distribution of the moneys.

You are also permitted to claim the costs of counseling, the filing fee, any court fee, and any applicable provincial and federal taxes on fees and the above noted disbursements.

18.4.3. Ordinary administration

BIA s. 39

The BIA outlines a tariff for ordinary administration bankruptcies of 7 ½ %. This tariff is rarely used. Generally, the Trustee's fees and disbursements are based on reasonable charges for the time spent on the administration and the actual disbursements incurred.

The Trustee and staff must keep details of time spent and duties performed in administering the estate as this will form the basis to justify fees claimed on the final R&D.

The Trustee's fees must be approved by the:

- inspector;
- creditors; and
- court.

18.4.4. Division I proposal

BIA s. 39

The terms of the Division I proposal indicate how the Trustee's fees are to be calculated. The fee calculation can be as unique as the proposal. It is not uncommon to see either an estimated lump sum fee or a fee based on the actual time the Trustee spends on the file.

18.5. Levy & Dividends

18.5.1. Levy

BIA s.147

BIA Rule 123

Directive 10R

A levy must be paid to the OSB pursuant to the BIA on all dividends paid to creditors. Please review the associated BIA section, Rule and Directive.

The levy is submitted to the OSB with the prescribed form.

18.5.2. Dividends

Upon approval of the final or interim R&D, dividends may be paid to the creditors.

When issuing dividends, the Trustee must be careful to follow the order of priority set out in the BIA. The property of the bankrupt divisible among the creditors is subject to the rights of secured creditors and deemed trust claims.

18.5.3. Order of priority for unsecured creditors

BIA s. 136

The BIA identifies the order in which the receipts realized in an estate are to be disbursed. The order of distribution to creditors is often subject to many conditions. Generally, the order of distribution is as follows:

- reasonable funeral and testamentary expenses incurred by the legal personal representative of the deceased bankrupt;
- the cost of the administration as outlined in the BIA;
- the levy payable under the BIA;
- preferred creditors in the order and subject to the conditions outlined in the BIA;
- unsecured creditors on a pro-rata basis; and

- excess funds go to shareholders or the bankrupt after payment of interest as provided for in s. 143 of the BIA.

18.5.4. Undistributed funds

Directive 18

A Trustee is expected to pay out a dividend to creditors even if the amount is very small as indicated in Module 17.

18.5.5. Unclaimed dividends

BIA s. 154(1)

Directive 18

In order to proceed with the Trustee's discharge, the estate trust account must have a NIL balance.

Pursuant to the BIA, a Trustee who cannot locate a creditor, or who is unsuccessful in getting the dividend cashed, can forward the funds to the OSB as an unclaimed divided.

The BIA outlines procedures to be followed by a Trustee to limit the number of unclaimed dividends and to assist the OSB in returning the dividend to a creditor when it is later claimed. The requirements of a Trustee to assist with this are:

- allow a longer period of time for cashing dividend cheques (30 to 45 days is suggested);
- make a reasonable effort to locate a current address for the creditor; and
- when forwarding funds to the OSB include any reference numbers found on the proof of claim to assist with tracing the dividend.

18.6. Details on the final R&D

18.6.1. Disposition of assets

In a bankruptcy, notes accounting for all of the assets listed on the Statement of Affairs must be made on the final R&D. Explain the disposition of each asset (whether the Trustee was able to realize on the assets or not). If the asset was sold, the amount realized as well as all costs related to the sale should also be indicated if applicable.

If the asset was released to the secured creditor and was fully encumbered, this should be indicated.

18.6.2. Status of bankrupt's discharge

The final R&D must also indicate the status of the bankrupt's discharge. The type of discharge received by the bankrupt should be noted.

18.7. OSB's role in Trustee's discharge

The R&D must be submitted to the OSB for comment. The comment letter from the OSB will indicate whether the administration has been satisfactorily completed and if the statement should be taxed. If they are not satisfied with the Trustee's administration they may so indicate on the comment letter, which would be presented to the court at the taxation hearing.

18.8. Taxation - summary administration and consumer proposals

BIA Rules 62-67 and 96–103

The taxation procedures for summary administration bankruptcies and consumer proposals are very similar and are outlined in the BIA. In this text, the term Trustee refers to both the Administrator in a consumer proposal and the Trustee in a bankruptcy.

The Trustee must apply for taxation of accounts and for discharge by sending to the OSB:

- final R&D and dividend sheet; and
- copy of inspector resolution (if applicable).

The OSB will issue a comment letter outlining whether the account must be taxed before a Registrar or not.

18.8.1. No requirement for taxation

Within 30 days of receipt of the comment letter the Trustee must submit to every proven creditor:

- the notice of taxation and discharge in prescribed form;
- a copy of final R&D and dividend sheet; and
- the final dividend (if the Trustee is confident that no creditors will object to the taxation or to his discharge).

The creditors have 30 days to object to the taxation or discharge. To do so they must:

- serve notice of objection to the Trustee by registered mail or courier;
- file a copy of the objection with the Registrar along with the applicable fee provided by the tariff; and
- send a copy of the notice of objection to the OSB.

18.8.2. Requirement for taxation

When a creditor opposes the taxation or the Trustee's discharge, the Trustee must obtain a hearing date from the Registrar. The Trustee must also obtain a hearing date if he receives a comment letter from the OSB requesting that his accounts be taxed.

Within 30 days of receipt of the comment letter or the objection the Trustee must send the following to every proven creditor, a minimum of 30 days prior to the hearing:

- a notice of hearing for the taxation and discharge, in prescribed form; and
- copy of the final R&D and dividend sheet (if not already sent).

18.8.3. Final dividend and discharge

If no objection is received within the 30 days after the notice of taxation and discharge, the Trustee must complete the steps below within three months.

If the Trustee was required to appear in court for taxation and the Registrar has taxed the account, the Trustee must complete the steps below within two months of the taxation order:

- Send each creditor the dividend owed to them (if not already done).
- Take the Trustee's fee.
- Close the trust account.
- Remit any unclaimed dividend and undistributed funds to the OSB.
- Send a certificate of compliance and deemed discharge, in prescribed form, to the division office.

18.9. Taxation – ordinary administration & Division I proposals

Upon review of the final R&D the OSB will issue a comment letter. The final Statement of Receipts and Disbursements is then submitted to the Registrar in order that he may approve it and tax the Trustee's accounts. After the R&D has been taxed by the court the Trustee sends a Notice of Final Dividend and Application for Discharge of Trustee (Form 11) together with a copy of the final R&D to:

- every creditor whose claim has been proved;
- the Registrar;
- the OSB; and
- the bankrupt.

The notice advises that any notice of objection to the final R&D must be filed with the court before the expiry of 15 days from the date of the mailing of the notice. Once 15 days has expired, provided there has been no objection by the creditors, the Trustee will pay the final dividends to the creditors, the levy to the OSB, and take his fees.

The notice further advises that the Trustee will apply to the court for an order of discharge on the date noted (or as soon thereafter as the motion can be heard). Any objection to the Trustee's discharge must be filed with the court at least 5 days before the date noted.

18.10. Trustee's discharge

18.10.1. Ordinary administration & Division I proposal

BIA s. 41(1)

In an ordinary administration bankruptcy or Division I proposal the discharge of a Trustee is granted by court order.

Before a Trustee can be discharged he must ensure that all outstanding matters in the estate are complete. If there is property that could not be realized on, the Trustee, with the approval of the inspectors may return that property to the bankrupt.

For a Trustee to be discharged he must have:

- his accounts approved by inspectors and taxed;
- all objections, applications and appeals settled or disposed of; and
- all dividends paid.

A Trustee discharge signifies that the Trustee has completed all of his duties. It also provides the Trustee with a degree of protection from liability as the court has recognized that the work was satisfactorily completed. The discharge provides a degree of protection to the Trustee from any further liability in respect of:

- any act done or default made by him; and/or
- his conduct as Trustee.

Notwithstanding the discharge, the Trustee remains Trustee de facto for any future duties that may be incidental to the full administration of the estate.

18.10.2. Summary administration & consumer proposal

Form 16

The requirements for discharging a Trustee in a summary administration bankruptcy or consumer proposal are the same as for an ordinary bankruptcy with the following exceptions:

- discharge is deemed to occur when the Trustee issues the Certificate of Completion or Certificate of Compliance, in prescribed form, to the OSB;
- no requirement for a court appearance unless an opposition to discharge is received.

If the OSB or creditors request the matter of the Trustee's discharge be brought before the courts, the discharge will occur upon court order.

19. Administer Receivership

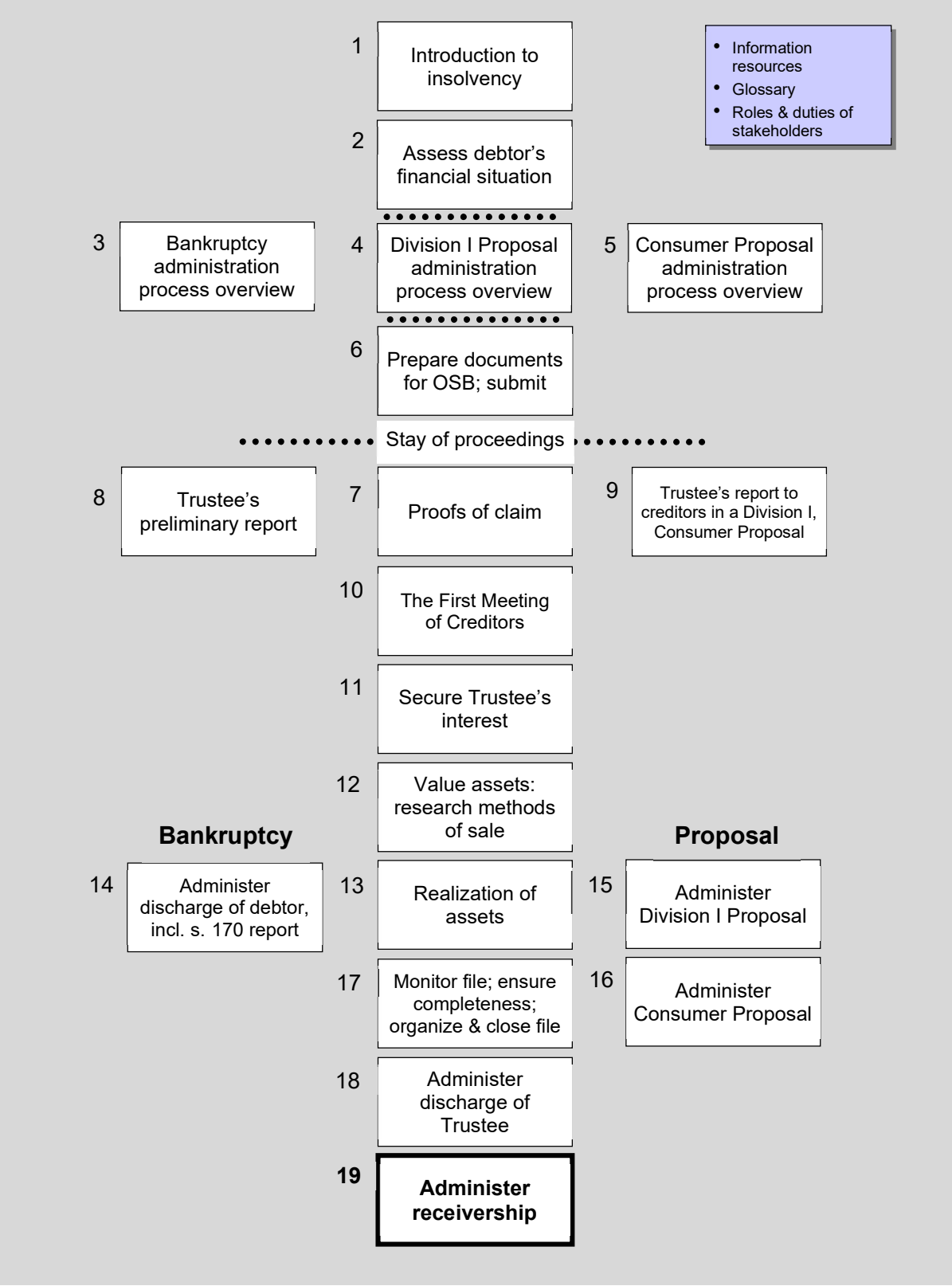

Table of Contents

19.1. Introduction

Module objective

At the end of this module, you will be able to describe the administration of a receivership.

Assigned readings

- BIA s. 14.06; 71, 81.1, 81.2, 81.4, 243(2), 245, 246 and 250

19.1.1. Introduction

BIA s. 243(2)

Only a Trustee can be a receiver.

According to the BIA, a receiver is defined as:

> "A person who has been appointed to take, or has taken possession or control, pursuant to
>
> a) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
>
> b) an order of a court made under any law that provides for or authorizes the appointment of a receiver or receiver-manager of all or substantially all of:
>
> a) the inventory,
>
> b) the accounts receivable, or
>
> c) the other property
>
> of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt."

The distinction between a receiver and a receiver-manager is often made. Typically, a receiver-manager is given the authority to continue the operations of the insolvent business and also to seize and sell the assets of the business. A receiver, on the other hand, is usually given only the authority to seize and sell the assets of the business. For purposes of this text, the term 'receiver' will also refer to a receiver-manager unless otherwise stated.

The effect of an appointment of a receiver on a company was stated by Lord Atkinson in Moss Steamship Co. Ltd. V. Whinney (1912):

> "The appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of

> all power to enter into contracts in relation to that business, or to sell, pledge, or otherwise dispose of the property put into the possession, or under the control of the receiver and manager. Its powers in these respects are entirely in abeyance."

The appointment of a receiver does not affect title but allows the receiver possession of the property. This property is then subject to the powers granted in the security instrument and/or the appointment letter or the court order and may be subject to the rights of prior secured creditors and certain government claims (e.g., source deductions, provincial sales tax, GST/HST).

The appointment of a receiver may be conducted by way of a private appointment or a court appointment.

19.2. General definitions

19.2.1. Private appointment

The receiver in a private appointment is appointed pursuant to the terms of a security instrument held by a private lender. This private lender is typically a bank but may also be a major supplier of materials, inventory, etc.

The authority for the receiver to act is granted within the security instrument and the appointment letter provided by the lender.

19.2.2. Court appointment

A receiver may also be appointed by a court order. This would occur when the secured lender makes an application to the court for such an appointment.

The court order provides the receiver with the authority to complete the duties and functions of a receiver.

19.3. Private appointment

19.3.1. Circumstances leading to appointment

Receivership by private appointment can be described as:

> "the machinery whereby a secured creditor endeavors through a receiver and manager to recover monies which were loaned under terms against the security of certain assets, and where either those terms have been breached or the borrower has failed to comply with a demand for repayment."

The objective of a receivership is to obtain repayment for the secured creditor as quickly as possible within the overall context of the powers and authority contained within the security instruments, and with due regard to the rights of other creditors and shareholders.

A receiver will generally be appointed in one of the following circumstances:

- the borrower fails to comply with the terms of the security documentation concerning repayment of principal and interest;
- for a variety of reasons, part or all of the principal debt is properly called by the secured creditor, and the borrower fails or is unable to comply;
- the approved limit of a banking advance or other borrowing limit is exceeded and either not reduced within a stipulated period, or sufficient additional security is not provided to satisfy the lender; or
- the provisions of the security instrument are in some other way breached by the borrower. A technical breach, such as failure to produce financial statements within a certain time, can normally be rectified by agreement.

19.3.2. Security instruments and enforceability

A receiver can be privately appointed pursuant to a security agreement. Some of those instruments are as follows:

- general security agreement;
- debenture;
- trust deed; or
- mortgage.

Generally, when a financial institution lends money, the borrower is required to sign numerous loan documents along with a security agreement. It is the security agreement which provides for the appointment of a receiver should the debtor not comply with certain criteria.

The powers of the receiver are specified within the security agreement. Those powers and privileges result from the fact that the receiver's appointment is the exercise of a contractual remedy by the secured creditor.

It should be noted that if a security agreement does not authorize the appointment of a receiver, the lender cannot seek a privately-appointed receiver. This fact, however, does not preclude the lender from seeking a court-appointed receiver.

19.3.3. Enforcement and statutory requirements

Receivers are subject to statutory regulation by several federal and provincial acts.

Prior to accepting any appointment as receiver, it must first be determined whether or not you have a conflict of interest. If a conflict of interest is apparent, the appointment must be turned down.

CAIRP's Rules of Professional Conduct state that:

"A member shall not permit himself to be placed in a position of conflict of interest; in keeping with this principle, a member shall not accept any appointment:

(a) which is prohibited by law

(b) as a receiver, a receiver-manager, agent for a secured creditor, liquidator or a Trustee under the BIA in respect of any insolvent person or corporation where the member is, or at any time during the immediately preceding two years, was:

(i) related to such person or corporation

(ii) the auditor or accountant of such person or corporation."

The *Canada Business Corporation Act* does not prevent an auditor from acting as receiver. However, if a company is provincially incorporated, the relevant provincial act may contain such prohibitions. For example, the *Ontario Business Corporations Act* specifies that a firm cannot act as receiver if it has served as auditor within the last two years. Furthermore, the CAIRP interpretations of the Rules of Professional Conduct mention the same prohibition, in order to maintain independence.

Once it has been determined that no conflict exists, the secured creditor's security should be reviewed by legal counsel. This should be done prior to enforcement proceedings to ensure that the security instrument is valid and properly registered under the appropriate legislation governing the security. The question of the validity of the security relates to its basic contractual terms including: proper execution, registration within the prescribed time period, and consideration being advanced.

Before accepting an appointment, the receiver must be satisfied that the security is also enforceable. Again, independent legal advice should be sought to establish that the security is also enforceable. For the security to be enforceable, a default must have occurred and reasonable notice must have been given.

It must be determined that a default has occurred under the security agreement and that the default has not been waived by the lender. To determine if a default has occurred, the terms of the default, as listed in the security instrument, must be reviewed and assessed as to whether or not they have occurred.

Once the secured creditor (often with the assistance of legal counsel) has determined that default has occurred and it has reached the decision to realize on its security, the secured creditor can demand its loan. Current case law indicates that a secured creditor must give reasonable time to a debtor to comply with the demand for payment of an obligation. Only after this period of reasonable notice has elapsed or the debtor company has waived notice should a secured creditor enforce its security by the appointment of a receiver.

19.3.4. Letter of appointment

A privately appointed receiver is granted authority to act pursuant to the security agreement and appointment letter. It is also these two documents which set out the duties of the receiver.

The main powers which the receiver will generally find in the letter of appointment or security agreement are as follows:

- to take possession of all assets and property covered by the security;
- to manage such property and the business of the company, if necessary;
- to receive any monies owing to the debtor;
- to sell any property covered by the security instrument; and
- to borrow money required for the protection of the property.

19.3.5. Indemnities

It is common practice for insolvency practitioners to request a written indemnity from the secured lender appointing him to act as receiver. Typically, the lender is requested to indemnify the insolvency practitioner to save him from harm resulting from all liabilities, claims, or lawsuits arising from acting as receiver except for those which might arise due to willful misconduct or negligence.

A receiver seeks an indemnity to protect himself from:

- trespass and damages – this would include the receiver's liability arising from damages incurred due to loss of future profits arising from the secured lender's security being invalid or reasonable notice not being given;
- environmental liability – any liability for clean-up that potentially could be incurred by a receiver who is in possession and control of the assets where an environmental matter or condition exists;
- product liability – potential liability arising out of the receiver's completion of work-in-process which may be in excess of product liability insurance available or taken;
- employee / successor employer liability – receivers should always be concerned with the potential liability or the cost of litigation associated with a claim, warranted or not, relating to successor employer issues; and
- costs / fees of the receiver – the receiver would typically seek an indemnity to ensure that the secured lender will guarantee the receiver's costs and expenses if the assets held as security were insufficient to pay him in full.

19.3.6. Role and duties

In the typical security agreement, the private receiver is deemed to be the agent of the debtor company for purposes of possession and realization, and to be the agent of the creditor for purposes of distribution. The purpose of such a clause is to ensure that the receiver has authority to possess, use and realize on the company's assets. Liability for the actions of the receiver is placed on the debtor company, while still allowing the receiver to act on behalf of the security holder. This clause is referred to as a **dual agency** clause.

Furthermore, the deemed agency clause also results in the limitation of some of the powers of the receiver. As he is deemed to be an agent for the debtor corporation, the powers and rights of the receiver over contracts, assets, etc. are no greater than that of the debtor.

In reality, however, the privately appointed receiver has a fiduciary obligation to the security holder who provided the appointment. As stated by Frank Bennett in B*ennett on Receivership* (2nd Edition, page 27).

> "The receiver's duty is to take possession of the charged property for the express purpose of recouping the loan to the security holder together with the duty to manage the operations of the debtor for the protection of the security."

The *Canada Business Corporations Act,* along with some provincial corporations acts, imposes duties on receivers. As indicated earlier, the receiver must act honestly and in good faith. Any sale conducted by the receiver must be done in a commercially reasonable manner with the objective of obtaining the best possible price for the goods in question.

Also, the receiver must be able to adequately account for any sales proceeds and turn over any surplus funds to the debtor, a Trustee in a bankruptcy and/or other creditors.

19.3.7. Liability

There are numerous issues and areas of liability for which the receiver may become responsible. These issues will be discussed at length throughout this module. The receiver should pay particular attention to a number of areas, including:

- liability for trespass;
- product liability;
- liability for existing contracts;
- liability for new contracts;
- environmental liability;
- employee liability and successor rights; and
- liability for outstanding government claims.

It should be noted that this list is not exhaustive. The receiver must consider all aspects of potential liability throughout his appointment.

Section 14.06 provides the receiver with some protection from liability, in particular with regards to successor employer claims and environmental matters.

19.4. Court appointment

19.4.1. Circumstances leading to a court appointment

A secured creditor may apply to the court for the appointment of a court-appointed receiver upon the default of a debtor under a security agreement.

It is usually appropriate to apply to the court when the receivership involves any of the following:

- extremely complex issues;
- foreign jurisdictions;
- conflicts between multiple secured creditors; and/or
- a high potential for disputes.

19.4.2. Appointment order

In order to apply to the court for the appointment of a receiver, the secured creditor must go through a number of steps. The secured creditor must establish that he has a legal right to enforce his security and that the debtor has not remedied the default.

The motion to appoint a court-appointed receiver may be made ex parte, or without notice to the debtor, if the secured creditor can justify the urgency of the situation. An ex parte motion is typically used when the debtor is about to abscond with or dispose of the secured assets to the detriment of the secured creditor.

The source of a court-appointed receiver's powers is the court order. The scope and limitations of these powers should be clearly specified in the order. The receiver is only authorized to act within these specified powers.

The typical powers in a court order would include the following:

- the appointment of the receiver. In addition, the assets which are to be the subject of the appointment should be clearly described together with details of any encumbrances;
- the authority for the receiver to be given access to the assets of the debtor and also the books and records;
- the power to conduct litigation in the course of the receivership. It is easier to obtain such an order from the court in the early stages of the receivership rather than attempt to obtain specific approval at a later stage;
- acknowledgement that other creditors or claimants are prevented from proceeding against the debtor or receiver, without the leave of the court. This clause is of particular importance to a receiver who intends to carry on the business of the debtor and who would be at risk for the loss of critical assets needed for carrying on the business without such an order;

- the authority to determine that the business should not be carried on;
- the authority to borrow money and to secure such borrowings on the assets of the debtor by way of receiver's certificates, usually in priority to the security interests of the plaintiff and any other encumbrances;
- the authority to arrange for the sale of the assets, subject to final approval of any particular sale by the court;
- the right to apply to the court for advice and direction;
- assurance that the receiver is paid his fees and for expenditures properly incurred in the course of his administration of the receivership. The clause usually provides that the amount of such expenditures and fees must be a charge on the assets of the debtor, in priority to the security of the plaintiff and other encumbrances, and subject to taxation;
- procedures for the passing of the receiver's accounts and for payment of the funds in the receiver's hands as directed by the court; and
- provisions that the plaintiff's costs incurred in connection with the application of the receiver should be paid by the receiver in priority to the plaintiff and/or other creditors.

While this list is not exhaustive, these are examples of what appears in a typical court order. Should there be specific clauses necessary for the debtor in question, these matters should be brought to the attention of the court so that any proper remedies may be incorporated into the order.

As indicated above, a court-appointed receiver may turn to the court for direction. Some examples of when a receiver may apply for direction are:

- to resolve disputes which cannot be resolved by negotiation;
- to settle issues as to priority of creditors;
- to approve the selling process;
- to approve the sale of assets, which in effect 'blesses' the selling price;
- to borrow funds; and
- to close down the operations of the business (liquidate versus operate).

19.4.3. Role and duties

In exercising the powers in the court order, the receiver must remember that a court-appointed receiver is an independent officer of the court with a duty to be fair, impartial and to act in the best interests of all parties concerned. The court-appointed receiver is not an agent of either the secured creditor or the debtor and thus should not take direction from either.

19.4.4. Liability

Court-appointed receivers, like privately appointed receivers, must deal with existing contracts of the debtor company. As with a private appointment, these contracts are not automatically terminated. However, greater care must be taken by a court-appointed receiver in breaking a contract, as a duty of care is also owed to other creditors and the debtor. If a receiver chooses to break a contract, leave of the court should be sought.

A court-appointed receiver may only enter into new contracts if permitted by the court order. When a court-appointed receiver enters into new contracts, it is a principal and becomes personally liable for the fulfillment of these contracts. The receiver does, however, have the right to be indemnified from the assets under his control and management.

19.5. Administration

19.5.1. Notices

BIA s. 245 and 246

BIA Rules s. 124, 125, 126 and 127

According to the BIA and the Bankruptcy and Insolvency General Rules, the receiver is required to send notice of his appointment in prescribed form to:

- the Office of the Superintendent of Bankruptcy;
- all known creditors;
- the debtor; and
- the Trustee in a bankruptcy (if the debtor is bankrupt).

This notice must be sent as soon as possible and no later than 10 days after being appointed receiver.

The act also requires the receiver to file an initial report for distribution**.** This report is sent to:

- the Office of the Superintendent of Bankruptcy;
- the debtor; and
- any creditor who requests a copy.

The report must include the following:

- names, addresses and amounts owed to all creditors;
- a list of assets under the possession or control of the receiver, along with their book values; and
- a statement of the receiver’s intended plan of action.

The receiver must also prepare interim reports no later than six months after the previous report which must include:

- a Statement of Receipts and Disbursements
- a statement of all property which has not yet been sold or otherwise realized; and
- information about the anticipated completion of the receivership.

This report must be sent to the same parties as the original report noted above.

Finally, upon completion of his duties, the receiver must immediately prepare a final report which includes:

- a Final Statement of Receipts and Disbursements;
- an explanation of how all receipts were distributed;
- details of disposition of any property of which the receiver has taken possession (or control) and that is not accounted for in the final R&D; and
- any other significant information about the receivership.

This report must be sent to the same parties as the original report noted above.

Furthermore, some provincial Personal Property Security Acts (PPSAs) impose notice requirements upon receivers (both private and court-appointed) with which they must comply prior to selling assets. Thus, ensure that you have determined any such requirements in your province before you begin selling assets.

19.5.2. Report to OSB

The BIA imposes duties on a receiver to advise the debtor, creditors and the Official Receiver of its appointment within 10 days. In addition, the receiver is obligated to provide regular reports to the Official Receiver and those parties who request the information. These reports outline the receiver's plan for disposition of the assets, its interim progress and its accounts.

Most provincial company acts, as well as the *Canada Business Corporations Act*, require that financial statements be prepared by a receiver every six months and made available upon request to interested parties. In the past, such financial statements have been limited to a Statement of Receipts and Disbursements. However, depending on their intended purpose, reports may include statements of financial position, deficit and realization.

19.5.3. Reports to the court

In a court-appointed receivership the receiver, given his broad fiduciary duty to all creditors, is required to send out notices of his appointment as well as notices to interested parties of any subsequent court applications.

Reports in support of an application for direction must include all the facts along with legal opinions, appraisals, affidavits and recommendations for the court to consider. As a result,

reports to the court tend to be more extensive and take far more time to prepare. Any report to the court becomes a matter of public record unless otherwise directed by the court.

Given the judicial process involved, not only do certain time-consuming procedures result in increased legal and receiver fees, but the decision-making process is invariably longer. In addition, there always exists an element of uncertainty should another party oppose the receiver's application. This stands in contrast with the immediate communication and feedback between the privately appointed receiver and secured creditor.

19.5.4. Reports to creditors

In a private appointment, reporting to a secured creditor would include verbal updates as the circumstances require. Within a few days of taking possession, a confidential written report setting out the receiver's initial findings, conclusions and recommendations as to realization may be required by the secured creditor.

Reports must be issued on a timely basis in order the keep the secured creditor informed of all major developments. Typically, where operations are continuing, a report, including an up-to-date Statement of Receipts and Disbursements, is prepared at least monthly.

19.5.5. Assets

BIA s. 81.1, 81.2, 81.4 and 81.6

It is the role of the receiver to sell the assets in his possession (or the interest therein) for the best price and terms he can obtain in the circumstances. To do so, the receiver should take all the necessary measures and means for obtaining the best price. This safeguards the interests of not only the secured creditor who appointed him but the lower ranking secured creditors and the ordinary unsecured creditors.

To avoid all criticism and the possibility of lawsuits due to poor administration or an improvident sale, the receiver should take all appropriate steps towards obtaining optimum realization and ensure that the assets are liquidated for an optimum return. Additionally, valuations, appraisals, etc. will reinforce the fact that the receiver sold the goods for the proper value.

The receiver must be aware of numerous competing claims over the assets he takes into his possession.

The BIA imposes a duty on the receiver to return, or otherwise deal with goods delivered by a supplier in the 30 days before the appointment of the receiver, if a demand for repossession of same is received in the 15 days after the receivership. The BIA also imposes duties on the receiver relating to goods delivered by farmers and fishermen no more than 15 days prior to the receiver's appointment, if a claim for these goods is received in the 30 days after the receivership.

19.5.6. Accounting

Records relating to the administration of the receivership should be prepared with the utmost accuracy by the receiver. These records will be necessary to protect the receiver against claims for outstanding tax debt, accusations of improper sales and/or expenses, etc.

The receiver, as a payer or collector of tax, is required to retain these books and records of account for a period of approximately six years pursuant to ITA s. 230(5) (In Quebec, section 35.3 of the Tax Administration Act) and s. 5800(1)(c) of the Income Tax Regulations.

19.5.7. Financing

Issues regarding financing typically occur when the decision is made to continue operating the debtor business in order to maximize realization. For more detail, please refer to the section on Continuing Operations – Financing Issues later in this text.

19.6. Taking possession, security, and stocktaking

19.6.1. Assets

Upon appointment, the receiver immediately becomes responsible for the assets charged to the secured creditor. The receiver must ensure that adequate controls are in place to protect those assets since he is ultimately responsible to the appointing creditor, the debtor and to other secured and unsecured creditors. Immediately upon being appointed, the receiver should ensure that the following issues have been completed and dealt with:

- physical security of assets;
- security over data in electronic format (remote access to computers, etc.):
- insurance;
- assets at third party premises;
- third party property;
- accounting records;
- cash and banking;
- book debts;
- inventory;
- security over intellectual property;
- restriction on movement of goods; and
- re-direction of mail.

19.6.2. Books, records, documents

While the debtor's books and records are ultimately the responsibility of the company directors, it is advisable that the receiver retain them for a period of time. This will allow the receiver to review them to determine what may be required to administer the assets under his appointment. They will also prove useful if it is necessary to prepare cash flow projections and/or pro forma statements. Moreover, these records will be necessary to substantiate the receiver's claims over assets with competing secured creditor claims, outstanding receivables, existing contracts, etc.

The receiver should obtain written authorization from the debtor company to either return the books and records relating to the period before the appointment of the receiver or destroy them as the records are the responsibility of the directors.

19.6.3. Insurance

Immediately upon taking possession of the debtor's assets, the receiver should review and confirm existing insurance coverage. Some receivers who maintain their own property and casualty contingency insurance package may rely heavily on the automatic coverage provisions for expediency purposes.

There are risks associated with relying on such blanket coverage. To the extent two insurance policies (the receiver's and the debtor's) co-exist and provide duplicate coverage, it is argued that a risk remains due to the standard wording used, that neither policy would cover any loss or damage insured by any other policy.

Pre-existing coverage is sometimes terminated in favour of blanket coverage in order to realize on unearned premiums. However, the receiver runs the risk of not being able to secure coverage at the pre-existing rates and of relying on blanket coverage which may be somewhat limited.

Needless to say, it is imperative to consult with an experienced insurance broker to discuss insurance requirements to suit the particular situation.

19.6.4. Employees of the debtor

The rights of employees in insolvency situations are unsettled areas and must be considered for both union and non-union shops. The continuation of bargaining rights of employees and collective agreements, despite changes in the legal entity constituting the employer, are of critical concern to purchasers of a business from a receiver. The purchaser could be considered a successor employer.

The factors which are considered in determining whether or not a major portion of the business has been sold, which could result in the purchaser being considered a successor employer, include:

- Has there been a continuation of the business?

- Is the nature of the work performed subsequent to the transaction the same as the nature of the work prior to the transaction?
- Has there been a transfer of assets, i.e., goodwill, customer lists, inventory or accounts receivable?
- Is there continuity of management and product?

Where a court finds that a business has been sold as a complete entity within the terms noted above, the purchaser remains subject not only to the terms of the collective agreement, but also to any outstanding grievances under the collective agreement relating to the conduct of his predecessor. This would be the case regardless of whether or not the purchaser has actual notice of the collective agreement or whether or not arbitration proceedings were pending at the date of sale.

A purchaser would then be responsible for severance pay owing to the employees as well as for all outstanding grievances. The effect of this is to substantially increase the risk to a potential purchaser. A prudent purchaser will, therefore, take all of these factors into consideration when arriving at a purchase price for the assets.

Please be mindful that WEPPA, as covered in Module 17, also applies in a Receivership.

19.7. Continuing operations

19.7.1. Approval (client, court)

One of the more important aspects of the receivership takes place in the very early stages of the appointment. This is the determination of the viability of the enterprise in the future. The mere fact that the enterprise has been placed into receivership does not necessarily mean that it is not viable. The receiver should initially review the enterprise's various facets to determine whether or not the business should be operated in an attempt to sell it as a going concern, whether the assets should be immediately liquidated, or whether the operations should be continued on a limited, decreasing basis to enhance the value of certain assets (such as work in process and accounts receivable).

Prior to making the decision on whether or not to continue operations, approval of the appointing creditor or the court, assuming that the court order grants the receiver power to continue operations, should be obtained. Any decision to continue operations of the business should be weighed heavily as the receiver, appointing creditor, and other interested parties would be greatly affected by any potential liability claims. These potential liabilities are discussed further in this section.

19.7.2. Cash flow projections

The decision to operate versus liquidate is basically a cost/benefit decision. The receiver must prepare a detailed cash flow forecast to support the decision. The cash flow along with the risks, costs and potential benefits should be presented to the secured creditor/court for approval.

19.7.3. Operating issues (employees, utilities, contracts, etc.)

At the commencement of any receivership, the receiver is faced with the decision as to whether or not to retain any or all of the company's staff. If it is the receiver's intent to carry on with the business, then the normal procedure is to advise the employees that their employment with the debtor company has been terminated. The receiver then re-hires those employees who are required.

In those instances where there are outstanding wages due to employees, the receiver must decide, in conjunction with his client, whether or not those wages will be paid. Normally, employees will not commit to continue with the receiver until the matter of their outstanding wages has been clarified.

For those employees who will not be retained by the receiver, the receiver should look to the provisions of the BIA s. 81.4 and the WEPPA (as discussed in Module 17) to determine their rights.

For those employees who will be retained by the receiver, each province has its own labor legislation which dictates certain standards between employers and employees. While the laws may vary from province to province, they normally cover such items as hours of work, overtime compensation and notice requirements regarding termination and severance pay.

With concerns about being paid for current outstanding debt owed by the debtor, many suppliers and/or utility companies will not be anxious to continue to trade with the receiver. Often suppliers will insist that all future sales be on a cash on delivery (COD) basis, if they agree to deal with the receiver at all. In order for the future operations to be successful, the receiver must have a guaranteed supply of materials to work with. Skill as an effective negotiator will definitely be an asset in such situations.

In a private receivership, the receiver will be faced with existing contracts that must be dealt with and may also enter into new contracts.

Existing contracts of the debtor company are not automatically terminated by a private receivership. The obligation of the debtor company to perform under the contract continues. Generally, the receiver can decide whether or not to carry out the contractual agreement. If the receiver chooses not to fulfill the terms of the contract, a breach occurs and the injured party may make a claim against the debtor company for damages. This claim for damages will be an unsecured claim against the debtor company.

To enter into a new contract, the receiver must be permitted to do so under the powers granted by the security instrument and appointment letter or court order. When entering into a new contract, the receiver must realize that he is obligated to fulfill the contractual agreement and must be aware of the liability being undertaken. Before signing a contract, a receiver must evaluate the cost/benefit of entering into the contract.

Upon signing a contract, a receiver will be liable in its capacity as receiver and may be personally liable. When acting in the capacity of receiver, liability is limited to the assets under administration. However, if a receiver is liable in a personal capacity, the liability is not

limited to the administered assets. As a result, a receiver should only enter into contracts in its capacity as receiver and expressly exclude personal liability.

19.7.4. Operating controls

While estates may differ as to the assets and property under the control of the receiver, a number of controls are common in the majority of appointments. These items can be prioritized depending on the circumstances but should be carried out immediately upon appointment as receiver. Some of these items include:

- establishing controls for inventory taking procedures, including stock-in-trade and fixed assets;
- ensuring the physical security of the assets;
- ensuring continued supply of utilities (if applicable); and
- determining liabilities regarding priority creditors.

19.7.5. Financing issues

Having decided to resume operations, the receiver may require an injection of working capital at the outset.

In a private appointment, the power to take action such as continuing operations, borrowing funds, etc. would be contained within the terms of the security agreement. In most situations, the appointing creditor would advance the funds required which, if not repaid by the receiver, would be added to the debtor's outstanding indebtedness.

In a court appointment, the receiver would usually obtain an order authorizing him to borrow and issue receiver's certificates, pledging as security the debtor's assets and specifying such borrowing to rank ahead of prior encumbrances. Although a privately appointed receiver may be empowered to issue receiver's certificates, such certificates would be subject to the prior encumbrances and therefore would not be a viable alternative.

The priority of receiver's costs, fees or borrowings is not normally an issue, but in a few situations the receiver ends up not having sufficient assets to pay off his borrowings.

A privately appointed receiver usually requests an indemnity from the lender for all the receiver's actions, to the extent that the receiver has acted properly in the discharge of his duty. Accordingly, he would look to the lender to satisfy any shortfall.

A court-appointed receiver, who is neither an agent of the debtor nor of the secured creditor and who incurs obligations in the course of the receivership, would be personally liable for such obligations unless such liability has been disclaimed. A lender may be satisfied with a statement that the receiver does not assume a personal liability for the loans, in situations where the receiver made borrowings pursuant to a court order and charged the assets under his administration to secure repayment.

19.7.6. Tax issues

A purchaser may wish to buy the shares of a corporation as opposed to the assets of the corporation. This would be done in instances where the purchaser may take advantage of any tax loss carry forwards. The *Income Tax Act* imposes several restrictions over trading in losses. These apply where there is a change of control of the corporation.

Generally, a change of control will not have any effect on losses incurred in the year that control changes. Business losses carry over, but can only be applied against future income from the same or similar business as that in which the losses were incurred. Furthermore, the business must have been carried on by the corporation throughout the year in which the loss is to be applied and continuously from the time when control changed, with a reasonable expectation of profit. Net capital losses of prior years expire upon the change of control. The precise way in which these rules will apply under any particular circumstances is often complex. In these situations, tax advice from an expert in the field should be sought.

19.7.7. Potential liabilities incurred in operating a business

In some instances it may be proper to consider resuming operations of the debtor company. However, the receiver should be fully aware of potential liabilities with the operational receivership. Some of these liabilities include:

- product liability;
- environmental liability;
- successor employer liability;
- tax liability;
- day-to-day payroll and overhead costs;
- professional fees to oversee operations;
- lack of customer support;
- lack of supplier support;
- lack of co-operation of key management, trade unions or employees;
- risk of unanticipated costs; and
- inability to provide a warranty on unfinished goods, which may reduce realization.

While the list above merely includes examples, it should be noted that such liability would significantly decrease any net realization from the sale of the debtor company's assets. As a result, the receiver is cautioned to explore all potential areas of concern prior to operating an insolvent business.

BIA s. 14.06 provides the receiver with some protection from liability, in particular with regards to successor employer claims and environmental matters.

19.7.8. Environmental concerns

BIA s. 14.06(2)

All aspects of environment law should be of major concern to receivers and secured lenders, especially when it becomes necessary to call a loan and realize on secured assets. While changes to the BIA provide some protection to a receiver, environmental concerns must be assessed and weighed prior to accepting an appointment as receiver. Prior to taking possession, a review should be undertaken of the debtor's business from the perspective of environmental risks and costs.

A secured creditor in possession of a debtor's business may be deemed to be an owner under the applicable environmental law and may be responsible for the costs of environmental clean-up. The key is to determine ahead of time whether or not the clean-up costs exceed the realizable value of the assets. It just may not be worth taking possession.

In addition to clean-up costs, a secured creditor must also consider the potential statutory civil liability which may arise for loss or damage resulting from pollution that leaches onto surrounding properties.

It is critical to remember that environmental concerns should be determined prior to taking possession. Depending upon the risks, the secured creditor may hire an environmental consultant to conduct an environmental audit to assess the potential environmental liabilities.

19.8. Sale of assets

Please refer to Module 12 "Value Assets, Research Methods of Sale", and Module 13, "Realization of assets."

19.9. Final steps

19.9.1. Relinquishing possession

The normal terms of a sale by a receiver are absent of any representations as to title, description or condition of the assets, i.e., there are no warranties and the assets are sold on an "as is, where is" basis.

The receiver sells his right, title and interest in the assets. The onus is on the purchaser to make sure that he is satisfied with respect to the terms of the sale. As such, he is permitted all reasonable opportunity to inspect the assets. Also, the purchaser is responsible for payment of any applicable taxes and ensuring that the receiver has obtained the necessary clearance certificates.

The receiver can only sell those assets to which the debtor has title, charged by the security instrument; he is in no better position than the debtor and cannot undertake a sale when he has no title to the assets which he is selling.

19.9.2. Statement of Receipts and Disbursements

The receiver is responsible for preparing his Statement of Receipts and Disbursements. This statement will provide a detailed breakdown of all funds received throughout the receivership process along with the associated realization and/or operating expenses. Also, the statement will incorporate payouts to any creditors with competing security rights, along with a list of any assets which have yet to be realized on.

This statement would be incorporated with any reporting to relevant stakeholders as discussed below.

19.9.3. Reporting to stakeholders (client, court, creditors, etc.)

BIA s. 246

The frequency of reporting, as well as to whom to report, are usually outlined in the Letter of Appointment (private appointment) or the Court Order (court appointment).

In most estates, the receiver would limit his reporting to the court or secured lender as required under the BIA. However, there are instances where further reporting may be required. Specifically, in Ontario, under the *Personal Property Security Act,* certain rights available to other creditors are outlined. Other provinces may have similar legislation, and you are advised to review your provinces companies' and/or PPSA legislation to determine any specific mandatory procedures.

Depending on the complexity of the appointment, your clients' reporting requirements may vary. It is important to provide your client with the basic information required to update him on the progress to date or to finalize the estate if it is a final report. You should be concise, factual and timely.

In those instances where there are other secured lenders holding subordinate security on assets under the receiver's control, they should be advised of actions that would directly impact them. A typical instance would be when assets are sold for an amount less than what is owed to the primary security holder.

A court-appointed receiver will conclude his appointment by preparing a report and circulating these documents to all those who have an interest in the matter. Presumably, this would include all of the estate's creditors and the court. It may also be necessary to provide this information if the receiver resigns or is replaced prior to the conclusion of the estate.

A court-appointed receiver has a broader obligation to be accountable than does the privately appointed receiver. This is because the court-appointed receiver has a duty to all of the creditors as opposed to a specific secured lender.

19.9.4. Taxation

The court may order the receiver to submit the Statement of Accounts to the court for review on receipt of an application by the Superintendent, the insolvent person, the Trustee (in the case of a bankrupt) or a creditor. This application must be made within six months after the

Statement of Accounts was provided to the Superintendent. This means that the court, through the taxation process, will confirm or adjust the amount of the billing. This process acts to ensure that the creditors have received value for their money and that the receiver's charges are reasonable. The court can question the receiver regarding his services and can reduce his billings if it is found that the receiver acted outside his mandate or billed for services which were not required of him, or that the charges were excessive.

The privately appointed receiver submits his final billing to his client for approval. If the client is dissatisfied with the billing, he would normally address it directly with the receiver. However, there are provisions in certain provinces for the fees of a privately appointed receiver to be taxed by the court or a "Taxing Master." Taxing Masters are normally senior lawyers who are appointed by the court to act in this capacity. You should check within your own jurisdiction to determine whether or not the court will tax the fees of a privately appointed receiver.

19.9.5. Clearance certificates

The receiver is required to keep books and records of accounting in order to prepare returns and calculate taxes payable. This obligation is set out in legislation such as the *Income Tax Act*, the *Excise Tax Act*, and various provincial acts such as *Provincial Retail Sales Tax Acts*.

Clearance certificates must be requested from the Receiver General and/or Provincial Minister of Revenue before the receiver can distribute any property under his control. If a clearance certificate is not obtained, the receiver may be found personally liable for any unpaid taxes, interest and penalties, without limitation on the personal liability up to the value of the property distributed.

19.9.6. Discharge

Whether the receiver is privately or court-appointed, he must be formally discharged once his functions have been completed. E. Bruce Leonard in his *Guide to Commercial Insolvency in Canada* states:

> "The successful passing of accounts by a court-appointed receiver and the submission of a Final Statement of Receipts and Disbursements by a private receiver to his appointing creditor results in the discharge of the receiver from his position as receiver.
>
> In the case of a court-appointed receiver, the court may require that the notice of the receiver's application for discharge be distributed to interested or affected parties. Once this is done, the discharge will then act to absolve the receiver from any future actions by aggrieved parties."

Leonard goes on to say that the privately appointed receiver enjoys no such luxury and:

> "Generally speaking, a privately appointed receiver can be protected from the claims of other creditors with interests in the administration only through their consent to the receiver's accounting of his administration."

And further:

“By and large, however, the obligations of a private receiver will continue after the conclusion of his administration; consequently, privately appointed receivers generally will request indemnities from their appointing creditors which will continue to apply after the distribution of the assets in their hands.”