

Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. <i>Distribution List</i>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

BANKRUPTCY AND INSOLVENCY LAW OF CANADA

L. W. Houlden, G. B. Morawetz, Janis Sarra

Release 2022-4, April 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in October 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the October 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

THOMSON REUTERS CANADA®

Customer Support

1-416-609-3800 (Toronto & International)

1-800-387-5164 (Toll Free Canada & U.S.)

Fax 1-416-298-5082 (Toronto)

Fax 1-877-750-9041 (Toll Free Canada Only)

E-mail CustomerSupport.LegalTaxCanada@TR.com

This publisher's note may be scanned electronically and photocopied for the purpose of circulating copies within your organization.

This resource contains the complete text of the *Bankruptcy and Insolvency Act* and Rules, the *Companies' Creditors Arrangement Act*, the *Farm Debt Mediation Act*, the *Wage Earner Protection Program Act* and the *Winding-Up and Restructuring Act*. The section-by-section and rule-by-rule case annotations and commentary provide an extensive and detailed resource tool for insolvency lawyers, trustees, receivers and liquidators. The collection of Policy Documents, Model Orders, Forms and Precedents provide additional practice guides to make it the most complete resource for the professional.

What's New in this Update:

This release features valuable updates to the commentary annotating the *Bankruptcy and Insolvency Act* — Part VI: Bankrupts; Part VII: Courts and Procedure; Part IX: Miscellaneous Provisions; and Part XI: Secured Creditors and Receivers. This release also features an update to the commentary annotating the *Companies' Creditors Arrangement Act* — Part II: Jurisdiction of Courts, and Part III: General. Also featured are updates to the *Wage Earner Protection Program Act* and the General Directives found in Appendix A.

Case Law Highlights

- **Bankruptcy and Insolvency Act — Debts not Released by an Order of Discharge — Debt or Liability for Obtaining Property or Services by False Pretences or Fraudulent Misrepresentation** — The Court of Appeal for Ontario considered an exception to the principle that a discharge from bankruptcy releases the bankrupt from pre-bankruptcy debts or liabilities. The exception, found in s. 178(1)(e) of the *BIA*, encompasses “any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation.” In this case, the respondent successfully sued the appellant and others for misappropriating trade secrets and confidential information. Before a hearing could take place to determine the quantum of the damages, the appellant became bankrupt. The motion judge declared that the debt under the trial judgment arose from the appellant having obtained property or services by false pretences and thus would survive discharge. The Court of Appeal for Ontario disagreed, setting aside the decision of the motion judge and considering the exception set out in s. 178(1)(e). The Court of Appeal concluded that the motion judge erred in law in coming to the conclusion that the debt or liability arising under the trial judgment fell within s. 178(1)(e). Justice Zarnett stated that at the core of the concept of false pretences is the making of a deceitful statement. For s. 178(1)(e) to apply, the debt must have resulted from the bankrupt having obtained property or services by making such a statement. No matter how reprehensible telling falsehoods on examination for discovery may be, it does not turn a debt or liability into one resulting from obtaining property or services by deceitful statements. Furthermore, the section applies to certain specific conduct that is morally objectionable; it does not equate all morally objectionable commercial conduct with false pretences. Justice Zarnett held that reading s. 178(1)(e) with the benefit of the definition of false pretences in the

Criminal Code illuminates its core concept: it only applies to a debt or liability that has arisen from one or more deceitful statements, by the debtor or for which the debtor is responsible, on the basis of which the debtor obtained services or property. It does not apply to other kinds of lying or wrongdoing, no matter how morally objectionable, that do not have these basic characteristics: *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 CarswellOnt 19606, 2021 ONCA 925 (Ont. C.A.); *Alberta Securities Commission v. Hennig*, 2021 CarswellAlta 3149, 95 C.B.R. (6th) 192, 2021 ABCA 411 (Alta. C.A.). [Editor's note: Houlden & Morawetz Newsletter Issue 2022-04 included commentary on the recent decision of the Court of Appeal of Ontario in *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 CarswellOnt 19606, 2021 ONCA 925 (Ont. C.A.) which also addressed s. 178(1) of the *BIA*].

- **Bankruptcy and Insolvency Act — Courts and Procedure — Appeals — Stay of Proceedings Pending Appeal** — The Manitoba Court of Appeal reviewed the test for cancelling a stay of proceedings pending appeal under s. 195 of the *BIA*. The Court of Appeal held that the factors to consider on an application to cancel a stay are the merits of the appeal and the relative prejudice to parties, including whether irreversible harm would be suffered if the stay is not cancelled and consideration of the interests of justice generally. The Court found that the receiver was appointed by the court for the benefit of all stakeholders and the judge correctly articulated the applicable law regarding discharge of a receiver and in this case, it was clear that there were a number of issues that had yet to be determined in the receivership. The Court of Appeal held that the relative prejudice weighed in favour of cancelling the stay because if the stay was not lifted, the sale agreement would come to an end. The Court held that the stay should be cancelled notwithstanding that cancelling it would effectively frustrate parts of the appeal. There was lack of merit to the appeal, and in balancing prejudice, the Court determined that it was in the interest of justice to lift the stay: *White Oak Commercial Finance, LLC v. Nygård Holdings (USA) Limited*, 2020 CarswellMan 939, 2020 MBCA 128 (Man. C.A.).

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView-generated PDFs of entire sections and pages