

Discharge of Bankrupt

Harry Fogul and Douglas Palmateer, Aird & Berlis LLP

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This practice note provides an overview of the process and effects of discharging a bankrupt, which can occur automatically or by application under the Bankruptcy and Insolvency Act.

For information on personal bankruptcy, see the Personal Bankruptcy Resource Kit.

Introduction

An individual who is bankrupt remains a bankrupt until that individual is discharged from bankruptcy. The making of a bankruptcy order against, or an assignment by, a person operates as an application for discharge (*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), s. 169(1)). A bankrupt's debts are not released until the bankrupt is discharged. In the case of a first-time bankrupt, the discharge is automatic unless there is an opposition filed or unless the bankrupt has a large personal income tax debt. Certain types of debts enumerated in the BIA are not released and remain a liability until they are paid or settled (see practice note: Bankrupt's Debts upon Discharge). These debts are set out in s. 178(1) of the BIA.

Discharge

Since the bankruptcy order or assignment operates as an application for discharge, the bankrupt is not required to file any application or notice of motion to activate the process (BIA, s. 169(1)). The trustee is required to notify the Superintendent of Bankruptcy, the bankrupt and the bankrupt's creditors, who have proved a claim, of an impending discharge at least 15 days before the date of the bankrupt's automatic discharge (BIA, s. 168.1(4)). On an application for discharge made by the bankrupt (see precedent: Application (Discharge of Bankrupt) (Bankrupt) (ON)) or the trustee (see precedent: Application (Discharge of Bankrupt) (Trustee) (ON)), the trustee is required to notify the Superintendent of Bankruptcy, the bankrupt and every known creditor of the hearing of the application, at least 15 days before the hearing date (BIA, s.169(6)) (see form: Notice of Hearing for Bankrupt's Application for Discharge (Form 81)).

A discharge can be opposed by the Superintendent of Bankruptcy, a creditor or the trustee. The opposing party must give a notice of opposition to the other interested parties and the bankrupt, setting out the grounds for the opposition (BIA, s. 168.2(1)) (see precedent: Notice of Opposition (Discharge of Bankrupt) (ON)).

Once an opposition is filed, the trustee is required to apply without delay to the court for an appointment for the hearing of the opposition unless the matter is to be dealt with by mediation under BIA, s.170.1 (BIA, s. 168.2(2)) (see practice note: Discharge: Mediation).

If the bankrupt has not been discharged by the time the trustee is applying for its discharge, the trustee must on 5 days' notice to the bankrupt apply for a discharge date (BIA, s. 169(2)).

Although the BIA states that the hearing must be held within 30 days after the date on which the appointment is made or any later time that may be fixed by the court at the bankrupt's or trustee's request, if the Registrar is back-

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logged with cases, the discharge hearing may not be heard for many months after the appointment is made (BIA, s. 168.2(2)) (BIA, s. 169(2)).

In Toronto, if a half or a full day is required, a special request form has to be completed. In cases where one or more days are required, a 9:30 a.m. appointment needs to be scheduled before a Commercial List judge, who will decide whether the registrar or a judge on the Commercial List will hear the matter (see form: Commercial List: 9:30 A.M. Hearing Request Form (ON)). In all other cases the Registrar in bankruptcy hears the applications for discharge.

Prior to the court hearing, the trustee is required to file a report (see precedent: Report of Trustee on Bankrupt's Application for Discharge (Form 82)) pursuant to s. 170 of the BIA in the following cases:

- if the bankrupt has surplus income;
- if an opposition to the discharge of the bankrupt is filed;
- if the bankrupt has been previously bankrupt; or
- if a court hearing of the discharge is required.

The report is prepared in the 8th month after the date of bankruptcy, if the bankrupt has no surplus income but an opposition is filed, or in the 20th month after the date of bankruptcy, if the bankrupt has surplus income and an opposition is filed or a hearing is required due to the size of the bankrupt's tax debt (Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (the "General Rules"), r. 121.1(2)(a)).

In the case of an individual who has been previously bankrupt and there is an opposition, the report is prepared in the 23rd month after the date of bankruptcy, if there is no surplus income or during the 35th month after the date of bankruptcy, if there is surplus income and an opposition is filed or a hearing is required due to the size of the bankrupt's tax debt (General Rules, r. 121.1(2)(b)).

In the case of an individual not entitled to an automatic discharge, the trustee's report shall be prepared not less than 10 days and not more than 60 days before the court hearing (General Rules, r. 121.1(2)(c)).

The report has to deal with the following matters as set out in BIA, s. 170(1):

- the affairs of the bankrupt;
- the causes of the bankruptcy;
- the manner in which the bankrupt has performed the duties imposed on him/her under the BIA or obeyed the orders of the court;
- the conduct of the bankrupt both before and after the date of the initial bankruptcy event;
- whether the bankrupt has been convicted of any offence under the BIA; and
- any other fact, matter or circumstance that would justify the court in refusing an unconditional order of discharge.

The report has to be accompanied by a resolution of the inspectors declaring whether or not they approve or disapprove of the report, and if disapproved, the reasons for the disapproval (BIA, s. 170(1)).

The trustee's report is to be sent to the Superintendent of Bankruptcy, to the bankrupt, and to each creditor who requested a copy not less than 10 days before the court hearing. The report must be filed with the court at least two days before the hearing (BIA, s. 170(2)).

The Superintendent of Bankruptcy is entitled to file a report with the court, if it chooses to do so (BIA, s. 170(3)).

The report of the trustee is evidence of the statements contained in the report (BIA, s. 170(5)).

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If the bankrupt intends to dispute any statement in the trustee's report, the bankrupt has to give notice in writing to the trustee, specifying the statements in the report that the bankrupt intends to dispute (BIA, s. 170(6)).

A creditor who intends to oppose the bankrupt's discharge on grounds other than those set out in the trustee's report is required to file a notice of intended opposition setting out the grounds for the opposition at or before the discharge hearing (BIA, s. 170(7)) (see precedent: Notice of Opposition (Discharge of Bankrupt) (ON)).

At the discharge hearing the bankrupt will usually give evidence and be cross-examined. The opposing creditor or other parties may also give evidence. The trustee will usually not give evidence unless its report is challenged.

Automatic Discharge

In the case of a bankrupt who has never previously been bankrupt before (see flowchart: Personal Bankrupt Discharge Flowchart (First-Time Bankrupt)), other than a bankrupt who has \$200,000 of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims, the bankrupt will be automatically discharged, if:

- on the expiry of 9 months after the date of bankruptcy, unless an opposition to the discharge has been filed or the bankrupt is required to make surplus income payments pursuant to s. 68 of the BIA; or
- on the expiry of 21 months after the date of bankruptcy, unless an opposition to the discharge has been filed before the automatic discharge takes effect (BIA, s. 168.1(1)(a)).

In the case of a bankrupt who has been previously bankrupt (see flowchart: Personal Bankrupt Discharge Flowchart (Second or Third-Time Bankrupt)), the bankrupt will be automatically discharged:

- on the expiry of 24 months after the date of bankruptcy, unless within the 24 month period, an opposition to discharge has been filed or the bankrupt is required to make surplus income payments pursuant to s. 68 of the BIA; or
- on the expiry of 36 months after the date of bankruptcy, unless an opposition to the discharge has been filed before the automatic discharge takes effect (BIA, s. 168.1(1)(b)).

Jurisdiction of the Registrar to Hear Opposed Discharges

The powers of the Registrar are set out in BIA, s. 192(1). The specific power to deal with the discharges is set out in BIA, s. 192(1)(c). The Registrar can deal with both unopposed and opposed discharges. A judge can also hear discharges by virtue of BIA, s. 192(2).

Role of the Trustee on a Discharge Application

The trustee is required to file a report with the court with respect to each discharge application that is not automatic (BIA, s. 170) (see section above titled "Discharge" for further details). The trustee can oppose the bankrupt's discharge in its report or the trustee can file a separate notice of opposition. The trustee will usually attend a discharge hearing when the discharge is opposed. Although the trustee's report is evidence, the trustee may give evidence in person at the discharge hearing particularly if some of the statements in the trustee's report are challenged by the bankrupt.

Early Application

A bankrupt can apply for discharge before the expiration of the 9-month period (BIA, s. 168.1(2)). This can usually only be done if there is no opposition to the discharge, and there is a compelling reason why an early discharge is required. An example is a case where the bankruptcy has an effect on the ability of the bankrupt to earn a living

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such as a real estate broker who cannot have a broker's licence while bankrupt, or a lawyer who cannot operate his own trust account while bankrupt.

*Current as of: **04/09/2024***

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