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*Established in 1871*



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## **INSOLVENCY**

**Insolvency means that there is not enough money to pay everyone. However, through expert planning and appropriate responses to insolvent situations, the effects of insolvency on particular creditors can be reduced or even negated. The aim of the Insolvency Group is to guide clients through the rocky shoals of financial adversity with as little damage as possible. This requires a broad knowledge of law and procedures, including debtor/creditor law (judgments, garnishment, seizure and sale of goods, and court sales of land), bankruptcy, creditor protection and reorganizations (including CCAA and BIA proposals), foreclosures, receiverships, consumer protection laws, personal property security law, builder's liens and the relative priorities of various types of claims (secured, unsecured and super priority government claims).**

Just as important is the experience to know which laws and procedures to invoke for each situation. The Insolvency Group has acted for every major chartered bank, most financial institutions, various insolvency professionals (such as trustees in bankruptcy and receivers), private lenders, mortgage insurers and other law firms who refer work they are unable to do or retain the firm to assist with their debts.

The insolvency lawyers at RBS are recognized as leaders in the legal community. The Insolvency Group is asked to and regularly present seminars, articles and teaching sessions to other members of the legal profession on insolvency-related topics. Lawyers of our firm regularly contribute to the Continuing Legal Education Society of BC resources in this area.

### **Foreclosures**

As counterweight to its active mortgage lending practice, RBS has a long history of providing mortgage collection services to various institutional and private clients, concerning both residential and commercial loans. The firm also acts for mortgagors facing foreclosure, who need appropriate advice and often more time to deal with their problems than lenders are inclined to allow.

Foreclosures involve a combination of repeated procedures and individual circumstances. They are also constrained by certain inflexible rules, such as the



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courts setting redemption periods and allowing lenders recovery of only a fraction of their legal costs, which often frustrate lenders. It requires skill and experience to guide lenders through foreclosures while maximizing their recovery and minimizing the impact of such rules. Above all, foreclosures require an ability to quickly assess unpromising situations and select the correct roadmap to the best available result.

The Province of British Columbia retained RBS to draft the Prescribed Standard Mortgage Terms, which were then incorporated into provincial legislation to be available for general use in mortgages in the province. The Insolvency Group employs the same level of expertise in addressing mortgage defaults.

### **Collections**

Collections are generally undertaken when there is no security, such as a mortgage or personal property security agreement that secures a debt. Absent the rare situation in which an insolvent debtor can somehow manage to pay an unsecured debt by, for example, borrowing money, collections usually involve starting a court action to obtain a judgment that can then be enforced by garnishment or seizure or, in rarer cases, by starting the process of selling land under court supervision. While the collections process can result in a successful recovery of the debt, the process is generally afflicted by the time and expense required to go through a lengthy court action to get a judgment and the difficulties of trying to enforce the judgment against the debtor's assets. There is a considerable danger of spending money on legal fees without producing a return in a process that almost seems designed to ensure creditors remain unpaid. While anyone can perform various collection tasks, it takes skill and expertise to do so productively.

### **Bankruptcy**

Bankruptcy involves a separate universe set up by the federal government in an attempt to reconcile two competing objectives: the rehabilitation of unfortunate debtors and the orderly payment of creditors. Due to the intricate maze of unique rules and procedures established by the *Bankruptcy and Insolvency Act* (BIA), insolvency lawyers sometimes divide the world into pre- and post-bankruptcy. This is as specialized a world as the *Income Tax Act* creates and requires extensive experience to traverse. The world of bankruptcy is flanked by legislative adjuncts such as the *Companies Creditors Arrangement Act* and the proposal provisions of the BIA, both of which are unique worlds that sometimes interact with the world of

bankruptcy. Not only are there many unique procedures within bankruptcy law but there are often different priority rules so a creditor with a claim of a certain ranking before bankruptcy might find that it has a different priority position after bankruptcy. This is not a self-help area and requires extensive expertise to function in effectively.

### **Secured transactions**

Secured transactions is the term given to security involving personal property (basically, every type of property except land). Instead of foreclosing on a mortgage to collect a debt (as with land), creditors look for personal property to satisfy their claims. Usually remedies involving personal property security are exercised without court involvement, unless there is the need to appoint a receiver over a business or a complicated group of assets, or the court's direction or supervision is required.

Most secured transactions in British Columbia are regulated by the *Personal Property Security Act* (PPSA). Remedies typically exercised under the PPSA are the seizure and sale of goods, the collection of accounts receivable and the sale of investment property pledged to secure debts. Each type of personal property involves different strategic factors and realization procedures. Again, this is a very technical area requiring extensive experience.

The world of secured transactions also includes realizations on vessels under the *Canada Shipping Act*, security granted to banks under the *Bank Act*, and to some extent intellectual property falling in mixed fashion under the PPSA and the federal *Patent Act*, *Trademark Act* and *Copyright Act*. Other federal legislation such as the BIA and the *Farm Debt Mediation Act* might also come into play.

RBS highly recommends securing your debts before insolvency occurs. Secured debts are repaid far more often and in higher proportions than unsecured debts. It is best to secure debts from the outset. The next best option is to secure previously unsecured debts once hints of possible insolvency appear and before debtors start to avoid contact with creditors. The Insolvency Group can put in place security in myriad situations to alleviate the effect of insolvency on creditors and help you navigate through the pitfalls of fraudulent conveyances and preferences on your way to a better priority position.

Included in the firm's extensive involvement with the PPSA is the drafting of several legislative amendments for the provincial government. RBS has also written for the BC Annual Review of Law and Practice, annually summarizing important

developments under the PPSA across Canada (each province has its own PPSA) since 2002.

### **Creditor protection proceedings**

Creditors are often greatly surprised when notified that debtors have sought protection either under the *Companies Creditors Arrangement Act* or by filing either an individual or commercial proposal under the BIA. The first concern is usually the creditor's resulting position. What options are available to the creditor? What are the chances of being paid? The Insolvency Group can advise you what, if anything, can be done and what will be involved in entering the fray. Creditor protection proceedings generally result in a few creditors being paid while the rest are not or receive only pittance. There is usually a danger of wasting considerable time and money in these proceedings by attempting to collect the uncollectible.

### **What the Insolvency Group can do for you**

The Insolvency Group will first assess your situation. The firm's years of experience allow it to quickly review and analyze the insolvent circumstances, determine how they affect you and then present the options available. It is important to start on the correct road and avoid "throwing good money after bad." Spending an hour with the firm's lawyers at the start ensures that you will accurately understand the situation and what remedies might be available and, just as importantly, what you should not do. RBS will then prepare a strategy that fits your objectives into the realistically available possibilities.

For troubled businesses, the Insolvency Group will present opportunities that will allow you to continue in business and deal with crushing debt, including creditor protection proceedings, voluntary proposals, implementing delays pending the arrival of assistance, negotiations with creditors, and related advice on who to pay first and alleviating the burden of guarantees and protection of individuals behind corporations and their assets.