

NOVA SCOTIA BAR REFRESHER
22 JANUARY 1993 from 2:10pm to 2:30pm
(Chateau Halifax Bluenose Room)

BANKRUPTCY AND INSOLVENCY

Ronald B. Twohig, O.C.
Assistant Superintendent of Bankruptcy
Consumer and Corporate Affairs Canada

QUESTION: "I just supplied goods to someone who has just gone bankrupt.- What are my options?"

1.01 UNPAID SUPPLIERS - DEFINITION

For purposes pursuant to section 81.1 of the Bankruptcy and Insolvency Act, an unpaid supplier is a person who has delivered goods or materials to a purchaser and has not been paid in full for the goods delivered.

1.02 SUPPLIERS' RIGHT TO REPOSSESS

Under the Bankruptcy and Insolvency Act, a supplier has the right to repossess, at his own expense, unpaid *goods that were sold and delivered to a purchaser, if the purchaser is bankrupt or in receivership and where the following conditions exist:

- 1) the supplier has demanded repossession, in writing, within 30 days after delivery of the goods;
- 2) the goods are in the possession of the purchaser, the trustee or the receiver;
- 3) the goods are identifiable, in the same state as when delivered, and not fully paid for;
- 4) the goods have not been resold at arm's length, and are not subject to any agreement for sale at arm's length; and
- 5) the purchaser, trustee or receiver, has not paid the outstanding amount forthwith upon presentation of the written demand. (Section 81.1, Rules 96, 96.1)

* Goods in this section include products of agriculture, products of the sea, lakes and rivers, and products of aquaculture.

1.03 THIRTY DAY PROVISION

The Act allows a supplier 30 days, from the date on which the unpaid goods were sold and delivered to the purchaser, to make written demand for repossession on the purchaser, the trustee or the receiver.

For purposes of section 81.1(2), in the case of a purchaser who is bankrupt, the date of bankruptcy is deemed to be the date on which the purchaser became bankrupt and pursuant to subsection (3) there is no retroactivity to the date of filing of notice of intention, proposal or petition for receiving order.

The time between the filing of a notice of intention to file a proposal, or the filing of a proposal if no notice of intention was filed, or the filing of a petition for a receiving order and the date the purchaser becomes bankrupt will not be counted when calculating the thirty day period mentioned above. (Section 81.1(4))

Once the supplier's right to repossess is conceded by the trustee or the receiver, the supplier will have to repossess within 10 days, unless this period is extended by mutual agreement. (Section 81.1(5))

Where the goods have been partially paid for, repossession of a portion of the goods delivered will be permitted, or if the partial payment made is reimbursed to the purchaser, trustee or receiver, the supplier may repossess all of the goods. (Section 81.1(2))

The supplier's right to repossess will rank ahead of any other claim against the goods, other than the right of a bona fide subsequent purchaser, who did not have notice that the supplier had demanded repossession of the goods. (Section 81.1(6))

The purchaser, trustee or receiver may apply to the court for direction in relation to any matter in this section and the court will give written directions as it considers proper. (Section 81.1(7),(9))

A supplier may apply to the court for an order, if the supplier has been aggrieved by any act, omission or decision of the purchaser, trustee or receiver. (Section 81.1(8),(9))

A supplier can exercise any right of recovery under provincial law. (Section 81.1(11))

UNPAID FARMERS, FISHERMEN AND AQUACULTURISTS (Sec. 81(2))

1.04 PURPOSE OF SECTIONS OF THE ACT RELATED SPECIFICALLY TO FARMERS, FISHERMEN AND AQUACULTURISTS

The purpose of these sections is to protect farmers, fishermen and aquaculturists who are unable to repossess their goods as unpaid suppliers because their goods have been immediately processed or resold.

The claim of a farmer, fisherman, or aquaculturist is secured for the unpaid amount by a charge on all of the purchaser's inventory and has priority over every claim except an unpaid supplier's right under the Act.

1.05 DEFINITIONS Section 81.2(2)

FARMER - includes the owner, occupier, landlord, and tenant of a farm.

FARM - means land in Canada used for the purpose of farming, which term includes livestock raising, dairying, bee-keeping, fruit growing, the growing of trees and all tillage of the soil.

PRODUCT OF AGRICULTURE - includes grain, hay, roots, vegetables, fruits, other crops and all other direct products of the soil, and honey, livestock (whether alive or dead), dairy products, eggs and all other indirect products of the soil.

FISHERMAN - means a person whose business consists in whole or in part of fishing.

FISHING - means fishing for or catching fish by any method.

FISH - includes shellfish, crustaceans, and marine animals.

PRODUCTS OF THE SEA, LAKES AND RIVERS - includes fish of all kinds, marine and freshwater organic and inorganic life, and any substances extracted or derived from any water, but does not include products of aquaculture.

AQUACULTURIST - includes the owner, occupier, landlord and tenant of an aquaculture operation.

AQUACULTURE OPERATION - means any premises or site where aquaculture is carried out.

AQUACULTURE - means the cultivation of aquatic plants and animals.

AQUATIC PLANTS AND ANIMALS - means plants and animals that, at most stages of their development or life cycles, live in an aquatic environment.

PRODUCTS OF AQUACULTURE - includes all cultivated aquatic plants and animals. (Section 81.2(2))

1.06 CLAIMS OF FARMERS, FISHERMEN AND AQUACULTURISTS FOR UNPAID GOODS DELIVERED TO PURCHASER

A farmer, fisherman, or aquaculturist who has sold and delivered goods to a purchaser, for use in the purchaser's business, within 15 days of the day on which the purchaser became bankrupt or was placed in receivership, is secured by a charge against all of the inventory of the purchaser and has priority over every other creditor with the exception of an unpaid supplier's right to repossess 30 day goods. (Section 81.2(1), Rule 96.2)

If the trustee or receiver takes possession or in any way disposes of inventory covered by the charge, the trustee or receiver is liable for the claim of the farmer, fisherman or aquaculturist to the extent of the net amount realized on the disposition of that inventory after deducting the cost of realization and is subrogated in and to all rights of the farmer, fisherman or aquaculturist to the extent of the amounts paid to them by the trustee or receiver. (Section 81.2(1))

The right of the farmer, fisherman and aquaculturist is exercised by filing a proof of claim with the trustee or receiver within thirty days after the purchaser becomes bankrupt or is placed in receivership. (Section 81.2(1)(d))

A farmer, fisherman or aquaculturist is not precluded from:

- 1) making a claim under Section 81.1, to repossess goods as an unpaid supplier; or
- 2) any right that that person may have had under the law of a province. (Section 81.2(5))

RULE 96.1 The written demand for repossession that may be presented by a supplier to a purchaser, trustee or receiver pursuant to paragraph 81.1(1)9a) of the Act shall be in Form 63.1 of Schedule III.

FORM 63.1

DEMAND FOR REPOSSESSION OF GOODS
(Paragraph 81.1(1)(a))

IN THE MATTER OF THE BANKRUPTCY (OR RECEIVERSHIP) OF

(NAME OF PURCHASER IN BANKRUPTCY OR RECEIVERSHIP OF)

TO: (Name of the Trustee or Receiver of the Purchaser)

I, (Name of Unpaid Supplier,) of (the address of the unpaid supplier) supplier, hereby demand access to and repossession of the goods described below, which were sold and delivered to (Name of the Purchaser), the purchaser, on the dates and in accordance with the terms indicated in the attached documents:

(Attach copies of documents of sale (i.e., invoices, delivery slips, ect.) and provide a description of the goods that is sufficient to enable them to be identified.)

The purchaser,

having made an assignment that was filed with the Official Receiver on the (day, month and year)

(OR having been declared bankrupt by a receiving order made on the day, month and year)

(OR a receiver having been appointed in respect of the purchaser's property on the day, month and year)

the trustee (or receiver) is required to release the goods described above in accordance with subsection 81.1(1) of the Bankruptcy and Insolvency Act.

DATED at (address of the place dated) this (day, month and year).

(signed)

(Name of Supplier)

RULE 96.2 The proof of claim that may be filed by a farmer, fisherman or aquaculturist with a trustee or receiver pursuant to subsection 81.2 of the Act shall be in Form 61 of Schedule III.

FORM 61

PROOF OF CLAIM

(Subsection 50.1(1), paragraphs 51(1)(e) and 66.14(b)
and subsections 81.2(1), 102(2), 124(2) and 128(1))

.....(GENERAL PROOF OF CLAIM FORM).....

.....C. CLAIM BY A FARMER, FISHERMAN, OR AQUACULTURIST

THAT I hereby make a claim under subsection 81.2(1) of the Bankruptcy and Insolvency Act for the unpaid amount of \$ _____

(ATTACH A COPY OF SALES AGREEMENTS AND DELIVERY DOCUMENTS.)

1.07 RANKING OF CLAIMS

The ranking of claims is as follows:

- 1) Unpaid suppliers' right to repossess;**
- 2) Claim of farmers, fishermen, and aquaculturists (charge against inventory);**
- 3) Federal or provincial government claims for source deductions;**
- 4) Secured creditors claims;**
- 5) Other creditors (preferred and other unsecured).**

1.08 TRANSITIONAL PROVISIONS

Sections relating to rights of unpaid suppliers, farmers, fishermen and aquaculturists only apply to goods and products delivered after the coming into force of Sections 81.1 and 81.2. (30 NOVEMBER 1992)

**OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY
TELEPHONE TOLL LINES FOR NATIONAL SEARCHES**

BANKRUPTCY AND RECEIVERSHIP SEARCHES

Telephone Number: 1-819-953-0903

Facsimile Number: 1-819-953-3345