

BANKRUPTCY & INSOLVENCY

LAWS 2081

Schulich School of Law
Dalhousie University

Fall 2018

Colin Jackson

COURSE SYLLABUS

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I. Overview

While bankruptcy is a very old area of law – tracing its roots back to Roman or even Babylonian law – it has only in the past 30 or 40 years attracted the attention of legal scholars in common law jurisdictions. The increased attention given to bankruptcy and other insolvency regimes may be attributable to the collapse of several large corporations in that time or to the rise of consumer credit and the corresponding increase in consumer bankruptcies.

Large law firms and legal academia alike have begun to appreciate that the risk of insolvency forms the backdrop for nearly all of corporate and commercial law. Moreover, insolvency regimes in Canada generate constitutional questions, interact with family law, environmental law, consumer law, tax law, tort law and many others.

In this brief introductory course, we will not be able to fully explore the breadth and depth of insolvency law. However I aim to leave you with the framework and skills to facilitate your future studies or work in this area and with an appreciation of how important, dynamic, challenging, and fun(!) the law and policy of insolvency regimes can be.

II. Learning Objectives

This course aims to help you develop the following knowledge and skills:

- You will understand the fundamentals of the Canadian insolvency regime, including the actors, institutions, and processes in the system and the major options available to insolvent debtors and their creditors.
- You will be familiar with the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*.
- You will be familiar with the policies underlying insolvency law, including the different frameworks for insolvent corporations and individuals, and will be able to apply these policy considerations to recommend reforms and to evaluate proposed reforms.
- You will continue to develop your professional identity, and be familiar with the issues of ethics and professional responsibility entailed in the practice of insolvency law.
- You will continue to develop your ability to read and analyze judicial decisions.
- You will continue to develop your legal writing ability.
- You will develop skills related to multi-party negotiation

III. Course Materials & Bibliography

There is no required text for the course. The key statutes, cases, and other readings will be available on Brightspace.

The key statutes are the following:

Bankruptcy and Insolvency Act, RSC 1985, c B-3 [BIA].

Companies' Creditors Arrangement Act, RSC 1985, c C-36 [CCAA].

The following books are suggested for further reference:

Roderick J Wood, *Bankruptcy & Insolvency Law*, 2d ed (Toronto: Irwin Law, 2015).

(In the library's reference collection and available electronically through the library)

Anthony Duggan et al, *Canadian Bankruptcy and Insolvency Law: Cases, Text, and Materials*, 3rd ed (Toronto: Emond, 2015).

Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c.47 and Beyond* (Markham, Ont: LexisNexis, 2007).

Frank Bennett, *Bennett on Bankruptcy*, 20th ed (Toronto: LexisNexis, 2017).

IV. Coordinates

E-mail: colinjackson@dal.ca

Office: W429

Office Hours: Wednesdays, 2:30 – 4:00

The best way to reach me is via e-mail at colinjackson@dal.ca.

You should feel free to stop by my office, send an e-mail, or stop me in the hall to talk about law. I'll promise to be in my office during the scheduled office hours, and I'm happy to meet with you at other times. If you want to make sure that you catch me, send an e-mail to make an appointment.

V. Course Sessions

The scheduled hours for the course are 3:00–3:50 pm on Mondays and 1:30–2:20 pm on Wednesdays in room 207, starting with Wednesday, September 5th, 2018 and concluding on Monday, December 3rd, 2018.

At this point, I do not anticipate needing to cancel any classes. Should the need arise, I will inform you via e-mail and give you as much notice as possible.

VI. Teaching Format, Preparation, and Class Participation

The course is broken up into blocks, most of which are one week long and cover a topic in Canadian insolvency law. In general, the teaching in each block will make use of four main components: assigned readings (available on Brightspace), a lecture (usually on Monday), review questions (usually available on Brightspace following Monday's class), and an active learning session (usually on Wednesday).

The Monday lecture is intended to provide an overview of the topic as a whole, and not to rehash the week's assigned reading. The Tuesday review questions will help you review the basics of the material covered in both week's assigned reading and the Monday lecture. These are intended to help you evaluate your own understanding and to set the stage for more difficult and complex exercises that will happen during Wednesday's class. The Wednesday active learning session will make use of a variety of pedagogical strategies, but in many cases will take the form of problem-based learning.

What You Should Expect from Me

As teacher, I am committed to working hard to help you succeed in the course. You should expect me to come prepared to class and to lead in creating a positive, challenging, engaging, and inclusive learning environment.

I will ensure that the class begins and ends on time, that I am available to you outside of those hours, and that I respond to your e-mails promptly.

I will endeavour to provide regular feedback to you to help you gauge your progress in the course.

I am committed to improving my skills as a teacher and to improving this course. You should expect me to take seriously the feedback that you give me.

What I Expect From You

I expect you to contribute to the creation of a positive, respectful, and challenging learning environment.

Consistent with the pedagogical approach and the tight schedule of the course, I expect you to come to class on time and prepared. Because we will not always have time to cover the assigned readings explicitly in class, I expect you to take the initiative in resolving any questions you have arising from the readings. (I am happy to answer these questions during or outside of class time; I do **not** expect you to understand everything you read in the course on your own.)

I expect that you will have access to the assigned reading (especially the relevant statutes) during the class.

I expect that you will regularly monitor both the Brightspace site and your dal.ca e-mail for updates related to the class. I have been asked to advise you that you “will be deemed to have received anything sent” to your @dal.ca e-mail address.

I also expect you to make use of both formal and informal methods of providing feedback to me.

VII. Evaluation

Final Exam (60%)

The course will have a 2-hour open-book final exam, which has been scheduled for Thursday, December 20th, 2018. The exam will be set with reference to the assigned readings, classroom discussions, material posted on Brightspace or circulated by e-mail, and the course’s learning objectives.

Professional Engagement (10%)

Among the goals of legal education is helping you develop your professional identity. To that end, part of your mark in this course is allocated to professional engagement.

On **November 19th**, you will submit a short reflection on your professional engagement with the course up to that point. For my part, I consider professional engagement to include punctuality, attendance, and active engagement during our class meetings; preparation for those meetings; respect for the work, and ideas, and time of the others in the course; reflectiveness; and commitment to your own growth and development. Your reflection may touch on some or all of these aspects of professionalism, may include other aspects, or may set out an entirely different view of professionalism. It may also suggest a grade that you believe is consistent with your engagement in the course and with the faculty’s grading standards.

Note that the reflection you submit will not itself be assigned a grade, but will be considered as I assign your professional engagement grade.

Restructuring Simulation (30%)

Over the last three weeks of the course, you will engage in an exercise intended to simulate a (simplified) corporate restructuring under the CCAA. You will represent one of the parties involved in CCAA proceedings and negotiate a plan of arrangement with your classmates. As part of this exercise, you will submit the following:

Strategy Letter (15%)

On **November 26th**, you will submit a letter to your client outlining the client's objectives in the CCAA process, and your proposed strategy for the multi-party negotiations.

Reporting Letter (15%)

On **December 3rd**, you will submit a letter to your client reporting on the outcome of the negotiation. The plan of arrangement that has been agreed upon should be attached.

Grading Guidelines

This course must have a median of 70 – 72 with the following grade distribution:

| | |
|----------------|----------|
| A | 10 – 20% |
| B | 40 – 60% |
| A & B together | 60 – 75% |
| C | 15 – 25% |
| D | 0 – 15% |
| F | 0 – 5% |

VIII. Diversity and Inclusion – Culture of Respect

Every person at Dalhousie has a right to be respected and safe. We believe inclusiveness is fundamental to education. We stand for equality. Dalhousie is strengthened in our diversity. We are a respectful and inclusive community. We are committed to being a place where everyone feels welcome and supported. Please do not hesitate to speak with me if you have questions or concerns, read more about Dalhousie's Diversity & Inclusiveness Strategy at www.dal.ca/cultureofrespect.html, and see dal.ca/dalrespect for further information on resources and supports.

IX. Integrity

All students must read the University policies on plagiarism and academic honesty <http://academicintegrity.dal.ca/> and the Law School policy on plagiarism <http://www.dal.ca/faculty/law/current-students/jd-students/academic-regulations.html>. Any paper or assignment submitted by a student at the Schulich School of Law may be checked for originality to confirm that the student has not plagiarized from other sources. Plagiarism is considered a serious academic offence which may lead to loss of credit, suspension or expulsion from the law school, or even revocation of a degree. It is essential that there be correct attribution of authorities from which facts and opinions have been derived. Prior to submitting any paper or other assignment, students should read and familiarize themselves with the policies referred

to above and should consult with the instructor if they have any questions. Ignorance of the policies on plagiarism will not excuse any violation of those policies.

X. Student Requests for Accommodation

Requests for special accommodation for reasons such as illness, injury or family emergency will require an application to the Law School Studies Committee. Such requests (for example, for assignment extensions) must be made to Associate Dean, Academic Michael Deturbide or the Director of Student Services and Engagement Dana-Lyn Mackenzie as soon as possible, before a scheduled exam or a deadline for an assignment, and will generally require documentation. Retroactive accommodation will not be provided. Please note that individual professors cannot entertain accommodation requests.

Students may request accommodation for either classroom participation or the writing of tests and exams due to barriers related to disability, religious obligation, or any characteristic under the Nova Scotia *Human Rights Act*. Students who require such accommodation must make their request to the Advising and Access Services Center (AASC) at the outset of the regular academic year. Please visit www.dal.ca/access for more information and to obtain the Request for Accommodation – Form A. Students may also contact the Advising and Access Services Centre directly at (902) 494-2836.

XI. Faculty Policy on the Submission of Major Papers and Assignments

Major papers and assignments must be submitted in hard copy. Students should hand papers in to the place stipulated by the instructor and ensure they are date and time stamped. Please read the law school policy on late penalties:

<https://www.dal.ca/faculty/law/current-students/jd-students/academic-regulations.html>

Please note students may also be required to provide an identical electronic copy of their paper to the instructor by the due date. Papers may be submitted by the instructor to a text-matching software service to check for originality. Students wishing to choose an alternative method of checking the authenticity of their work must indicate to the instructor, by no later than the add/drop date of the course, which one of the following alternative methods they choose:

- a) submit copies of multiple drafts demonstrating development of their work
- b) submit copies of sources
- c) submit an annotated bibliography

XII. Schedule of Classes and Readings

Please refer to the table below for important dates and assigned readings for the course. To maximize student learning, I may adjust the schedule and the assigned readings from time-to-time. If so, I will inform you via e-mail with as much notice as possible.

The readings in the list below will be posted on Brightspace, along with other resources that you may find helpful. In some cases, I will also post a note to help you prioritize your reading for the week.

| | Topic | Statutory Provisions | Key Readings (see Brightspace for these and further resources) |
|-------------------------|--|--|---|
| Week 1 – Sept 5 | Introduction | <i>BIA</i> , s 2 “insolvent person” | Course Syllabus |
| Week 2 – Sept 10, 12 | Receivership | <i>BIA</i> , ss 13.4, 47, 243, 244 | <i>Ostrander v Niagara Helicopters</i> <i>Enterprise Cape Breton v Crown Jewel Resort Ranch</i> (set of 3 decisions) |
| Week 3 – Sept 17, 19 | Commencement of Bankruptcy Proceedings | <i>BIA</i> , ss 42, 43, 48, 49, 69.3, 69.4 | <i>Valente v Fancsy Estate</i> <i>Re Barkhouse</i> <i>Vachon v Canada Employment & Immigration Commission</i> |
| Week 4 – Sept 24, 26 | Property of the Estate | <i>BIA</i> , ss 2 “property”, 67, 68, 71, 97(3), 127-134 | <i>Saulnier v Royal Bank of Canada</i> <i>Coopers & Lybrand v Lumberland Fields (Re)</i> |

| | Topic | Statutory Provisions | Key Readings (see Brightspace for these and further resources) |
|-------------------------------|---|--|---|
| Weeks 5 & 6 – Oct 1, 3, 10 | Review of Pre-Bankruptcy Transactions & Executory Contracts | <i>BIA</i> , ss 2 “transfer at undervalue”, 30(1)(c), 84.1, 84.2, 95-98, 146 | <i>Ford Motor Credit v Welcome Ford Sales</i> <i>Aéropostale Canada Corp (Re)</i> <i>Keith G Collins v CIBC</i> <i>Orion Industries v Neil’s General Contracting</i> <i>Re Cameron Estate</i> <i>Truestar Investments v Baer</i> |
| Week 7 – Oct 15, 17 | Proof, Valuation, and Payment of Claims I - Overview | <i>BIA</i> , ss 69.41, 121, 124-126, 135, 136 | <i>Re Weibe</i> <i>Schreyer v Schreyer</i> Tamara Buckwold & Roderick Wood, “Priorities” |
| Week 8 – Oct 22, 24 | Proof, Valuation, and Payment of Claims II - Crown Claims | <i>BIA</i> , ss 67(2)-(3), 86, 87 | <i>Century Services Inc v Canada (AG)</i> |
| Week 9 – Oct 29, 31 | Proof, Valuation, and Payment of Claims III - Environmental Claims | <i>BIA</i> , ss 14.06, 69.6, 81.1, 81.2 | <i>Newfoundland and Labrador v AbitibiBowater</i> <i>Orphan Well Association v Grant Thornton</i> |
| Week 10 – Nov 5, 7 | Discharge from Bankruptcy | <i>BIA</i> , ss 168.1-170, 172-173, 178, 180, 187(5) | <i>Moloney v Alberta</i> <i>Re Schreyer</i> <i>Scotia Mortgage Corp v Berkens</i> |
| Study Break | | | |
| Nov 19 | Professional Engagement - Reflective Self-Assessment Due @ noon (submit on Brightspace) | | |

| | Topic | Statutory Provisions | Key Readings (see Brightspace for these and further resources) |
|-------------------------|---|--|--|
| Week 11 – Nov 19, 21 | Restructuring I - Introduction | CCAA, s 2 “claim, “company”, 9, 11.02-11.04, 11.51-11.52, 11.7 | Nocilla, “The History of the Companies’ Creditors Arrangement Act and the Future of Restructuring Law in Canada” |
| Nov 26 | Restructuring Simulation - Negotiation Strategy Letter Due @ noon (submit on Brightspace) | | |
| Week 12 – Nov 26, 28 | Restructuring II - Operating the Business | CCAA, ss 6, 11.2-11.4, 19, 22, 36, 36.1 | Michael B Rotsztain, “Debtor-in- Possession Financing in Canada: Current Law and a Preferred Approach” <i>Re Northstar Aerospace</i> |
| Dec 3 | Restructuring Simulation - Client Reporting Letter and Plan of Arrangement Due @ noon (submit on Brightspace) | | |
| Week 13 – Dec 3 | Restructuring III / Conclusion | | <i>Re Winalta</i> |
| Dec 20 | Final Exam | | |