

Bad Faith Conduct in Insolvency

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Overview

- Review s. 4.2
- Legal review
- Practical review
- Group polls / discussion

BIA s. 4.2

- Duty of **Good Faith**
- [2019, c. 29, s. 133](#)
- **4.2 (1) Any interested person** in any proceedings under this Act shall act in good faith with respect to those proceedings.
- **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by **any interested person**, the court may make **any order that it considers appropriate** in the circumstances.

Undefined phrases

- “any interested person”
 - Very broad
 - Subject to the rule, but also have rights to apply to court
 - Who would NOT fall under this definition?
- “good faith”
 - How to define
 - Patterns to look out for
 - Practical examples
- “any order” the Court considers appropriate. Examples:
 - section 135(5) of the *BIA*: The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.[\[26\]](#)
 - Courts can also utilize their discretion to make an order under the “[Rules of Civil Procedure](#)”, such as “staying or dismissing a motion that appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.”

Legal Review

- Cases involving s 4.2
 - Re Gregoriou
 - Alberta cases
- Examples of Alberta statutory requirements to act in good faith
- Other legislation / rules

Re Gregoriou, 2024 ONSC 5972

- Motion brought by the bankrupt
 - Former spouse, also a creditor, acting in bad faith
 - Egregious conduct – obvious bad faith
 - Court expunged his proven claim and his notice of opposition to discharge

Relevant Alberta Cases

- CWB Maxium Financial Inc. v. 2026998 Alberta Ltd., 2021 ABQB 137
 - Court provided an 8-point conclusion that is helpful for consideration:
 1. Interested persons in proceedings under the BIA are statutorily required to act in good faith with respect to those proceedings.
 2. A secured creditor seeking a RO is an “interested person”, subject to the good faith requirement, including its conduct in events preceding the application, where that conduct “is factually and temporally connected to the proceedings”.
 3. Good faith in the insolvency context requires that an interested party not bring or conduct proceedings for an oblique motive or improper purpose.
 4. Since the BIA does not define “good faith”, the common law principle of good faith in contractual performance may be used, for example, in respect to the contractual relationship between lender and borrower.
 5. “Good faith” requires the parties not to lie or mislead but does not impose a duty of loyalty or disclosure or require the subordination of one’s own interest to the other. It falls short of a fiduciary duty.
 6. The court has broad discretion regarding remedies under s. 4.2 BIA, which may include denial of a RO.
 7. The conduct of the party alleged to have breached the good faith requirement should be assessed in light of the intent and policy objectives of the BIA.
- Taber Water Disposal Inc. (Re), 2024 ABKB 680

Examples of Alberta statutory requirements to act in good faith

- **Labour Relations Code**
 - General obligation to bargain in good faith
- **Personal Property Security Act**
 - Proper exercise of rights, duties and obligations
 - **66(1)** All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.
 - **(2)** A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.
 - **(3)** The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply

Other Legislation / Rules

- CCAA - similar provision added
- Fraudulent Preferences Act
- General Rules of Court
- Directors' Duties
- Codes of Conduct – Bar / LITs

Practical Discussion

- ARIL articles
- Who typically acts in Bad Faith?
- Practical Limitations
 - Is S. 4.2 being used?
- Other options

ARIL Articles

- **Enough is Enough: Dealing with Bad-Faith Stakeholders in Insolvency Proceedings**
 - *Adam Fisher and Gina Rhodes*[*](#)
- **Good Faith Under the BIA and CCAA: It Depends On Who You Are and Who You Ask**
 - *Julia K Lockhart and Kayla K Strong*

Slido: In your experience, which parties sometimes act in Bad Faith? (select all that apply)

- Creditors
- Debtors
- Trustee
- Disallowed creditors
- Family (including ex-family)
- Employees
- Bidders
- Debt consultants
- Lawyers
- Others

Slido: Have you been involved in a case where an application was made pursuant to s. 4.2?

- Yes or No

Practical limitations

- Is it really bad faith?
- LIT neutrality
- Costs vs. benefit, and how to fund
- Risk to LIT
- Other options may be easier / better

Slido: What other methods have you used to encourage / enforce good faith?

- Educate
- Letters / threaten court action
- Discharge opposition
- Refer to OSB
- Complaint to regulatory body
- Refusal to take action (recommend proposal, extension, sale)
- Disallow claim
- Other

Discussion: What are some creative ways to use 4.2?

Q&A