Court File No.: CV-25-00738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC

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Court File No.: CV-25-00738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUDSON SRI, HBC CANADA PARENT HOLDINGS INC., HBC CANADA PARENT HOLDINGS 2 INC., HBC BAY HOLDINGS I INC., HBC BAY HOLDINGS II ULC, THE BAY HOLDINGS ULC, HBC CENTERPOINT GP INC., HBC HOLDINGS GP INC., SNOSPMIS LIMITED, 2472596 ONTARIO INC., and 2472598 ONTARIO INC

Applicants

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CANADA

Debates of the Senate

1st SESSION • 38th PARLIAMENT • VOLUME 142 • NUMBER 98

OFFICIAL REPORT
(HANSARD)

Wednesday, November 23, 2005

THE HONOURABLE DANIEL HAYS
SPEAKER

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(Daily index of proceedings appears at back of this issue).

Debates and Publications: Chambers Building, Room 943, Tel. 996-0193

Published by the Senate
Available from PWGSC – Publishing and Depository Services, Ottawa, Ontario K1A 0S5.
Also available on the Internet: http://www.parl.gc.ca

THE SENATE

Wednesday, November 23, 2005

The Senate met at 1:30 p.m., the Speaker in the chair.

Prayers.

[*Translation*]

SENATORS' STATEMENTS

NATIONAL FEDERATION OF FRANCOPHONE SCHOOL BOARDS

FIFTEENTH ANNUAL CONVENTION

Hon. Maria Chaput: Honourable senators, I recently had the opportunity of taking part in the fifteenth annual convention of the National Federation of Francophone School Boards held in Ottawa from November 2 to 4, 2005.

Founded in 1990, the federation brings together representatives from every francophone school board in Canada. It has a current membership of 31.

The objectives of the federation include providing Canada's francophone and Acadian school boards with a forum for exchange and collaborative efforts, supporting the actions of its members on the provincial level and representing its members at the national level.

The federation sees the ideal school as an institution that is adequately financed, open to its community, equipped with auxiliary structures — child care and early childhood education — and focused on cultural identity.

Because the federation believes language is directly linked to culture and identity, it feels that the school must play a vital role in the development of its students as francophone citizens.

My congratulations to federation president Madeleine Chevalier for her excellent leadership and to all those who are instrumental in the success of the Federation.

[*English*]

FAMILY VIOLENCE PREVENTION MONTH

ALBERTA

Hon. Grant Mitchell: Honourable senators, November is Family Violence Prevention Month in Alberta. As part of that event, I recently had the opportunity, along with Deputy Prime Minister Anne McLellan and Senators Tardif and Banks, to attend the launching of a book entitled *Standing Together*.

The book is a collection of stories and poems by 103 women who have experienced the horror of family violence. Each has made the difficult step of taking control of their lives under the most difficult circumstances and putting a stop to the abuse they and their children were experiencing. They tell their stories in their own words. These stories are at once terrifying, tragic and uplifting. They are stories of pain, courage and strength. Ultimately for some, but unfortunately not yet for all of these authors, they are stories of hope for freedom from fear.

That night, a number of the women read their stories and poems to those in attendance. There could not have been a person in that room who was not deeply moved.

Family violence is a serious issue that affects far more people than many of us would know — women, children, the elderly and, yes, sometimes even men. For women, the violence is likely to be particularly severe. Family violence can be emotional and psychological, as well as physical and sexual.

One of the presenters that night made the point that it is sobering to think that in this era when public safety, particularly in the international context, has been given such profile, the least safe place for some Canadians is in their own homes.

This project did not occur by itself. It was the brainchild of Iris Evans, Alberta's Minister of Health. It was supported by Jan Reimer, former Mayor of Edmonton and now the head of the Association of Women's Shelters of Alberta. It was edited by Linda Goyette, an Edmonton author and former journalist and columnist.

Each of these women and especially each of the contributing authors is to be congratulated for undertaking this important project. I know that all senators join me in doing so.

ATLANTIC CANADA WOMEN ENTREPRENEUR TRADE MISSION TO BOSTON

Hon. Catherine S. Callbeck: Honourable senators, last week I led a trade mission to Boston on behalf of the Honourable Joe McGuire, Minister of the Atlantic Canada Opportunities Agency. This trade mission was different from any other trade mission previously led by ACOA in that it was organized exclusively for Atlantic Canadian women entrepreneurs.

Fourteen women-owned companies participated in the trade mission. Their products and services ranged from custom-fit golf equipment to jewellery to organizational and health promotion services.

During the past five months, these women entrepreneurs have been involved in the Women Exporters' Initiative, which trained them to be export-ready. They arrived in Boston with the tools, skills and confidence to sell their products and services.

I am pleased to let honourable senators know that many of the participating companies made new sales and signed contracts with their clients and distributors in New England.

While in Boston, the women took part in business meetings. They had opportunities to network with business groups in the Boston area and listened to engaging and highly qualified guest speakers. Through it all, they formed a strong network of contacts among themselves. They all came back to Atlantic Canada with strong leads and valuable in-market experience.

As my honourable friends know, in November 2002 I was asked by the Prime Minister to serve as Vice-chair of the Prime Minister's Task Force on Women Entrepreneurs. The task force was put in place to find out how the federal government could be more supportive of women entrepreneurs and to determine why there were not more women entrepreneurs fuelling the Canadian economy.

• (1340)

In October 2003, we presented our report to the Prime Minister. One of our recommendations was that the federal government should encourage and assist women entrepreneurs to be export-ready. This first women entrepreneur trade mission from Atlantic Canada to Boston is exactly the type of initiative we recommended.

I want to recognize ACOA, International Trade Canada, Export Development Canada and the Canadian Manufacturers and Exporters for organizing this women exporters initiative. They have all worked extremely hard. Their collaboration ensured that more women entrepreneurs from Atlantic Canada will become successful exporters. I congratulate them on their success.

Hon. Senators: Hear, hear!

NORTH ATLANTIC TREATY ORGANIZATION PARLIAMENTARY ASSEMBLY

FIFTIETH ANNIVERSARY

Hon. Joseph A. Day: Honourable senators, I should like to talk for a few minutes today about the fiftieth anniversary of the NATO Parliamentary Assembly and the Canadian senator who was instrumental in the establishment of the assembly. The North Atlantic Treaty Organization Parliamentary Assembly was formed 50 years ago, on July 18, 1955. However, its formation at the time was not without its doubters.

Even though there were calls for the creation of a parallel parliamentary assembly after the inception of NATO in 1949, there was resistance to the idea. NATO, at the time, did not support the idea and favoured national parliamentary associations in each of the member states. Even with such resistance, parliamentarians are a stubborn lot, and the first annual conference of the NATO parliamentarians, with Nova Scotia Senator Wishart Robertson as co-chair, was held on July 18, 1955.

Senator Robertson was born in Barrington Passage, Nova Scotia in 1891, and served in this chamber with distinction from 1943 to 1965. In addition to serving as Speaker of the Senate, Senator Robertson also served as Leader of the Government in the Senate from 1945 to 1953. He was recognized for his efforts in the formation of the NATO Parliamentary Assembly by being elected honorary life president at the conclusion of its inaugural meeting in Paris in 1955.

Honourable senators, this is indeed a great honour, and one this chamber should be proud to have as part of our history. Many other honourable senators have from time to time served on the NATO Parliamentary Assembly. For instance, Senator Rompkey served recently as vice-president of the assembly, while Senator Nolin currently serves in that capacity.

Our delegation this year was led by Senator Cordy, President of the Canada NATO Parliamentary Association. The delegation for the fiftieth anniversary meeting also included Senators Hubley, Andreychuk and myself. We were all pleased to take part in this year's historic meeting, and I know honourable senators will want to join with me in offering congratulations to the NATO Parliamentary Assembly in its fiftieth year of service.

Hon. Senators: Hear, hear!

RESIDENTIAL SCHOOL COMPENSATION PACKAGE

Hon. Nick G. Sibbeston: Honourable senators, today the federal government announced compensation for Aboriginal people that have been in residential schools. That decision is a very good and touching one.

When I heard the decision this morning, I shed a tear, because I was six years old when I went to residential school. My mother got sick and had to go into the hospital. I left the comforts of my home in Fort Simpson — my grandmother and my mother — and I went to residential school for six years in Fort Providence.

With the exception of one summer when I was able to go home for only one weekend, I went home every summer for a few weeks. However, I have cousins who attended residential school and who, for 10 years, never went home. Imagine sending your child away for months, let alone years.

Many of those who attended residential school have suffered a lasting effect. Many have experienced trauma and difficulty.

I am fine physically. People ask me how I am, and I tell them that nothing hurts on me, that I am in good physical shape. However, mentally, there are days and stretches of time when I suffer from depression and sadness and have a hard time coping with life. Fortunately, through a healing process, I and many others are able to function and enjoy life.

A number of years ago, when we started our healing process, many of us said, "We do not want money; we just want our life. We want to experience happiness." Fortunately, some of us have made progress; unfortunately, others have not. Many have died and many suffer today from addictions, such as alcoholism.

Honourable senators, this is a monumental day — not so much because of the money, but because of the gesture and the recognition that it has been really tough on those who attended residential schools. I am very thankful today.

Hon. Senators: Hear, hear!

ROUTINE PROCEEDINGS

LIBRARY OF PARLIAMENT

SECOND REPORT OF JOINT COMMITTEE PRESENTED

Hon. Marilyn Trenholme Counsell, Joint Chair of the Standing Joint Committee on the Library of Parliament, presented the following report:

Wednesday, November 23, 2005

The Standing Joint Committee on the Library of Parliament has the honour to table its

SECOND REPORT

Pursuant to the order of reference from the Senate on November 22, 2005, House of Commons Standing Order 111.1, and the order of reference from the Commons on November 17, 2005, the Committee has considered the certificate of nomination of Mr. William Robert Young to the office of Parliamentary Librarian.

The Committee approves the appointment of Mr. Young to the office of Parliamentary Librarian.

A copy of the relevant Minutes of Proceedings (*Meeting No. 5*) is tabled in the House of Commons.

Respectfully submitted,

MARILYN TRENHOLME COUNSELL
Joint Chair

The Hon. the Speaker: Honourable senators, when shall this report be taken into consideration?

On motion of Senator Trenholme Counsell, report placed on Orders of the Day for consideration at the next sitting of the Senate.

• (1350)

[*Translation*]

CANADA-FRANCE INTER-PARLIAMENTARY ASSOCIATION

THIRTY-THIRD ANNUAL MEETING, AUGUST 28-SEPTEMBER 4, 2005—REPORT TABLED

Hon. Lise Bacon: Honourable senators, pursuant to rule 23(6), I have the honour to table in the Senate, in both official languages, the report of the Canada-France Inter-Parliamentary Association on its 33rd annual meeting, held in Vancouver, Victoria and Nanaimo, British Columbia, from August 28 to September 4, 2005.

[*English*]

CANADA-UNITED STATES RELATIONS

MAINE—PROPOSED LIQUEFIED NATURAL GAS TERMINALS—PRESENTATION OF PETITION

Hon. Michael A. Meighen: Honourable senators, I have the honour to present petitions from 133 residents of New Brunswick and elsewhere in Canada, the U.S. and the U.K. asking our government to refuse the right of passage to LNG tankers through Head Harbour Passage.

QUESTION PERIOD

INDUSTRY

INVESTMENT CANADA—NOTICE OF NET BENEFIT REGARDING SALE OF TERASEN GAS TO KINDER MORGAN

Hon. Pat Carney: Honourable senators, my question is for the Leader of the Government in the Senate. Yesterday, I asked the leader what benefits for the public were negotiated by Industry Canada when it approved the purchase of Terasen Gas by the Texas energy giant Kinder Morgan. The leader advised the chamber that:

> ...section 36 of the Investment Canada Act precludes the minister or any government official from disclosing any information that has been obtained through the administration of that act.

The minister's written answer to me indicates that there are exceptions to the confidentiality provisions of the ICA. The written answer states that what can be made public includes information contained in any written undertaking given to Her Majesty in right of Canada relating to an investment that the minister is satisfied or is deemed to be satisfied is likely to be of net benefit to Canada. That is exactly what I want to know. What undertakings were deemed of net benefit to Canada?

Is the minister telling us that the undertakings given to Her Majesty were oral undertakings? If they are still secret, were they oral? According to the letter he provided me, information contained in any written undertaking can be made public.

Hon. Jack Austin (Leader of the Government): Honourable senators, in answering the honourable senator's question yesterday, I did provide information with respect to the undertakings made by Kinder Morgan Inc. with respect to the acquisition of Terasen Gas. I mentioned capital investments and other items that would assure net benefits to Canada. I believe that a satisfactory answer was provided to the honourable senator about the agreement of Kinder Morgan.

Senator Carney: May I remind the honourable leader that yesterday he specifically said:

> ...section 36 of the Investment Canada Act precludes the minister or any government official from disclosing any information that has been obtained through the administration of that act.

While we are grateful for some of the information provided, we would like to know the rest of the information. For example, Terasen Waterworks, a subsidiary of Terasen Gas, owns and operates municipal waterworks in Canada, including those in the municipalities of Calgary and Kelowna. Canadians are not comfortable with foreign ownership of our water systems, so I would like to know whether Industry Canada, when it undertook the review, asked Terasen Gas to divest itself of the ownership of municipal water systems.

Senator Austin: Honourable senators, the disclosure I made yesterday included the phrase "with the consent of the parties," and that was the nature of the disclosure. As for the balance, the government has disclosed that which was consented to, and I have no other information I can provide. I have quoted the section of the Investment Canada Act that provides the barrier to disclosure.

I am most curious as to why the honourable senator is so concerned with this particular foreign investment. As I pointed out yesterday, the government of which she was a member took a significant departure from the government of Mr. Trudeau and introduced this act. Then Prime Minister Brian Mulroney said that Canada was open for business. His government actively invited foreign investment in Canada and said that it was good.

It is of further interest to me to note, for example, an editorial in today's *Vancouver Sun* entitled "Critics of Terasen sale resort to fear-mongering and ignore the facts." In brief, the article says that the attempt to block this deal was not in the public interest.

> Opposition to the deal gathers momentum only because its critics are misrepresenting what Terasen does and are channelling the anti-American, anti-business and anti-globalization attitudes of the ill-informed into an attack on a private deal between two private companies.

The article also states:

> Of course, Terasen doesn't own any energy resources. It doesn't produce any petroleum products. It doesn't explore for oil and gas. It does no refining. It has no interests in oil or gas fields.
>
> It simply buys gas and distributes it to 875,000 customers in B.C. Moreover, it is not allowed to make a profit reselling the gas. It can only charge for delivery and that rate is regulated by the BCUC. In fact, even the rate of return it may earn on its gas utility business is set by the regulator...

The article concluded:

> ...the outcome of this contest is assured. Canadians will be the winners.

Honourable senators, Senator Carney says that Canadians believe this and Canadians believe that. I have pointed out that the B.C. Utilities Commission heard countless witnesses and rendered over 50 pages of assessment supporting this transaction. It was also not dissented from by the province of British Columbia or the province of Alberta. It is fascinating to me that the honourable senator continues to pursue this issue. It would be interesting to know what the merits of her presentation might be.

Senator Carney: Honourable senators, the merit of my presentation is that the Investment Canada Act requires a review of foreign acquisitions of sensitive industries in Canada. They include the production of uranium and owning an interest in a uranium-producing property in Canada, providing any financial service, providing transportation services, including the transportation of oil or gas through pipelines, and cultural business. That was the gist of the legislation that the Conservative Government of Canada brought in when it said that Canada was open for business. However, it also said that it wanted a review of sensitive industries to determine whether there would be a net benefit to Canada. I have been asking the leader to make public the net benefits in this case.

INVESTMENT CANADA—NOTICE OF NET BENEFIT REGARDING SALE OF WESTCOAST ENERGY TO DUKE ENERGY

Hon. Pat Carney: In 2001, Duke Energy, one of North America's largest transmission companies, purchased Westcoast Energy for $8.5 billion, the largest foreign transaction that year. Purchases of transmission systems are subject to review under the Investment Canada Act, which is my rationale for asking the question. Four years after the sale, can the minister tell us what net benefits were negotiated for Canadians in the sale of Westcoast Energy? Eight thousand British Columbians and other Canadians wrote the British Columbia Utilities Commission about their concern over these transactions. Contrary to what the leader said earlier, there were no public hearings held by the B.C. Utilities Commission, although we asked for them.

The honourable leader asked about the justification for my question. It can be found in the words of the legislation brought forth by a Conservative government — the Investment Canada Act — which call for a review and analysis of net benefits. We have a written undertaking that these benefits can be disclosed. Therefore, what were the benefits?

• (1400)

Hon. Jack Austin (Leader of the Government): Honourable senators, I shall simply repeat that the net benefits have been disclosed in summary form and the act provides —

Senator Carney: I asked about Westcoast.

Senator Austin: The statements are on the record. I do not have to speak for a transaction that took place in 2001.

ROYAL CANADIAN MOUNTED POLICE

AUDITOR GENERAL'S REPORT—
CONTRACT POLICING AGREEMENTS—
HUMAN RESOURCE SHORTAGES

Hon. Pierre Claude Nolin: Honourable senators, the Auditor General's report released yesterday looked into whether the RCMP meets its contractual obligations for policing services in provinces, territories and municipalities. The report concluded that, while it fulfils its responsibilities under these contracts, the RCMP often does not have the capacity to deal with staff shortages caused by such routine matters as illness and parental leave. There are also gaps in terms of proper training qualifications and certification of officers. For example, newly-graduated cadets do not always receive six months of training in the field with a senior officer, as is expected.

Could the Leader of the Government in the Senate tell us how the federal government will ensure that the RCMP has the ability to respond to human resources shortages? We are aware of the response of the RCMP to the Auditor General that they will do their utmost to correct the problem, but I want a more specific answer from the minister.

Hon. Jack Austin (Leader of the Government): Honourable senators, the only answer I can give is that the government will do its utmost to support the RCMP.

Senator Nolin: Honourable senators, the Auditor General also reported on RCMP contract policing in Aboriginal communities. Public Safety and Emergency Preparedness Canada, or PSEPC, which is responsible for negotiating these agreements, does not fully monitor how they are implemented. An example used in the report is that peace officers are required to spend at least 80 per cent of their time on the reserve to which they are assigned. However, PSEPC does not have a system to track the amount of time an officer spends in the community and, therefore, cannot tell band councils, with which they have agreements, if the requirement is being carried out. How can the department provide Aboriginal communities with the level of policing they need and expect, if it cannot determine whether the agreements are being carried out?

Senator Austin: Honourable senators, that is a good question based on the findings of the Auditor General. The government accepts the findings and conclusions of the Auditor General with respect to policing in Aboriginal communities. It is clear that these issues need to be given a great deal more attention and that more work needs to be done in collaboration with Aboriginal communities. It is a deficiency with which the government intends to deal.

NATIONAL DEFENCE

PROPOSED EQUIPMENT EXPENDITURES

Hon. J. Michael Forrestall: Honourable senators, my question of the minister is with respect to equipment replacement.

Prior to the last election, the government announced expenditures of $7.7 billion in promised capital projects for defence, of which about $5.7 billion had already been announced but not activated.

Senator Mercer: We're doing that right now.

Senator Forrestall: Are you ever!

Senator Mercer: Promises made, promises kept!

Senator Forrestall: Are you listening, leader?

This was announced but never put in place. So much for your words.

The Hon. the Speaker: Honourable senators, order, please. Senator Forrestall has the floor.

Senator Forrestall: In the last four months, a $12-billion to $13-billion expenditure has been talked about. What will you say about that? Will you spend it?

A $4.6-billion purchase submission has gone out to replace the aging Hercules. The immediate replacement of fixed-wing search and rescue equipment was a top budget priority announced at CFB Greenwood, being the Hercules and the Buffalo. That was promised in the election barnstorming.

Mr. Minister, why was the second aspect of the original plan to replace fixed-wing aircraft dropped?

Hon. Jack Austin (Leader of the Government): Honourable senators, I answered that question yesterday. I said that, initially, the Chief of the Defence Staff recommended to the government the acquisition of transport aircraft, fixed-wing aircraft, a helicopter package and some electronic equipment for existing aircraft. However, it became clear that the acquisition of the military's top priority, that is, the transport aircraft, would slow down if the entire package were dealt with at one time. I could quote General Hillier, but I am sure that Senator Forrestall is familiar with all of this. Therefore, it was decided to proceed to replace the Hercules CC aircraft.

I misunderstood Senator Forrestall's last question yesterday. He asked me about the age of the JJ series and I answered with regard to the age of the CC series, which shows that he is much better at these identification numbers than I.

However, it is clear that, instead of proceeding with a series of equal priorities, which would be a slower process, the military desired to go ahead with the acquisition of transport equipment as the first priority, which is how we are proceeding.

Senator Forrestall: Honourable senators, it is of vital concern to Canadians that search and rescue have the tools it needs to do the job. We have replaced the Sea King helicopter with the EH-101, which has the endurance and power to a first-class job.

Incidentally, Canada has identified a problem in the tail rotary assembly of the EH-101. It is interesting to note that in other places around the world where EH-101s are being deployed they are still flying full missions with no restrictions. One wonders why there are restrictions here.

My question has to do with the urgency of search and rescue capability for this country. When can we expect a decision in that respect? A very important part of search and rescue is the capacity of fixed-wing aircraft to drop fuel and medical and other supplies where needed. Will we get it during the early stages of the campaign?

• (1410)

Senator Austin: Honourable senators, if it were up to me alone I would be delighted to announce the answer here and now. However, I am in a position simply to say that I will submit Senator Forrestall's representations to the Minister of National Defence and hope to have an answer before the election, which I expect will take place in April.

UNITED NATIONS

VOTING PATTERN ON MIDDLE EAST ISSUES

Hon. Marcel Prud'homme: My question is with respect to foreign affairs.

It is no secret to anyone that my great master was the Honourable Prime Minister Trudeau. He taught me how to be a proud Canadian and how to be consistent in our foreign policy. He used me for that purpose, and I was a willing volunteer.

On Thursday, September 25, 2003, I asked the Honourable Senator Austin a question. On Thursday, December 2, 2004, I again asked a similar question. Today, I shall ask the government leader a similar question.

Who are our friends; with whom do we usually vote at the United Nations? During our voting at the United Nations in November on multiple resolutions before the committee on action pertaining to Middle East, I realized that Canada has new allies. As I said twice before, to the embarrassment of many, Canada voted with the Federated States of Micronesia, Marshall Islands, Nauru, Palau, Tuvalu, United States, and Israel.

The United States of America is my friend and neighbour. Last Monday, when I introduced the ambassador of the United States to the Muslim community, he was applauded. I asked them to applaud him, and our friend and neighbour was applauded very widely.

That said, honourable senators, I am very concerned. All my life I have been taught, and I mentioned this in 2003 and in 2004, that in a situation such as I mentioned, it is supposed to remain an official secret. Under the Official Secrets Act, you are not supposed to say that.

In case there is doubt, you vote in good company. This time, good company abstained from voting. Everyone abstained. Canada is the only country that put its neck out with these great new allies of Marshall Islands, Nauru, Palau, Tuvalu and Micronesia.

Why were we voting in that manner on Monday at the United Nations? Are there any developments I am unaware of, so I can visit these new allies of Canada and ask them what is going on?

Hon. Jack Austin (Leader of the Government): Honourable senators, while I would not want to cast different categories of membership in the United Nations, according to its charter, all members of the United Nations are equal and are entitled to play an equal role in its affairs — although that is not always the case in practice.

Our vote with respect to the Middle East is based on an attempt to be constructive in dealing with Middle Eastern issues. We consistently try in our policy on these issues to reduce the number of resolutions, many of which we find redundant and outdated. We find they lack fairness and balance, so we try to encourage a more innovative approach to drafting these resolutions than has been the case in the past.

Canada seeks to have these resolutions based on a pragmatic and reality-driven formula, which allows the parties to enhance the possibility of their dialogue.

Senator Prud'homme: My supplementary question is with respect to finding out whether it is true that the real Minister of Foreign Affairs pertaining to the Middle East, who is vetting every word of every resolution, is not the Minister of Foreign Affairs, Mr. Pierre Pettigrew, but the honourable member from Mont Royal, who is responsible in cabinet for vetting every word, comma and paragraph of anything pertaining to the Middle East. If that is the case, it is disturbing to know that the Minister of Foreign Affairs has been eliminated.

As my successor, I can talk roughly to him. I have not shared this with him yet, but I will do so after stating it publicly.

I see an honourable senator getting nervous in the back. He can ask a supplementary question. Before he does, he should learn that one must be 30 years old to sit in the Senate, not 21.

Senator Austin: Honourable senators, it is no secret that resolutions in the United Nations with respect to the Palestine-Israel situation have been quite polemical and are designed for political positioning rather than based on the merits of issues. Unfortunately, that has been a long-standing history in the use of resolutions and their practice in the UN forums.

We follow a policy of offering both criticism and support to Palestinian and Israeli practices or their failures to live up to their obligations, and we are consistently strong in condemning acts of terrorism.

FOREIGN AFFAIRS

POLICY WITH RESPECT TO ISRAEL

Hon. Yoine Goldstein: Honourable senators, let me first correct a misapprehension. I did not suggest to the honourable senator on my extreme left that I did not know that our Constitution requires a senator to be at least 30 years of age.

What I said was that, since we are older than 21, we are certainly capable, it seems to me, of being able to withstand criticism.

That having been said, however, I should also point out that I assumed that Minister Pettigrew would be particularly disturbed and upset if he found out that the honourable senator to my extreme left considers that he, Minister Pettigrew, has nothing to do with the foreign policy for which he is responsible but that in fact foreign policy is dictated by the Minister of Justice. I dare say the Minister of Justice would not be of that view, nor would Honourable Minister Pettigrew.

Does the Government of Canada follow the statements of the Right Honourable Paul Martin who indicated on a number of occasions that Israel is Canada's friend and ally?

Senator Prud'homme: Oh, oh.

Senator Goldstein: The Prime Minister said "friend and ally." I did not interfere when Senator Prud'homme was asking his question; I would ask him to please not interfere with me.

As I was saying, does the Government of Canada follow the policy enunciated by the Honourable Prime Minister that Israel is a friend and ally of Canada? Does the Government of Canada accept the assertion by the Honourable Prime Minister that Canada and Israel share common values; democratic government, an independent legislative process, an independent judiciary, gender equality and a free press? That is what the Prime Minister said. Is that the policy that is followed by us in the United Nations and elsewhere?

• (1420)

Hon. Jack Austin (Leader of the Government): Honourable senators, what the Prime Minister has said about Canada's relationship with Israel or with the Palestinians is the policy of Canada.

THE ENVIRONMENT

NEWFOUNDLAND AND LABRADOR— REINSTATEMENT OF GANDER WEATHER OFFICE

Hon. Ethel Cochrane: Honourable senators, my question is for the Leader of the Government in the Senate. Two years ago the federal government moved regional forecasting in Newfoundland and Labrador to Halifax, Nova Scotia. Since then there have been many cases of dangerously inaccurate forecasting in my province. I have heard reports of problems with inadequate storm warning updates, and even simultaneously issued forecasts from Montreal and Halifax that were radically different.

Next week, a petition will be presented in Ottawa asking the federal government to reinstate weather forecasting at the Gander weather office. The petition contains the names of 125,000 people, who all share the concern that Newfoundland and Labrador has been poorly served by this decision.

My question for the Leader of the Government in the Senate is this: Will the federal government heed the wishes of the people of my province and fully restore the Gander weather office?

Hon. Jack Austin (Leader of the Government): Honourable senators, the question reminds me of representations that I receive from British Columbia coastal communities, in particular with respect to the weather forecasting that is done by satellite regarding Pacific weather movements and their impact.

Honourable senators, I can answer the question by saying that I will send Senator Cochrane's representation to the minister, but it is a subject on which perhaps we could ask the Standing Senate Committee on Energy, the Environment and Natural Resources to hear witnesses, to determine if weather forecasting has indeed deteriorated in its quality since the change in technology.

Senator Cochrane: Honourable senators may be aware that Newfoundland and Labrador has not had representation in cabinet for many weeks on this particular issue, due to the illness of the former Minister of Natural Resources, John Efford. The reinstatement of the Gander weather office is one of several important issues facing the province that have not been dealt with as a result. This issue has been going on for a while.

The people of the province now are particularly concerned, knowing full well that winter is coming upon us and the serious detriment weather forecasting could have, especially on our people who live close to the water, not just the fishermen but all these people. *The Globe and Mail* reported earlier this month that due to Mr. Efford's absence the Prime Minister said he would take an active role — and this is the Prime Minister — in advancing the province's concerns.

Could the leader then make inquiries and tell us what action the Prime Minister has taken over the last several weeks with respect to this Gander weather office?

Senator Austin: Honourable senators, the Prime Minister has said that he would represent in cabinet the interests of Newfoundland and Labrador. Again, I cannot tell you whether this particular issue that has now been brought to us by Senator Cochrane has been drawn directly to the Prime Minister's attention. I will draw it to his attention and ask him for his guidance.

DELAYED ANSWER TO ORAL QUESTION

Hon. Bill Rompkey (Deputy Leader of the Government): Honourable senators, I have the honour of presenting a delayed answer to an oral question raised in the Senate on November 3 by Senator Forrestall, regarding the alleged bust of a Salafist Group for Call and Combat in Toronto.

PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

ALLEGED EXPOSURE OF TERRORIST CELL

(Response to question raised by Hon. J. Michael Forrestall on November 3, 2005)

On November 3, 2005, Stewart Bell, a reporter for the *National Post*, wrote an article quoting a senior CSIS counter terrorism official who told a closed-door national security workshop in Toronto during the week of October 31 to November 2, 2005 that CSIS had dismantled a suspected terrorist cell in 2004.

The article stated that the cell consisted of four Algerian refugee claimants who had lived in Canada for as long as six years and were alleged to be members of a radical Islamic terror faction called the Salafist Group for Call and Combat (GSPC), and that the leader of this cell had received explosives training at an al Qaeda training camp in eastern Afghanistan.

Mr. Bell wrote that the senior CSIS counter terrorism official told the closed-door "National Security Workshop 2005", a federal initiative that brings together security officials and representatives of Ontario industries involved in critical infrastructure, that three of the four individuals were deported during the summer of 2005, as they were inadmissible to Canada under the Immigration and Refugee Protection Act, and the fourth left voluntarily in March 2004, after being questioned by CSIS.

CSIS highlighted the case in its presentation as being a prime example of inter-agency cooperation. The presentation was unclassified.

The government has informed the public that there is currently no imminent threat to Canada or Canadians. Should such a threat emerge, the government will take appropriate action. It should be noted that the government added the GSPC to Canada's list of banned terrorist entities in November 2002. One of the consequences of being listed is that the GSPC's property can be the subject of seizure/restraint and/or forfeiture.

It should also be noted that for privacy reasons, we do not discuss specific cases.

As CSIS noted during its presentation, its investigation is ongoing. Consequently, it would be inappropriate to provide further information.

QUESTION OF PRIVILEGE

SPEAKER'S RULING

The Hon. the Speaker: Honourable senators, yesterday, Tuesday, November 22, Senator Spivak rose on a question of privilege to complain about the answer she had received to a series of written questions she had placed on the Order Paper. Under our rules and practices senators are entitled to ask written questions soliciting information from the government on any matter that comes within its jurisdiction or administrative authority. In this particular case, Senator Spivak had posed a number of questions regarding the boundaries of Gatineau Park, which is controlled and managed by the National Capital Commission. I will refer to it as the NCC.

[*Translation*]

According to Senator Spivak, the answers provided by the NCC through Canadian Heritage were contradictory. Her complaint is based on the fact that the responses that she received were different in material respects from those made to identical questions asked by a member of the other place. Senator Spivak explained that, in three specific instances, the information given to her about the boundaries of Gatineau Park was inconsistent with the answers provided elsewhere.

[*English*]

The failure to prepare complete answers that are accurate and consistent is, in the senator's view, a serious breach of privilege since it deprives parliamentarians of the information they need to do their job properly. To prove her point, Senator Spivak mentioned the work that she is doing on a draft bill relating to Gatineau Park for which solid data on its boundaries is important.

[*Translation*]

Following the senator's remarks, I indicated that I would seek to provide a ruling as soon as I was able on the question of privilege, to determine if a prima facie case had been established. I have considered the matter carefully and am prepared to make my ruling now.

[*English*]

Senate rule 43 outlines the criteria that I must use to determine a question of privilege prima facie. I am satisfied that the matter has been raised at the earliest opportunity, but I am less clear about the remaining criteria. It is not obvious to me how an inconsistent response provided by the NCC through Canadian Heritage constitutes a matter that directly concerns the privileges of the Senate, a committee or a senator.

While the senator has made a good case that the information received from the NCC is not consistent with the information it has provided elsewhere, I do not see how this, in itself, is a matter of privilege or contempt. As the senator herself stated in the opening of her intervention, parliamentarians often complain that answers from the government are slow or incomplete. None of these instances would normally give rise to a question of privilege.

In addition, no evidence was presented to suggest that these errors or inconsistencies were deliberate. I am also uncertain about whether it is the information that was provided to the senator or to the other parliamentarians that is inaccurate.

Honourable senators, may I have order while I go through this ruling?

Had a compelling case been made that the NCC had sought to mislead the senator deliberately, my ruling would have been different. As it happens, however, with respect to this case, other means are readily available to seek some clarification about the NCC information. For example, the matter could be taken up again by another written question, or perhaps by hearing officials from the NCC at a Senate committee. These alternative approaches would be in keeping with the traditional oversight function of the Senate and would be more suitable than having the matter considered as contempt.

[*Translation*]

Having reviewed the complaint based on the criteria stipulated in rule 43, I am unable to support the contention that a prima facie question of privilege has been established.

• (1430)

[*English*]

ORDERS OF THE DAY

BUSINESS OF THE SENATE

MOTION TO EXTEND WEDNESDAY SITTING AND AUTHORIZE COMMITTEES TO MEET DURING THE SITTING ADOPTED

Hon. Bill Rompkey (Deputy Leader of the Government), pursuant to notice of November 22, 2005, moved:

> That, notwithstanding the Order of the Senate of November 2, 2004, when the Senate sits on Wednesday, November 23, 2005, it continue its proceedings beyond 4 p.m. and follow the normal adjournment procedure according to rule 6(1); and
>
> That committees of the Senate scheduled to meet on Wednesday, November 23, 2005, be authorized to sit even though the Senate may then be sitting, and that rule 95(4) be suspended in relation thereto.

Hon. Madeleine Plamondon: Must I grant permission on that?

The Hon. the Speaker: As a matter of information, this is a motion of which notice was given yesterday, and it is now before the Senate for debate and determination. Does the honourable senator wish to speak to that motion?

Senator Plamondon: There could be a vote?

[*Translation*]

Hon. Marcel Prud'homme: Honourable senators, it is debatable and then votable.

Senator Plamondon: The matter is debatable and then votable, but we cannot put the question immediately.

[*English*]

Senator Prud'homme: Honourable senators, you may have heard me explain that it was both votable and debatable.

I will be very blunt: I strongly object to the comments made by some senators last evening to the effect that I could manipulate Senator Plamondon and say no to certain permission being asked. I am not prepared for it but I am angry enough.

Senator Plamondon is not a person one can manipulate. There is only one person I have controlled all my life, and that is me: my vote, my decision. It would be unkind to put on record the names of those who came to me last evening and said that I was manipulating the honourable senator. I think it is my duty as an elder, as an older parliamentarian, to explain plainly what this is all about. I just did, and you overheard me: "No, no, it is debatable and votable. You cannot say no today."

I think it is the duty of each of us not to dictate, and never have I done that. When Senator Cools was sitting in front of me and, according to some, she was uncontrollable, I was constantly approached to speak to her. I would look at her and say "Anne," and some of the time she would listen. One day she put me in my place by saying, "Do not 'Anne' me today."

Senator Plamondon — and I say this in English out of anger, but I should say it only in French —

[*Translation*]

She has a reputation in Quebec of thinking for herself. She is not a woman one can order around. There will always be, in the coming days and months, people like Ms. Plamondon, Marcel Prud'homme and several others. In the difficult days, months and years to come for Quebec, you English speakers will not have to deal with this situation. We will need people who can think for themselves to talk to all the other French-Canadian Quebecers.

[*English*]

Not the West Island people. I know how to vote. I represent the majority of French Canadians.

I take strong objection. I hope the honourable senator rises to say that she has no orders to receive from Senator Prud'homme. I have shared my opinions with her as to the rules, to the best of my ability because I am still learning every day from the chair, the Clerk, and Mr. O'Brien. I do not think it is fair to ask someone else to do what I can do alone. If I wanted to say "no" yesterday, I would have said "no" to you, Senator Austin, and to you, Senator Rompkey. I can take my responsibility. I will not be blackmailed by comments such as: "If we do not do this, we will sit on Saturday." Well, that is fine. The only thing that makes me unhappy is not to be attending my sister at the moment, who needs me. Between my duty to the Senate and my duty as a brother, my duty to the Senate will take over.

I resent this with a passion, so do not do it ever again or you may never again hear me speak English in this institution. I may sit differently as an independent, and you may not be happy. I am fed up with these stupid rumours of manipulation. Maybe some of you are experts in manipulating people, but you will not manipulate me and you will not manipulate Senator Plamondon. She is a big girl. She knows what she wants to do.

On the motion, I totally oppose it. I totally oppose that the Senate sit while committees are sitting. Why? There are important pieces of legislation scheduled to be discussed here this afternoon and my duty is to be at the Foreign Affairs Committee. What do I do? While I am at the Foreign Affairs Committee, perhaps someone will pass a bill I do not agree with.

I have always said that our duty is to the Senate first. I am sorry that some people do not know how to arrange the affairs of the Senate. The Senate is not the House of Commons. The Senate is the Senate, regardless of the events in the House of Commons.

Therefore I will ask for a vote on this issue. It takes only two senators to ask for a vote. It is debatable. I have debated it. I will say why I object. We came to terms with each other that, on Wednesdays, in order for committees to sit, we would adjourn at 4:00 p.m. That was the best, most intelligent and civilized way to deal with the Senate.

Now we want to bypass that agreement because there is some event coming next Monday or Friday night. I object to that. The motion is debatable. I have just debated it. If no one else debates it, His Honour will put the question and I will rise. One other senator might stand; perhaps it will be Senator Plamondon. It takes only two senators to stand and ask for a registered vote. I will ask for a registered vote and, as a democrat, I will bow to the wishes of the majority.

[*Translation*]

Hon. Jean Lapointe: Honourable senators, the question I asked Senator Prud'homme was why he did not vote against the motion.

[*English*]

The Hon. the Speaker: Would the honorable senator take a question?

[*Translation*]

Senator Lapointe: I was quite simply asking for some information and I got my answer: it is debatable and then votable. So, first, it can be debated. Then, I would like the Honourable Senator Prud'homme to share his views with us. I believe that, to some extent, he is absolutely correct.

Senator Plamondon: Honourable senators, I sit on only one committee, the one on banking. This is the committee that interests me, and I never miss a meeting.

I also have a perfect attendance record in the Senate chamber. I would not want to be absent from either place. I am opposed to any arrangement that would keep me from either the Standing Senate Committee on Banking, Trade and Commerce or the Senate.

By the way, there are a few things I want to say about attendance in the Senate. When we are sworn in as senators, we are told that our first duty is to the Senate.

• (1440)

I would not want to be whip, not for all the money in the world, because of absenteeism. Today, due to the circumstances, there are fewer senators absent but, all too often, we can see the whip looking worried, looking for his or her senators. We should all make it our duty to be present in the Senate chamber. Committees should never sit at the same time as the Senate. Whether during statements by senators, notices of motions or speeches, I always learn something new by listening carefully to each person who rises.

I do not think that this sort of item should even be put on the order, because it forces us to make a choice that is inconsistent with the oath we have taken.

Senator Prud'homme: Am I being manipulating the honourable, senator?

Senator Plamondon: Those who know me know that I get down on my knees before no one but God and that my mother always had the words "It is better to die standing than to live on your knees" posted above the phone.

[*English*]

The Hon. the Speaker: Since no other senator is rising, I will ask if honourable senators are ready for the question.

Hon. Senators: Question!

The Hon. the Speaker: Is it your pleasure, honourable senators, to adopt the motion?

Some Hon. Senators: Yes.

Some Hon. Senators: No.

The Hon. the Speaker: All those in favour of the motion will please say "yea".

Some Hon. Senators: Yea.

The Hon. the Speaker: All those opposed to the motion will please say "nay".

Some Hon. Senators: Nay.

The Hon. the Speaker: I believe the "yeas" have it.

And two honourable senators having risen:

The Hon. the Speaker: With two senators rising, we will call in the senators. Is there agreement on the bell? It will be a fifteen minute bell, senators, so the vote will be held at five to three.

• (1455)

Motion carried on the following division:

YEAS
THE HONOURABLE SENATORS

Atkins	Joyal
Austin	Kenny
Bacon	Keon
Baker	Kinsella
Banks	Lavigne
Bryden	LeBreton
Callbeck	Losier-Cool
Campbell	Lovelace Nicholas
Carstairs	Maheu
Chaput	Mahovlich
Christensen	Massicotte
Cochrane	McCoy
Comeau	Meighen
Cook	Mercer
Corbin	Milne
Cordy	Mitchell
Cowan	Moore
Day	Munson
De Bané	Nolin

Di Nino
Dyck
Eggleton
Eyton
Fairbairn
Forrestall
Fraser
Furey
Gill
Grafstein
Harb
Hubley
Pépin
Peterson
Phalen
Poulin
Poy
Ringuette
Robichaud
Rompkey
Stollery
Stratton
Tkachuk
Zimmer—62

NAYS
THE HONOURABLE SENATORS

Plamondon
Prud'homme
St. Germain—3

ABSTENTIONS
THE HONOURABLE SENATORS

Andreychuk
Angus
Champagne
Lapointe
Trenholme Counsell—5

• (1500)

FOOD AND DRUGS ACT

BILL TO AMEND—THIRD READING

Hon. Terry M. Mercer moved third reading of Bill C-28, to amend the Food and Drugs Act.

The Hon. the Speaker: Honourable senators, are you ready for the question?

Hon. Senators: Question!

Motion agreed to and bill read third time and passed.

WAGE EARNER PROTECTION PROGRAM BILL

SECOND READING

Hon. Bill Rompkey (Deputy Leader of the Government) moved second reading of Bill C-55, to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

He said: Honourable senators, I rise to speak to Bill C-55, to establish the Wage Earner Protection Program Act, to amend both the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, and to make consequential amendments to other acts.

[*Translation*]

The bill proposes an ambitious, comprehensive and balanced reform of the insolvency system in Canada. It will have a significant impact and positive effects on both the economy and individuals. We believe that this bill enjoys relatively widespread support, and I urge all honourable senators to support it so as to ensure it speedy passage.

[*English*]

The bill is the product of significant consultation with stakeholders, and many of its provisions were drawn from the report prepared by my honourable colleagues in this chamber entitled *Debtors and Creditors: Sharing the Burden*, a review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act, released in November 2003.

Since the introduction of the bill, stakeholders from a broad spectrum of interests have studied its implications. The reaction has been positive. Of course there have been suggestions for further improvements. I think there will be a number of senators who will say that this is not a perfect bill. However, it is clear that the bill has considerable support and will impact positively the thousands of Canadians who rely on the insolvency system to protect their interests in situations of financial distress.

I should like to highlight a few of the reforms proposed in Bill C-55. Most significantly, the bill proposes changes to ensure that workers are better protected in the case of insolvency of their employer. It proposes the creation of the wage earner protection program, an unlimited super-priority for unpaid wages that will combine to protect workers without creating undue risks for creditors or enticing strategic behaviour that would have been unfair to taxpayers. The wage earner protection program will be a safety net, paying up to $3,000 of lost wages owed to workers whose employer goes bankrupt or is put into receivership. This type of program is not radical or new. Many countries already have a similar program to protect their workers, countries such as the United Kingdom and Australia, and it is time now for Canada to have one, too.

The government expects to recover up to half of the money paid out by the program by acting as a creditor to the employer. The government will assume workers' claims against their employers' estate, including their right to use the new, limited super-priority for unpaid wages. As suggested in the Senate report, this limited super-priority is capped at $3,000 and will only apply to current assets in order to mitigate potential impact on credit.

The proposed reforms will result in better protection to pensions, an issue of critical importance to many Canadians. In a bankruptcy, a receivership, a proposal or a CCAA filing, regular contributions that an employer should have made or that were deducted from an employees' paycheque will be required to be paid into the pension plan for the benefit of workers before most other creditors are paid.

The status of collective agreements during a corporate restructuring is also of great importance to workers. This reform will allow employers and unions to renegotiate collective agreements under the relevant labour legislation, but the changes are explicit. If there is no agreement between the employer and the union, the existing collective agreement remains in force. A court may not unilaterally change a collective agreement.

In addition to better protecting workers, this bill also represents a substantial overhaul of our insolvency laws. One of the key objectives of this bill is to foster the use of reorganization as an alternative to bankruptcy. Debt reorganization in most cases is a better alternative than a bankruptcy. It helps debtors avoid the stigma of bankruptcy, provides better return for creditors, and, in the case of businesses, it protects jobs.

To meet this objective, the CCAA will be substantially rewritten. The reforms will ensure greater transparency in the process, allow parties to better defend their interests, codify rules for important restructuring elements such as interim financing, the termination of assignment of contracts, the sale of assets outside the ordinary course of business, governments' arrangement of the debtor company, including the ability to remove directors, and the application of regulatory measures. The bill will provide guidance and certainty, while preserving the flexibility that has made the CCAA such a successful restructuring vehicle. Most restructuring of large insolvent companies is carried out under the Companies' Creditors Arrangement Act. Bill C-55 is a major step forward in ensuring that the CCAA reflects the needs of the marketplace and provides the necessary degree of predictability to all parties involved. It is useful to note that the CCAA has not been brought up to date since 1930.

• (1510)

Businesses and individuals can also restructure their debts by making a proposal under the Bankruptcy and Insolvency Act. A number of changes included in Bill C-55 will make the proposal process more effective and attractive to debtors. On the corporate side, many improvements made to the CCAA are replicated in the BIA to ensure consistency. For individuals, the changes are designed to make it easier to use consumer proposals as an effective means to regain financial stability.

Honourable senators, Bill C-55 will also better protect individual Canadians who face bankruptcy. For example, the bill will exempt RRSPs from seizure in a bankruptcy, subject to certain conditions. Until now, this protection has not been offered to RRSPs under the Bankruptcy and Insolvency Act. Protection for RRSPs varies based on provincial rules, resulting in unequal protection across the country. Bill C-55 will correct this disparity.

Student loan debt will be eligible for discharge after seven years and, in the cases of undue hardship, the bankrupt may apply to the court to obtain the discharge after five years. The bill also prohibits the use of ipso facto clauses in contracts whereby a debtor faces automatic termination of an existing contract for the sole reason that he or she is bankrupt.

At the same time, Bill C-55 contains a number of provisions that will prevent potential abuse of the insolvency system. New rules will make it more difficult to use bankruptcy as a means to avoid paying debts. Honest but unfortunate bankrupts will receive their discharge, but those who attempt to abuse the system will not.

On a technical note relating to the treatment of deemed trusts for taxes, the bill makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.

Honourable senators, Bill C-55 will greatly improve the administration of Canada's insolvency system through a number of changes affecting the role and duties of trustees, receivers and monitors. The role of the Office of the Superintendent of Bankruptcy Canada will also be clarified and will include maintenance of a central registry of CCAA cases. Bill C-55 will make certain that Canada's insolvency laws help to create an environment where there are safety nets for individuals in financial difficulty, where all parties are treated fairly and where workers are protected.

These rules will ensure that Canada remains an attractive place for investors and promotes entrepreneurship and innovation. I am confident that the measures proposed in this bill will have broad support among Canadians, and I urge all honourable senators to support this important legislation and its swift adoption.

Hon. Michael A. Meighen: Honourable senators, I am pleased to join the debate at second reading of Bill C-55. I thank Senator Rompkey for his remarks.

Honourable senators, the bill is almost 150 pages in length. Reduced to the bare essentials, the bill makes several changes to the laws governing bankruptcy and insolvency. It creates the wage earner protection program to ensure that employees of bankrupt entities receive their unpaid wages in a timely manner. It reduces to seven years from 10 years the period during which a student debt may not be discharged through bankruptcy.

Furthermore, the legislation ensures that locked-in RRSPs will no longer be part of the assets that can be taken in a bankruptcy and that providers of services such as utilities and car leases will no longer be able to discontinue those services.

Bill C-55 also begins the process of addressing a number of other critical issues. Among them are facilitating the restructuring of financially troubled companies, better protecting unpaid wages in insolvency situations, making the system fairer and preventing abuse, and improving administration.

It has been clear to all of us for some time that both the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act require significant amendment. In this context, I note that Bill C-55 was preceded by no less than three significant studies.

[*Translation*]

First, the amendments made in 1997 to the Bankruptcy and Insolvency Act allowed for a review by a parliamentary committee five years after the revised statute came into force. The Standing Senate Committee on Banking, Trade and Commerce concluded this in-depth review in November 2003 and formulated 53 recommendations in its report entitled *Debtors and Creditors: Sharing the Burden*.

[*English*]

Second, consumer insolvency issues were examined by the Personal Insolvency Task Force established in 2000 by the Office of the Superintendent of Bankruptcy with membership from the principal stakeholder groups. This panel reported in August 2002.

Third, Industry Canada published its report on the operation and administration of the Bankruptcy and Insolvency Act and the Companies Creditors Arrangement Act in September 2002. Canada's main law governing bankruptcy is the Bankruptcy and Insolvency Act, which sets out rules to govern business and consumer bankruptcy and rules for proposals made to creditors by an insolvent firm or individual. As honourable senators are well aware, larger firms have the option of reorganizing under the Companies' Creditors Arrangement Act. Unhappily, though, numerous companies' individuals find themselves declaring bankruptcy every week in this country, with approximately 11,000 businesses and 100,000 individuals making use of the BIA on an annual basis.

I am pleased to note that the bill at least includes some of the recommendations of the Standing Senate Committee on Banking, Trade and Commerce such as the inclusion of income trusts and the ipso facto provision and protection for RRSPs. In the case of the definition of a "consumer bankruptcy," it raised the ceiling on bankruptcies to $250,000 of net debt from $75,000, going beyond the Senate recommendation to raise this to only $100,000.

Honourable senators, numerous other parts of our committee report were either watered down or ignored. The committee called for a student loan to be eligible for discharge after five years, or sooner in case of undue hardship. This bill provides for a minimum of seven years for discharge, or five years in the case of undue hardship.

The committee called for Registered Education Savings Plans to be exempt from the list of assets that may be taken in a bankruptcy. Bill C-55 deals only with RRSPs.

The government has not acted on the Senate Banking Committee recommendation to prohibit reaffirmation agreements. In such cases a bankrupt who continues to make payments on a debt through error or inadvertence becomes responsible for the entire debt, in spite of bankruptcy.

Also missing from the bill is a recommendation to establish a list of federal exemptions outlining the assets that a bankrupt may keep in a bankruptcy. Under the Banking Committee's proposal, the bankrupt would have decided whether to apply the federal or the provincial exemption to his or her bankruptcy. Currently, the list of exemptions differs dramatically by province.

The government ignored as well the Banking Committee's recommendation prohibiting the use of non-purchase money security interests in personal exempt property. These concerned personal effects such as clothing and furniture taken as security for a loan.

Clearly, honourable senators, there is substantial room for improvement, either immediately or during our consideration of the bill, or for future changes to the underlying legislation.

[*Translation*]

This enactment proposes the creation of distinct legislation, the Wage Earner Program Protection Act, on wages owed by an employer who is bankrupt or subject to receivership. Wage earners will receive up to $3,000 from the government, which will then act on behalf of the wage earners in order to recover the wages owed by the employer.

• (1520)

[*English*]

The purpose of this program is to provide employees with a more timely and certain outcome than at present. Currently, three years may elapse before unpaid wages are collected. Since wages now rank behind other debts, an average of only 13 cents on the dollar is now recoverable. Bill C-55 also provides unpaid wages and vacation pay of up to $2,000, with priority above secured creditors of current assets such as cash, inventories and accounts receivable. Currently, wages due to employees rank behind secured creditors.

When it comes to labour contracts, a debtor company can ask a court to order the collective agreement be opened for renegotiation if this renegotiation would facilitate a restructuring.

Turning now to consumer issues, individuals with more than $200,000 in personal income tax debts, representing more than 75 per cent of their unsecured liabilities, will not be eligible for an automatic discharge from bankruptcy. This is meant to prevent high income earners from using bankruptcy to clear tax debts. Locked-in registered retirement savings plans will be exempt from seizure, as I noted earlier.

[*Translation*]

First-time bankrupts will be required to pay prescribed amounts of their surplus income for a period of nine months following the bankruptcy and perhaps even an additional year. Second-time bankrupts will have to make payments for a period of two years and perhaps even three. Trustees will no longer be able to recommend that the bankrupt pay an amount lower than that determined by the Superintendent of Bankruptcy, by directive. For a family of four in 2005, surplus income is defined as 50 per cent over and above a monthly limit of $3,223.

[*English*]

A discharge, honourable senators, releases the bankrupt from any further obligation to creditors. Currently, first-time bankrupts may apply for automatic discharge after nine months, but others must seek a discharge through the courts and must even appear when there is no opposition to the discharge. This can lead to considerable delay in areas where the courts are backlogged. Bill C-55 will allow second-time bankrupts to be eligible for an automatic discharge 24 months after bankruptcy, provided they complete mandatory counselling and have made payments from their surplus income to creditors.

Finally, many contracts contain an ipso facto clause that allows one party to end the contract if the other party enters into insolvency proceedings. Bill C-55 extends the rules that currently limit the use of ipso facto clauses in cases of consumer proposals to include consumer bankruptcies. This means providers of services such as gas, telephone, electricity and car leases will not be able to cut services after bankruptcy.

Those are things I think that all honourable senators would applaud. However, in conclusion, let me turn briefly to what is perhaps the troubling aspect of this legislation. Simply put, honourable senators, once again the government has dropped the legislative ball and has put this chamber in a lose-lose situation. We lose as senators if Canada's wage earners do not receive, without further delay, the protection they deserve and which is provided for in this bill. We lose again if we simply close our eyes, hold our nose and pass this legislation without serious examination.

Frankly, I have serious reservations, as I know many senators have, about unceremoniously rushing any bill — let alone such a complex and voluminous one as this — through the parliamentary process. Its complexity deserves a meticulous review. Having said that, I think the portion dealing with the protection of wage earners is fully supportable, even if a couple of amendments might be appropriate.

This aspect of the bill is one that ought to be given the highest priority. To that end, I believe this bill should have been split into two parts — or should be split into two parts — so that the wage earner protection program could be passed without delay, and the complex, voluminous, detailed remainder could be studied thoroughly and conscientiously.

Although there are some deficiencies in the wage earner protection program, its passage is a priority for Canada's workforce. One cannot help but wonder why such an important and intricate piece of legislation was not made a priority and introduced earlier in this session. Indeed, the rush was such that even committee hearings in the other place were cut short.

Full and thorough committee hearings are a must, honourable senators, if we are to take our work in this place seriously — and more importantly, if others are to take our work seriously. Legislation such as this deserves thoughtful consideration and not a rubber stamp.

Let me refer to the views of The Insolvency Institute of Canada, a group of 125 leading insolvency professionals from across the country that have no particular axe to grind, other than to get much-needed reforms to existing insolvency legislation.

> The IIC supports the move to better protect wage earners, believes that the proposed legislation is flawed in this and other areas and that, without amendments, the legislation will not achieve its intended objectives, and, indeed, could even be detrimental to businesses in general.

Also according to the IIC,

> This legislation is poorly drafted, reflecting perhaps the haste with which it came about, and could make it more difficult for small and medium businesses to borrow money and, in the view of unbiased experts, will lead to higher costs of capital.

Other organizations have expressed serious reservations in correspondence that many honourable senators may have received. They include the Canadian Bankers Association, which was not even heard in the other place, the Canadian Association of Insurance Premium Finance Companies and the Canadian Life and Health Insurance Association. The Canadian Bankers Association goes so far as to say:

> There are numerous flaws in this bill and a number of provisions which will have a major negative impact on the economy of our country.

Even though the CBA is supportive, as am I, of the wage earner protection program, the association believes that the remainder of the bill could seriously harm Canada's economy.

As honourable senators can see, passing this bill without thorough study would be irresponsible. Not only is it far from a perfect bill, as mentioned by my colleague, Senator Rompkey, but many respected commentators feel that it represents a giant step backward, with the result that Canada will no longer meet global standards.

This crucial piece of legislation was passed in the other place without listening to Canadians. Someone needs to give Bill C-55 some sober second thought. Who better than us, honourable senators?

Hon. David Tkachuk: Honourable senators, I, too, wish to say a few words about Bill C-55. I was the Deputy Chair of the Standing Senate Committee on Banking, Trade and Commerce when we did a review of the bankruptcy laws. I think I was the only non-lawyer in the bunch. We will miss the chairman of that committee, Senator Richard Kroft, who did such an admirable job in leading us in the study of the bankruptcy laws. I think he left the Senate too early; he should have been here for this debate.

The laws governing bankruptcy are a key part of Canada's business framework legislation. Prior to agreeing to any changes to these laws, both Houses of Parliament owe it to both the business community and consumers to exercise due diligence as we carry out our work.

The government tells us that proposed amendments in Bill C-55 have four main objectives: to facilitate the restructuring of viable but financially troubled companies; to better protect unpaid wages in insolvency situations; to make the system fairer and prevent abuse; and to improve administration.

This bill has been rushed to us out of political concern for one of these objectives, that of better protecting unpaid wages. It has been rushed to us in spite of a host of other concerns that we have in several other parts of bill, and we have been asked to rubber-stamp it and to rush it through committee. The Senate was not created as a rubber stamp. I hope we will not act in that fashion, but that we will find a way out of this situation and give the bill the study it deserves.

I would like to bring the Senate's attention to a letter that I received from the Canadian Life and Health Insurance Association, one of many letters that we have received on this bill.

Essentially, Bill C-55 will reduce creditor protection for millions of current and future holders of registered retirement savings plans and registered retirement income funds issued by life insurance companies.

• (1530)

Mr. Gregory Traversy, president of the association, wrote the following to me, and I believe to other senators on the committee, on November 16:

> Saskatchewan is unique among Canadian provinces in providing creditor protection for RRSPs and RRIFs issued by all financial institutions.
>
> Regrettably, section 57 of Bill C-55, together with the proposed regulations which would set out the pre-conditions for the creditor protection in bankruptcy to apply, would eliminate Saskatchewan's current provincial credit protection for all RRSPs and RRIFs.
>
> These protections would be replaced with a much reduced protection.
>
> Furthermore, the proposed new scheme would retroactively reduce creditor protection for RRSPs and RRIF contracts that have been in place for years.

As a Saskatchewan senator, I find this a bit alarming. It is certainly not part of the spin on this bill, but it deserves to be explored further. It may not be only a Saskatchewan problem. This could be the case elsewhere in Canada where the proposed new law would eliminate long-standing creditor protection for life insurance, RSPs and RRIFs. The association makes a valid point calling for an amendment to fix this problem.

The insurance industry is not alone in arguing for the bill to be improved. In a brief to the Industry Committee of the other place, the Canadian Bar Association identified several areas in which the bill could be improved and then concluded by drawing to the committee's attention several things that were outlined in the report of our Standing Senate Committee on Banking, Trade and Commerce that did not make it to the final bill. They said that the Canadian Bar Association:

> ...recommends adoption of the Senate Committee recommendations relating to reaffirmation agreements, non-purchase money security interests in exempt property, recognition of cross-border personal insolvency discharges, and family law recommendations relating to addressing technical deficiencies in the 1997 support amendments to the BIA, exempting assets, preventing the bankruptcy trustee from intervening in matrimonial litigation, and creating a bankruptcy remedy against the fraudulent or malicious dissipation or concealment of property to defeat family property claims.
>
> With these suggested modifications, the CBA Section believes the BIA and the CCAA will better reflect the intention behind the various provisions, ensure that they are effective, and will reduce any unintended consequences negatively affecting the rights of debtors and creditors.

We need to hear from the Canadian Bar Association, and we should have the opportunity to amend this bill to reflect their testimony if we believe that their position is more valid than that of the government. This is just one of many groups that have found problems with this bill.

The International Swaps and Derivatives Association has identified what they say is a technical flaw in the bill that needs to be amended as well. Although perhaps through an oversight, Canada's bankruptcy laws will no longer protect termination and netting.

I received a detailed email from the Canadian Bankers Association outlining what would happen if this bill passed. It says in part:

> It is politically attractive, of course, to be able to say that workers have been given a priority status to the extent of $2,000 per employee. But we urge you to achieve worker protection without adversely impacting the credit availability in the economy, i.e., use a Workers Protection Fund and not rely on super priorities.
>
> Just how much liquidity could be expected to be taken out of the system if the super priorities were passed?
>
> The amount of $15 to $20 million is being cited when discussing Bill C-55. But, that's just the amount that the government itself might have to pay.
>
> The fact is that the reduction in credit availability would be exponentially higher.

The bankers go on to a detailed set of calculations to show how the credit available to a single large employee could be reduced by as much as $1 billion.

Another group with concerns is the RESP Dealers Association of Canada. They sent a letter to the minister last month, which states:

> With the parent as the subscriber, the opportunity to seize RESP proceeds during bankruptcy proceedings threatens the viability of parents making these important investments in the first place. RESPs have played a critical role for families wishing to establish a financial base for their children's higher learning. The plans have been shown to increase the probability of a child going on to post-secondary education.

Honourable senators, the Insolvency Institute of Canada and the Canadian Association of Insurance Premium Finance Companies have also found fault with the bill. It seems strange

that almost the entire business sector that this bill is supposed to serve has serious concerns about it. Yet, here we sit, five days before an election call, asked to hold our noses and vote for an entire bill so the one part, the wage earner protection program, can be made law.

A better solution would be, as Senator Meighen has said, to split the bill into two parts as we have done in the past with other complex or controversial bills. Bill C-37A could create the wage earner protection fund, while Bill C-37B could form the basis of a new bill that could be reintroduced with improvements by a new government after the election.

Hon. Noël A. Kinsella (Leader of the Opposition): Honourable senators, I, too, wish to participate in the debate on this bill at second reading. I trust all honourable senators have read all 147 pages of the bill. From my first read of the bill, I believe there is a lot of credence in the suggestion of the Honourable Senator Meighen that this bill could very nicely be split. The first 13 pages deal with the matter that I think is urgent and should be moved on right away, that is, the wage earner protection program act. There are a couple of consequential elements in the back of the bill that would be attached to that as well.

I am distressed about the context in which we have this bill and the pressure on this chamber to deal with it as expeditiously as possible. There are three other bills in the same category, and we have those bills in committee.

Honourable senators, yesterday the government made the decision to stand this bill. They stood the bill. We have lost one whole day. That day is very important, and I will explain why. I think that the suggestion I have made is logical if this house is to fulfil its duty as a house of review. I think we can deal with the analysis of the first 13 pages, but I do not think that even all the collective wisdom in this place would be able to give the other 134 pages the serious study they deserve. If we attempt to proceed with such a study, rather than being a house of review we would become somewhat fraudulent.

I wish to underscore my support for the wage earner protection program section of the bill. My proposal to the government representatives on the other side is that we will support the bill in principle to get it to committee if the government gives us an indication that it will support or indeed introduce a motion, after we send the bill to committee, to send an instruction to the Banking Committee — as I believe it has been agreed that this is the committee to which the bill will be referred — to divide the bill along the lines indicated by myself, Senator Meighen and Senator Tkachuk.

I happen to know that many members of the Banking Committee, from all sides of the house, are of like mind. However, we are caught in a political and contextual box. In the public interest, it is important that we sometimes expedite legislation. However, we also have an obligation to look hard to determine if there is a way in which we can expedite legislation without undermining the whole banking system or the responsibility of this chamber to do a review of the legislation. I think there is a solution in what I am suggesting.

• (1540)

I will not take up any more time to argue why I believe the wage earner protection program part of the act is so important. I will simply underscore that the bankruptcy and insolvency part of the bill is beyond my grasp after one day of reading. No doubt, it is well within the capacity of all other honourable senators. The Senate Banking Committee has already given us the signal that this bill might not have it all right, or at least that part of the bill. I think there is a lot of merit in the idea. I would appreciate an indication from the government as to whether it would support sending this bill to committee with an instruction that the bill be divided so that it could be reported back here very quickly and sent to the House of Commons. In this way, they might be able to adopt that amendment prior to three o'clock Monday afternoon.

Senator Rompkey: Honourable senators, as much as I think there is a lot of merit at first blush in the recommendation that has been made, I do not think we have the time to do what is being asked. We did explore that possibility. As a matter of fact, that was one of the reasons we took the day, to explore that possibility. Given the rules in the House of Commons and the time available to us, and given the way the bill is structured so that one section depends on the other to do what is necessary to provide wage protection to workers, I do not think that the proposed solution is possible within the time frame that we have in front of us.

There is agreement on both sides that work needs to be done to improve the bill. I am not disputing that fact. There are very knowledgeable people on our side who have ideas that they want to put forward, including the Chairman of the Banking Committee and other members of that committee. I do not think there is a disagreement among members of the Banking Committee on either side of this house. They know more about this subject matter than I do. They have studied it and know what needs to be done. As a chamber, we must find a way to let them do that within our rules and the rules of the House of Commons. I suggest that we let the bill go to that committee because I think other things can be done to ensure that, sooner rather than later, what is at fault here is corrected. There are ways to do that. I would suggest that this committee is the best place to explore those options. I wish I could accede to the request of Senator Kinsella, but as I tried to explain, I do not think it is an option that we have the luxury of following right now.

Hon. Terry Stratton (Deputy Leader of the Opposition): When the Deputy Leader of the Government said other things could be done, I am curious. What other things could be done? I think the chamber should be given an idea of what those other things are.

Senator Rompkey: As I said, I am not as conversant with this bill as are other senators. I do not think I want to or can get into the alternatives at the moment, but I think there are alternatives. I know there have been discussions across the chamber with those people who are on the committee and are knowledgeable about the contents of this bill. I believe if we leave it to them, they can come up with a way to do this. We would be prepared to support whatever is reasonable. Whatever can be done, we would be prepared to support. I do not want to suggest things specifically. Given my own inexperience, I would yield to the superior knowledge of those senators who are members of the committee.

Hon. W. David Angus: Honourable senators, I rise in the same spirit as my colleagues, Senators Kinsella, Tkachuk and Meighen, to join this debate on second reading of Bill C-55. It is curious, to say the least, that there are no senators from the government side, other than the deputy leader, to extol the merits of this bill.

It has been made adequately clear by Senators Meighen and Tkachuk and the members of our party here and throughout the other place that we support and continue to support the wage earner protection provisions of Bill C-55, which are a very small part of that bill. I believe they are severable but maybe not in three days. The problem is that this particular provision, in a nutshell, means that there will be increased security given to wage earners in the case of a bankruptcy. They will be ranking up high with the governments and bank security holders. As anyone who knows bankruptcy law will confirm, this hierarchy, if you will, of security holders, is listed and would enhance the position of the wage earner. We are very much in support of it.

The problem is that we are faced with framework legislation. From May 1, 2003 until late November of that year, the Banking Committee reviewed at great length the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and all the related statutes and regulations that make up our insolvency legislation in this country. This matter was referred to the Banking Committee, following long studies by stakeholders, because Canada's insolvency legislation was so vastly out of date.

The committee had the benefit of learned counsel and a host of witnesses. I cannot remember the exact number. The committee report was tabled in this house in November 2003. The recommendations from the Banking Committee and other input that was deemed appropriate by the government led to the drafting of Bill C-55. It was just starting its passage through this Parliament. It was before the committee of the other place when it became evident to committee members — and I am reliably informed — that there were many glitches or inaccuracies, drafting errors and problems with the bill that were to be dealt with by the government. Representatives of the Department of Industry were to make the appropriate amendments at that committee and that was the place to do it. Now, this bad legislation is being foisted upon us by the other place and we are asked to deal with it quickly.

I have a problem with the low regard afforded to senators and to this institution by many Canadians. The reasons are many and varied and probably mostly wrong. They do not all arise from the fact that we are appointed rather than elected, or in some peoples' minds "unaccountable" in their definition of the word "accountable." Our image, rightly or wrongly, is poor. It is not what we would like it to be even in an imperfect world. As we know, perception usually elevates to reality sooner or later. The way we act in certain cases, usually just before dissolution of Parliament, frequently comes in for criticism because of our obvious failure to do our constitutional duty, namely, to study, review and give sober second thought to legislation sent to us by the House of Commons. This is a classic case, honourable senators, where sober second thought and review is needed.

• (1550)

As the Deputy Chairman of the Banking Committee, I can tell honourable senators that we had this matter on our agenda for February of next year. I do not want to misrepresent the number, but I think we had some 70 witnesses lined up to testify, including experts, and we were planning a thorough review. When we heard there were flaws and glitches, we were hopeful the bill would come to us already amended in a substantial way, which would obviate some of the need for study.

Honourable senators, I have often pointed out the problem of the Senate rushing bills through and not doing our constitutional duty, which is why our image takes a big hit at times like this. The last time was in May of last year and, in this year, Bill C-15 was whipped through without amendments being allowed to be made at committee after several weeks of study and many witnesses. The bill was whipped through and we could not even make amendments. It turns out there is a vast body of opinion that this bill was bad law and maybe even unconstitutional, and it is already being challenged in the courts. The ink is hardly dry on the bill. This gives us collectively a very high hill to climb if we want to clean up our act.

When I came to the Senate in June of 1993, I think the image of senators was at an all-time low. It was following the GST debate. My relatives said, "How can you possibly go to that place?" I can remember long discussions here, and we set up a committee to deal with how to improve our image, what kind of PR program we should bring forward, and what kind of education we needed for ourselves. Then we fall back into the same old ways, which makes no sense.

Honourable senators, this bill is not our fault. It is not a matter of party. This bill came to us from the other place. The House of Commons interrupted their work and sent it to us in a terrible shape. It behoves us to hold them to account and not accede to their request.

I did sit on the committee through all the hearings in 2003. I am a lawyer and I do know something about bankruptcy. It is certainly not my field of expertise, but it is that of our learned colleague Senator Goldstein, who was the counsel to the Senate Banking Committee for those hearings. It does not show respect to our new colleague to put him in the position where he would have to put his moniker on something like this.

Starting about five o'clock yesterday afternoon, I and Senator Meighen and others in this place started to receive phone calls, letters, emails and messages. I know that Senator Grafstein, the chairman of the committee, did as well. I have never had anything like this happen as long as I have been a senator.

There are technical problems and drafting problems with the bill. There are things that could be fixed easily but which have grave consequences. We are trying to find a solution. On our side, we would like to split the bill. We do not know the technical reasons, but we take it on good faith that the other side has tried and cannot do it. Another thing that could be done, and which has been referred to, would be to simply bite the bullet and defer this bill. It is wrong for us proceed.

My colleagues have referred to a number of specific problems with the bill. We all know that if amendments are introduced in the Banking Committee and come back to this place, we will be faced with the same problem again of having to split the bill. There is no point kidding ourselves that we can study the bill in the Banking Committee and fix it because we will be faced with the same problem. Senator Grafstein said that we have a crisis of conscience because we take our job seriously. We think, rightly or wrongly, that the Banking Committee has great credibility in the financial services sector and the business community, and it would be a laughingstock if it put a rubber stamp on this bill.

Honourable senators have all heard that this bill deals with a very complicated part of the financial services business — the structured products industry, derivatives, swaps and all of the products that are involved with hedging. Canada is a big player in this global industry. I will read something wherein I am told that if the bill passes, it will destroy completely the derivatives and swaps and the structured products industry in Canada. It would be a terrible black eye for Canada. An expert wrote to me and stated that it is very important that bankruptcy legislation include exemptions from statutory and court-ordered stays on the acceleration or termination of contracts and the protection of netting rights if entities from that jurisdiction are to participate in the securities lending, repo and derivatives markets. This is a requirement of the BIS standards, which is the Bank for International Settlements, in Basel, implemented in every country. Canada does have those termination and netting protections in all of its insolvency legislation. That is the legislation presently on the books.

He went on to say that Bill C-55 has a glitch because certain amendments have been made to the CCAA within the terms of Bill C-55 without thinking about the termination and netting exemption for these contracts. In a nutshell, the CCAA currently has an exemption for eligible financial contracts from the general stay power of a judge in a CCAA proceeding.

This is what keeps Judge Farley in business, and Senator Smith knows very well what goes on up there.

This is currently the only stay power a judge has under the act. The new stay powers are in section 11 and section 34 — section 34 being an automatic stay on accelerating contracts. This is actually the more important stay with respect to derivatives contracts because termination and acceleration are exactly the actions that must be taken under an EFC, which is one of these kinds of contracts, and this is what BASEL-2 requires to be enforceable in an insolvency proceeding. Section 34 has a parallel provision in the BIA proposed provisions and in the BIA bankruptcy, but only with respect to individuals in bankruptcy.

In other words, the drafters or officials made the amendment in Bill C-55 for the BIA section, but they forgot to do it with respect to CCAA. I am told by the stakeholders that this oversight was brought to the attention of Industry Canada, and they said, "Oh, yes, we will fix it in the House committee," which did not happen.

The expert went on to say that if this is not changed, Canadian banks and financial institutions will not be able to obtain legal opinions which they will only lend against in terms of these kinds of contracts and the industry will be destroyed.

I will not go on. This is very technical stuff, but it is an example of what we would be collectively enacting. Many of us are from Missouri on these kinds of things, but I am telling you that we were ready and were planning to do a full study in the new year on this bill. I think that is the solution if we cannot split the bill. We would love to split the bill, and I endorse what everyone has said in that regard, but if we cannot, I am afraid it will have to be done next year.

I hope honourable senators will take these comments as they are meant. They are meant seriously, and they are in all of our interests. This is serious stuff, and it goes to our constitutional duties as senators and members of this place. I would conclude by moving adjournment of the debate.

[*Translation*]

Hon. Madeleine Plamondon: Honourable senators, I support the adjournment motion. I would just like to explain why.

Senator Prud'homme: Certainly.

Senator Plamondon: Before I came to the Senate, my career was in the field of consumer affairs.

• (1600)

[*English*]

The Hon. the Speaker *pro tempore***:** Honourable senators, it is moved by the Honourable Senator Angus, seconded by the Honourable Senator Eyton, that further debate be adjourned to the next sitting of the Senate. Is it your pleasure, honourable senators, to adopt the motion?

Some Hon. Senators: No.

The Hon. the Speaker *pro tempore***:** Those in favour of the motion will please say "yea."

Some Hon. Senators: Yea.

The Hon. the Speaker *pro tempore***:** Those opposed to the motion will please say "nay."

Some Hon. Senators: Nay.

The Hon. the Speaker *pro tempore***:** In my opinion, the "nays" have it.

And two honourable senators having risen:

The Hon. the Speaker *pro tempore***:** Call in the senators. Is there agreement on the bell?

Hon. Rose-Marie Losier-Cool: Could we agree to a fifteen-minute bell?

The Hon. the Speaker *pro tempore*: Is it agreed, honourable senators?

Hon. Senators: Agreed.

The Hon. the Speaker *pro tempore*: The bell to call in the senators will sound for 15 minutes.

• (1620)

Motion negatived on the following division:

YEAS
THE HONOURABLE SENATORS

Andreychuk	Johnson
Angus	Kinsella
Carney	LeBreton
Champagne	McCoy
Cochrane	Meighen
Comeau	Nolin
Di Nino	Plamondon
Eyton	Stratton
Gustafson	Tkachuk—18

NAYS
THE HONOURABLE SENATORS

Austin	Hervieux-Payette
Baker	Hubley
Banks	Joyal
Biron	Lapointe
Bryden	Lavigne
Callbeck	Losier-Cool
Campbell	Mahovlich
Carstairs	Mercer
Chaput	Milne
Christensen	Mitchell
Cook	Moore
Corbin	Munson
Cordy	Pépin
Cowan	Peterson
Dallaire	Phalen
Day	Poulin
De Bané	Poy
Downe	Ringuette
Eggleton	Robichaud
Fairbairn	Rompkey
Fraser	Smith
Furey	Stollery
Gill	Tardif
Goldstein	Trenholme Counsell
Grafstein	Watt
Harb	Zimmer—52

ABSTENTIONS
THE HONOURABLE SENATORS

Prud'homme—1

The Hon. the Speaker *pro tempore*: Resuming the debate.

An Hon. Senator: Question!

The Hon. the Speaker *pro tempore*: The motion is defeated. Resuming the debate, Senator Plamondon.

[*Translation*]

Senator Plamondon: Honourable senators, I would have liked to have been able to take advantage of the adjournment to prepare for speaking on bankruptcy from the consumer's point of view. Before I came to the Senate, I headed a consumer group, and budget consultation was a daily occurrence. When giving budget advice, one does not try to push people into bankruptcy. That is the last option. The first thing one does, when dealing with a consumer in difficulty, is to try to balance the budget, to find enough money to pay off the creditors, which sometimes involves calling them and trying to negotiate the debt. If people do have to declare bankruptcy, they do it with reluctance, because it is perceived as a failure in their life. It is a black mark on their credit rating. No one rejoices at having to declare bankruptcy.

There is always a cost. As I listened to the speeches by my colleagues, I would have liked to have seen the minutes of the standing committee that sat just before I arrived here. Reference has been made to the Standing Senate Committee on Banking and Commerce, and I have not had time to look at the document. You can see what a size it is. It seems to me that it would have been fair to allow me the opportunity of a single day's adjournment so that I could start by consulting some consumer groups and then study the conclusions of the briefs presented by consumer groups. I do not know whether some of those groups also contacted the House of Commons. It would be important to find out the opinions of consumer groups involved in budget consultation before passing a bill as important as this one without any reference to daily experience. I am familiar with what is done in Quebec. I think that, in the rest of Canada, they are called credit counselling agencies or something of the sort. We do not have the benefit of those witnesses.

Without wanting to seem impolite, I must say that I find it indecent to pass a bill on bankruptcy without consumer input. I do not have the statistics at hand. There is a campaign being carried out at this moment in Quebec that has a catchy title in French about being in it up to one's neck. People are getting deeper and deeper in debt. We will be seeing bankruptcies. There are major plant downsizings being announced, and people will end up forced into bankruptcy.

I will not talk again about the bill that would have people caught in the clutches of finance companies. It would be tempting to say that, when banks turn down a budget arrangement, finance companies hasten to do so, knowing that the loans will become delinquent and income can still be generated from exorbitant interest rates.

I would have liked to have had a little time and to be able to speak after I had read this massive document and consulted a few consumer groups. I do not know whether a further adjournment may be requested but, on the off chance that it can, I request it. I ask that the debate be adjourned.

[*English*]

The Hon. the Speaker *pro tempore***:** Are honourable senators ready for the question?

An Hon. Senator: Question!

[*Translation*]

Hon. Marcel Prud'homme: Honourable senators, Senator Plamondon referred to this massive document. The reason for her appointment to the Senate is no mystery. Whether some honourable senators find it questionable or not, the Right Honourable Jean Chrétien was always the cleverest of politicians.

You can see that I came unprepared, I am not trying to hold things up here, so, please bear with me. Some honourable senators do not even know what I am talking about because they do not speak French and they are not even hooked up to the simultaneous translation system. This goes to show that we are often wasting our efforts in the Senate, and I find that regrettable. The Senate is not the House of Commons. This is pretty strange.

You may have noticed that I watch and I observe. Soon I will put my observations in writing as part of my 42 years as a parliamentarian. I have seen and heard hope, despair, deception, a bit of everything. I know we could pay a little more attention to people who have more experience, like Jean Chrétien, who appointed Senator Plamondon to the Senate. She is certainly not known in Vancouver, except in a few circles. She probably is not known on the West Island of Montreal except by a few, like Senator Goldstein, who was Senator Kolber's adviser on the banking committee, on which I had the honour of sitting. He thought I had a lot of judgment at the time. This did not stop me from voting against bank mergers, which proved that I may not have been so wrong.

I see a great gentleman, the grandson of a prime minister here today, who saved my honour by saying: "I am sorry, but I do not agree with the views of Mr. Prud'homme, I do not agree with his position. I was at the Standing Senate Committee on Banking, Trade and Commerce and what Mr. Prud'homme just said is true." I commend Senator Michael Meighen for his integrity. Some people questioned whether I had voted against the bank merger bill. I thank him again. I am not afraid to thank people in public, and if I insult people, I am not afraid to apologize in public.

• (1630)

However, Senator Plamondon is known in the rest of Quebec. I said it earlier with a little more enthusiasm, which I am now losing for reasons you well know. She is known in the rest of Quebec and has good connections. You do not watch French television, and I do not blame you. When Senator Plamondon appears on French television in Quebec, she is appearing in a very closed market. English speakers have access to a huge international market. You have access to a variety of television and radio stations, but in some places in Quebec, people watch only two or three television stations. Unilingual francophones do exist. You think that there are only unilingual anglophones in Canada. There are still millions of unilingual francophones in Quebec, and these people will have to be convinced to vote Liberal, but I will not be the one to do it. I would be happier to vote for the Conservatives but not for the Bloc Québécois — not me, not now.

Senator Plamondon has the power to convince, because she is always being invited on the most popular television shows and we are not. So, I tend to listen to her when she talks about something she knows.

She is what we call hard-headed. She is known for this in Quebec. I do not want insult you. In other words, she is stubborn. When she knows her subject, she is relentless. She knows what she is talking about. She is the great champion of consumer rights in Quebec. She is tuned in. When will you tune in to what I am saying? Instead of trying to push her around, just try to convince her. There is no harm in listening.

The Senate is a place of reflection. I see Senator Andrée Champagne, who has just joined us. She has something to contribute. She was once a minister. She is very familiar with CBC, the Crown corporation. We all have something to contribute to this country. We are senators; we are protected. When we have the misfortune of not following the lead of petty leadership in the Senate, people try to crush us by any means possible.

You on the opposite side have tried to destroy me for years and you have failed. My term is almost up, and I will be leaving. However, as long as I am here, I will not allow people to destroy someone just because they do not like what they hear. All Senator Plamondon wanted was one more day. She would have had time to call her consumer associations. She would have had time to get a better idea of this massive document, as she so aptly said.

[*English*]

I am sure that what I am about to say will be music to the ears of Senators Austin and Rompkey.

[*Translation*]

I am sure that, with some patience, you could change the honourable senator's mind about the upcoming agenda but you are going about it the wrong way. I can tell you now that you will not have much success. I am not going to tell her what to do, but if she asks me how this rule works, then it is my duty and the duty of all parliamentarians to tell her. It is not up to me to tell people how to vote. I do not like being told how to vote, but I do not know much about this topic.

I am telling you, Senator Goldstein, you saw me work on the banking committee. I am a peacemaker. I know that people would like us to fight one another to make the debate interesting.

[*English*]

I will not fight you, because I know that you will not fight me. The honourable senator knows that the honourable senator knows her subject. I do not. Senators who are never present usually say that they do not know what we are talking about. I like to listen to people who have knowledge and understanding, and then I make up my own mind, as a good senator should. That is what we should do.

However, I regret to tell Senator Plamondon that, according to the rules, she cannot ask for an adjournment. I could move an amendment, and then she could speak again. Honourable senators know that I could do that under the rules. I could even move the adjournment of the Senate. However, that would be a waste of energy because that would only provide a 15-minute break.

In life, sometimes we need to back off and cool off. I will do that and not move an amendment, as I could, just to annoy a couple of senators, although it is very tempting to do so.

Madame Speaker can now proceed to do her duty, but honourable senators must remember that there are rules, although the Liberals, in particular, have repeatedly abused them. Senators Tkachuk and LeBreton will love what I am now about to say. The Liberals have no lesson to teach anyone. When I was chairman of the Liberal caucus in the other chamber, I used to sit in the gallery here, watching you, and I saw the Liberals repeatedly abusing the rules. Now, whoever knows the book can make life miserable for the Liberals. I suggest that, in the time available to us, senators read the book.

[*Translation*]

The little catechism of French-Canadian Catholics from Quebec.

[*English*]

If Senator Plamondon learned all the rules of the Senate, she could stop the proceedings of the Senate. I know an ex-Prime Minister who would greatly enjoy watching that.

I will go no further than to ask that accommodation be given to people who feel strongly about an issue. I do not wish to tutor anyone or to be paternalistic. However, that is my feeling with regard to accommodating the government's agenda. I am trying to negotiate publicly. There is too much negotiating behind the curtain. I know the government's agenda and I am trying to help reconcile what seems irreconcilable. There are bigger problems in the world: There are people dying of poverty; there are people dying of torture. I think we can find a way to harmoniously conclude our work here in the Senate, as Canadians expect us to do, even if they cannot in the House of Commons.

I regret to inform Senator Plamondon that she cannot move the adjournment, nor can I. Neither will I move an amendment, although I am surprised that no Conservative senator has done so, but I do not wish to give them ideas.

Hon. Jack Austin (Leader of the Government): Honourable senators, out of respect for Senator Plamondon and Senator Prud'homme, I will say that the public policy issue here is a trade-off between the interests of a senator in further studying the bill and the urging of various communities in the Canadian public that want us to address the bill aggressively. It seems to me at this moment that the appropriate action by the chamber is to send the bill to the Standing Senate Committee on Banking, Trade and Commerce. Senator Plamondon is a member of that committee and, of course, she is fully aware that she can speak again on third reading debate in this chamber to present her views to us.

The Hon. the Speaker *pro tempore***:** Are senators ready for the question?

Some Hon. Senators: Question!

The Hon. the Speaker *pro tempore***:** Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

Motion agreed to and bill read second time, on division.

• (1640)

REFERRED TO COMMITTEE

The Hon. the Speaker *pro tempore***:** When shall this bill be read the third time?

On motion of Senator Rompkey, bill referred to the Standing Senate Committee on Banking, Trade and Commerce.

BUSINESS OF THE SENATE

MOTION TO AUTHORIZE SATURDAY SITTING ADOPTED

Hon. Bill Rompkey (Deputy Leader of the Government), pursuant to notice of November 22, 2005, moved:

> That when the Senate adjourns on Friday, November 25, 2005, it do stand adjourned until Saturday, November 26, 2005, at 9 a.m.

The Hon. the Speaker *pro tempore***:** Is the house ready for the question?

Hon. Senators: Question!

The Hon. the Speaker *pro tempore***:** Is it your pleasure, honourable senators, to adopt the motion?

Hon. Senators: Agreed.

The Hon. the Speaker *pro tempore***:** I do not see two senators rising. Are you asking for a vote, Senator Plamondon?

Hon. Madeleine Plamondon: Yes, because I do not agree with the motion.

The Hon. the Speaker *pro tempore***:** I had asked if the house was ready for the question, senator.

Hon. Marcel Prud'homme: If I may, honourable senators, Senator Plamondon said that she would like to adjourn further debate on the item.

Senator Plamondon: No.

The Hon. the Speaker *pro tempore*: Honourable senators, is leave granted to hear Senator Plamondon again?

Some Hon. Senators: No.

The Hon. the Speaker *pro tempore*: Leave is not granted, senator.

Motion agreed to.

MOTION TO AUTHORIZE MONDAY SITTING ADOPTED

Hon. Bill Rompkey (Deputy Leader of the Government), pursuant to notice of November 22, 2005, moved:

> That, notwithstanding rule 5(1), when the Senate sits on Monday, November 28, 2005, it shall meet for the transaction of business at 9 a.m.

Motion agreed to.

PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT

MOTION TO REFER TO BANKING, TRADE AND COMMERCE COMMITTEE ADOPTED

Hon. Bill Rompkey (Deputy Leader of the Government), pursuant to notice of November 22, 2005, moved:

> That the Standing Senate Committee on Banking, Trade and Commerce be authorized to undertake a review of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (S.C. 2000, c. 17) pursuant to Section 72 of the said Act; and
>
> That the committee submit its final report no later than June 30, 2006.

Motion agreed to.

[*Translation*]

TELECOMMUNICATIONS ACT

BILL TO AMEND—REPORT OF COMMITTEE ADOPTED

The Senate proceeded to consideration of the ninth report of the Standing Senate Committee on Transport and Communications (Bill C-37, An Act to amend the Telecommunications Act, with amendments and observations), presented in the Senate on November 22, 2005.

Hon. Joan Fraser moved the adoption of the report.

She said: Honourable senators, rule 99 states that:

> On every report of amendments to a bill made from a committee, the Senator presenting the report shall explain to the Senate the basis for and the effect of each amendment.

Bill C-37 amends the Telecommunications Act to allow the creation of a national do not call list. The Senate referred the bill to committee on November 2, 2005.

We heard witnesses on Wednesday, November 15, 2005. In four hours of hearings, we heard 20 witnesses. We also received written submissions and follow-ups in writing from witnesses who had appeared.

Clause-by-clause review of the bill took place on November 22. Three amendments were taken into consideration, two of which were passed unanimously and are contained in the report before us today.

[*English*]

There are observations attached to the report, which I will address briefly in a moment. First, I will speak to the two amendments. The amendments are simple, senators. The first one applies to a clause of the bill that had proposed that the Minister of Industry table the CRTC's annual report on the operation of the do-not-call list in the House of Commons only. As honourable senators know, when this kind of process creeps into a bill that comes to us from the other place, we correct it. In that way when a document is tabled in one House, we require that it be tabled in both Houses. We insist that both Houses be treated equally, as is the constitutional right. The amendment in question ensures that the bill respects the position of both Houses by requiring that the report be tabled in each House of Parliament.

The second amendment is almost as simple and, in the view of the committee, equally necessary. As it came to us from the other place, the bill called for fines if violations of the proposed legislation were to occur. The fines were to be a set flat amount of $15,000 per violation in the case of corporations and $1,500 per violation in the case of individuals.

When one considers the intent of a do-not-call list, one can imagine a small company unwittingly breaking the law 20 to 40 times before realizing what it was doing. That small company would be liable for a total amount in fines that could drive it out of business. That is not the object of the bill, which is designed primarily to curb those terribly annoying telemarketers whose job is to harass us at suppertime.

Your committee adopted an amendment that would set those fines as maximums, so that the fine would be up to $15,000 per violation for a corporation and up to $1,500 for individuals. These amendments, which were proposed by the Honourable Senator Tkachuk, were adopted unanimously in committee.

We also attached some observations that I should address. It is important to realize that Bill C-37 is subject to a three-year review. That is important because like many such bills, it has complicated implications. It will be important to assess how it has worked. In addition, the CRTC, which is charged with implementing the bill and with setting up the mechanical and regulatory framework for implementing the bill, will hold a wide-ranging consultation before the bill comes into force.

Therefore, our observations say that during its consultation, the CRTC should gather information and prepare recommendations for the eventual three-year review. The review would suggest ways in which the legislation could accommodate some calls that are not exempted currently under the bill. Those would be calls based on personal relationships — in other words, you call somebody you know on behalf of a non-profit agency; business to business calls, and calls based on referrals. The latter was a point that was raised in particular by the insurance industry.

• (1650)

We also note that as the CRTC is developing its regulations, it will need to give particular attention to clarifying what it means when referring to "a pattern of abuse." This is not in the bill, but it is the term that was used by the representative of the CRTC who appeared before us. He explained that they would be most unlikely to bring the full weight of the law to bear in the case of somebody who had made one phone call that was not permitted by the law; that they would require a pattern of abuse to be established. However, they have not told anybody what that pattern of abuse is. Therefore, we are telling them, in our observations, that they must be very clear about what that means.

Finally, we asked them to collect statistics on complaints that they receive under the terms of this legislation, and on complaints that they receive about calls that are not prohibited by the legislation. As you know, there are some broad categories of exemptions under this bill. This bill does not affect calls made by registered charities, political parties, newspapers or businesses with which the person being called has a business relationship established within the preceding 18 months. We thought it would be important, when the three-year review comes around, to have some indication — which is not now available; statistics do not exist — of the kinds of calls that prompt complaints to the CRTC.

That is the work that your committee now submits to you for your consideration.

Hon. David Tkachuk: Honourable senators, no one has a problem with Bill C-37 in principle. Its purpose was so that people could be removed from a list and so that other people would not call them to solicit — whether it be cash or business or messaging in the case of political parties, or for people whom you do business with, who have other business that they may wish to sell you.

It is a strange situation because we all put our names in the phone book and then we are really upset when people call us. I have never understood the logic behind do-not-call lists. I always thought if you do not want people to call you, you pay the telephone company $2 a month and your name will not be in the phone book, nor will it be available through information. The only people who will call you are the people you want to call you.

Nonetheless, we have the situation; and this bill came before us, which is full of exemptions. It needed a technical amendment, which Senator Fraser has already spoken to, and we adopted that. Therefore, it was open because it had to go back to the House of Commons for further amendments.

The exemptions in this bill, which include political parties, charities and people you do business with on a regular basis over an 18-month period, means that you will still get between 68 to 80 per cent of the calls that you already get. There will be no removal list to go to. People will still be able to call you.

If Canadians think that over the Christmas holidays there will be peace and quiet in their homes, they are badly mistaken. This bill is like a catch-22. It will prevent do-not-call, even though you have your name in the phone book, but people will still call you anyway. That is the kind of legislation that we have before us.

We have the other great exception, which is newspapers. They, too, are exempt; they can phone you. They convinced the people in the other place that they serve a great public good. Life insurance companies and disability companies do not, but newspapers do.

On the basis that the House had already accepted the principle of exemptions, I took it that we should just exempt everyone. I tried to do that. I tried to get the life insurance companies in there as well, and I will tell you a little bit about that in minute.

In the bill, they also had fines. The officials and the parliamentarians responsible seemed to have a shaky grasp of the content themselves. While they told us that the fines levied by the bill would be on a sliding scale, the legislation made no allowance for this. It stipulated a fixed figure of $1,500 for individuals and $15,000 for incorporated businesses.

They said that they would not necessarily act after a complaint. You get on the list and then you have to complain if people call you that you are exempted from, and there has to be a pattern of abuse. What was a problem is that they were not able to define what a "pattern of abuse" would be. We did talk about that quite a bit, and all of us were concerned because this would mean that officials and bureaucrats would get to determine pattern of abuse, and politicians would not be able to step in for a period of three years.

We did move an amendment. I do not want to spend too much time on this since we have another bill over at the Banking Committee. The Liberals will be happy that I do not intend to spend too much time on them. Therefore, I will go to the amendment that I tried to move, which was to exempt insurance companies. The insurance companies had a particular problem. When you work for an insurance company, the first people you approach are your family. You phone cousins and people like that. You develop a direct marketing program around families and friends; those are the first people to whom you try to sell insurance. They may be buying insurance, or they will say, "I already have some, but Senator Gill does not have insurance. Would you like to phone him?" That is what they do, and this legislation prevents them from doing that, so I attempted to move an amendment for that.

What happened is that there were two of us and there were six Liberal senators. We moved the motion to amend the bill, and I thought we had won the amendment because it was two to one. However, they convinced me that Senator Tardif had raised her hand. It was then two to two, so it fell. However, we had the vote anyway because no one else voted. Either they had abstained or were not sure about what was happening.

The interesting part was that there was an amendment to the amendment. I moved it and it passed. The amendment to the amendment passed, and then all the Liberals voted against the original amendment. As a result, the life insurance industry lost a very important amendment and they are hoping this bill fails when it gets to the House of Commons.

An amendment that our side put forward did pass, which was to have a sliding scale of penalties. The penalties were set up so that it could be interpreted as $1,500 per call. In other words, if you made 10 bad calls, you could be fined $15,000 — or $150,000 for a business. We clarified that and that amendment was supported by all members of the committee.

I support this bill with a great deal of reluctance. However, in the grand scheme of things, it is not the most important thing in the world. After the election that is coming in January, we will make all the crucial amendments that are necessary to this bill.

• (1700)

Senator Fraser: Under the rubric of commenting on Senator Tkachuk's brilliant remarks, I will make a correction to my own remarks. I said that both the amendments that we adopted were proposed by Senator Tkachuk. In fact, the first of them was proposed by Senator Tardif. The record will show that the disputed vote was eventually resolved by roll call vote.

Senator Tkachuk: In my previous speech on Bill C-55, I said that I was the only non-lawyer on the committee. Of course, Senator Massicotte gave me heck. I always wondered why he was so smart, but he is not a lawyer, either. I would like to correct that for the record.

Hon. Larry W. Campbell: Honourable senators, for some reason my honourable friend believes that putting your name in the phone book makes you eligible for verbal abuse right around suppertime. Anyone who has more than three friends will probably want to have their name in the phone book, because some may forget your phone number.

The option to voting for this bill is to simply do nothing, of which we have had many years. This is not the way to address an ongoing and growing problem. I believe that, as the senator said, the bill should be implemented, and I believe that the Liberal Party will be happy to fine-tune it after the next election.

I have never had a relative try to sell me insurance. Maybe that does not happen in British Columbia, or maybe it is because I live such a dangerous life that no one will insure me.

I do not believe that some of these examples hold up in the real world and I would ask that we go forward and vote on this legislation.

The Hon. the Speaker *pro tempore*: Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and report adopted.

The Hon. the Speaker *pro tempore*: When shall this bill, as amended, be read the third time?

Hon. Marcel Prud'homme: At the next sitting.

Hon. Claudette Tardif: Now.

The Hon. the Speaker *pro tempore*: Is leave granted, honourable senators?

Some Hon. Senators: Agreed.

The Hon. the Speaker *pro tempore*: It is moved by the Honourable Senator Tardif —

Senator Prud'homme: At the next sitting. There is no leave.

The Hon. the Speaker *pro tempore*: I asked if leave was granted.

Senator Prud'homme: You asked when the bill will be read the third time, and I said, "At the next sitting."

The Hon. the Speaker *pro tempore*: Senator Tardif asked that the bill be read the third time now.

Is leave granted to proceed to third reading now?

Some Hon. Senators: Agreed.

Senator Prud'homme: The next time I will bring a big microphone. Long before Senator Tardif, whom I like very much, got up, I said, "At the next sitting."

The Hon. the Speaker *pro tempore*: Is leave granted, honourable senators?

Some Hon. Senators: Yes.

Some Hon. Senators: No.

The Hon. the Speaker *pro tempore*: The Honourable Senator Tardif moved, seconded by the Honourable Senator Fraser, that the bill, as amended, be read the third time now.

Is it your pleasure, honourable senators, to adopt the motion?

Some Hon. Senators: Agreed.

Some Hon. Senators: On division.

Hon. Terry Stratton (Deputy Leader of the Opposition): Honourable senators, I rise on a point of order. Perhaps Madam Speaker did not understand. When the question was put, Senator Prud'homme said, "At the next sitting." That was clearly an indication that leave was not given to proceed today.

The Hon. the Speaker *pro tempore*: Senator Tardif's motion was to proceed immediately to third reading. That required an answer before —

Senator Stratton: Unanimous consent is required to do that, and Senator Prud'homme said, "Tomorrow."

The Hon. the Speaker *pro tempore*: I am sorry. Am I correct that Senator Prud'homme does not want to give unanimous consent?

Senator Prud'homme: I said, "At the next sitting of the Senate." I think that is clear.

Hon. Sharon Carstairs: Three times the Speaker *pro tempore* asked, "Do we have leave?" At no time did Senator Prud'homme say "no," which is the correct response when you are not prepared to give leave. The Speaker *pro tempore* asked once, twice, and a third time. Honourable senators, if Senator Prud'homme wanted to say "no," he should have said "no."

Senator Prud'homme: I very much like being tutored by Senator Carstairs. When we come back, I want to work on the special committee on ageing, so I do not want to fight with her now.

I think that saying "no," and saying, as the rules provide, "At the next sitting," are equivalent. I leave that in your hands. You have a good adviser. In my view, "At the next sitting" means not now.

Senator Stratton: Because some of us on this side heard and understood Senator Prud'homme, some on this side said "no" to clarify the situation, at least three times.

The Hon. the Speaker *pro tempore*: Leave is not granted. Therefore, the bill will be placed on the Order Paper for consideration at the next sitting of the Senate.

On motion of Senator Tardif, bill placed on the Orders of the Day for third reading at the next sitting of the Senate.

[*Translation*]

PERSONAL WATERCRAFT BILL

THIRD READING

On the Order:

> Resuming debate on the motion of the Honourable Senator Cochrane, seconded by the Honourable Senator Andreychuk, for the third reading of Bill S-12, An Act concerning personal watercraft in navigable waters.—(*Honourable Senator Lapointe*)

Hon. Jean Lapointe: Honourable senators, be warned that I am going to waste less time than Senator Prud'homme. I am just being funny, perhaps not very funny, but then neither is Senator Prud'homme all of the time.

When we sit long hours and follow the orders of Parliament which sends us bills at the last minute, you can see how many senators attend. You will notice that, instead of adopting a regular procedural policy, we are always in a last-minute rush. Now we are going to sit Friday, and Saturday and Sunday while we are at it. I do not mind. I will be here.

That said, in connection with this Bill S-12 concerning personal watercraft in navigable waters, I must start by congratulating Senator Spivak for her hard work on this and her devotion to helping improve the quality of life for those who live along our country's waterways.

That said, I must point out that, between the time this bill was first introduced and this stage, the watercraft industry has made several rather major changes in response to the concerns and problems of those living along waterways. Bombardier Recreational Products has made substantial progress in the design, creation and manufacture of machines that are cleaner, quieter and safer.

As far as the environment is concerned, a number of studies have demonstrated that the impact of personal watercraft on aquatic plants, fish and animals is slight, if not non-existent. What is more, these studies indicate that the noise levels of personal watercraft are lower than those of conventional motorboats and that they produce the same atmospheric emissions as similar motorboats. What is more, the industry has introduced new, two-stroke motors which are far less polluting than the previous four-stroke ones, and this will radically change the emission levels of personal watercraft.

As for safety, I have learned from a number of documents I consulted that the Coast Guard would be prepared to consider requests to restrict or ban the use of personal watercraft on certain bodies of water using the existing procedures under the Boating Restriction Regulations. These regulations cover the safe use of all types of vessels, including personal watercraft, thereby making the bill we have before us pointless.

• (1710)

Honourable senators, I will conclude by emphasizing that the problem with personal watercraft is not the watercraft but lack of good citizenship on the part of certain users.

[*English*]

The Hon. the Speaker *pro tempore*: Are honourable senators ready for the question?

Hon. Senators: Question!

The Hon. the Speaker *pro tempore*: It was moved by the Honourable Senator Cochrane, seconded by the Honourable Senator Andreychuk, that this bill be now read the third time. Is it your pleasure, honourable senators, to adopt the motion?

Some Hon. Senators: Agreed.

Some Hon. Senators: No.

The Hon. the Speaker *pro tempore*: I heard a "no." On division.

Motion agreed to, on division, and bill read third time and passed.

CRIMINAL CODE

BILL TO AMEND—SECOND READING—
DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Grafstein, seconded by the Honourable Senator Ferretti Barth, for the second reading of Bill S-43, An Act to amend the Criminal Code (suicide bombings).—(*Honourable Senator Rompkey, P.C.*)

Hon. Roméo Antonius Dallaire: Honourable senators, I wish to —

Hon. Terry Stratton (Deputy Leader of the Opposition): May I make a point? I understand that Senator Dallaire is the second speaker. I would like to reserve the 45 minutes as the second speaker for the official opposition, if I may.

The Hon. the Speaker *pro tempore***:** Is it agreed, honourable senators?

Hon. Senators: Agreed.

Senator Dallaire: I stand before you to pursue the debate on Bill S-43, to amend section 83.01 of the Criminal Code on suicide bombings, making it, per se, a criminal offence. The aim of this amendment to the Criminal Code is fundamentally to close a loophole in regard to one of the crimes against humanity that is becoming more and more current in this era. Furthermore, it is to reinforce our position in regard to continuing an assault on impunity: that is, impunity of those who continue to use the civilian population as targets in an attempt to change the situations in their country.

My particular interest in arguing or presenting arguments in support of this bill comes from my experience with the International Criminal Court. Through that court it has been my experience that much documentation is referred to when we attempt to bring to solution and bring to justice those who commit crimes against humanity. It is not just the act but so often also the documentation by which we can bring these individuals to justice that is the reference that we need to prosecute them and ultimately to create such an atmosphere where impunity is no longer acceptable. By doing these things, we reduce the possibilities of crimes against humanity that turn into humanitarian catastrophes that ultimately end not only in ethnic cleansing but go all the way to genocide.

We are in a new era not of security but insecurity. The era of the Cold War provided us with a certain balance of where we stood in regard to the possible threats to our nation. However, since the end of the Cold War, we have entered a new era of what one might even say is disorder, contrary to what George Bush Sr. said would be an era of order. In this era, the nature of conflict and also the threat to our security has radically changed. It is no more the classic warfare of grand armies on our four frontiers or in far-off lands to which we would participate in protecting our country. On the contrary, we find ourselves wrapped up in conflicts in which the sense of insecurity is now rendered even more intolerable by the fact that it is nearly impossible to identify or determine the threat. At least in the Cold War we knew who would press the button that would ultimately send us into oblivion under a nuclear threat. We knew their ethos. We knew their mantra of conviction. However, in this era, conflict has become exceptionally complex and ambiguous. It is not an era where it is clearly the good guys and the bad guys, an era of the white hats and the black hats.

We have entered an era of conflict where the general population in so many of these nations is the instrument of war, and conflict is being exported beyond those nations that are in conflict. Now, in this time frame, we have seen ourselves moving from what used to be interstate conflicts to intrastate conflicts, and where we find the expression of conflict in a variety of fashions and some of those fashions most ignoble and barbaric. We also find ourselves in an era where we use children as instruments of conflict. In the extreme, children are even used as suicide bombers. We are now in an era where the civilian population is no more on a side of the conflict where the militaries have gone at each other over the years. On the contrary, we are in an era where the civilian population is an instrument of the conflict and is used by those in conflict to influence the outcome.

Primary strategies used by extremists in this era are to instil horror and terror, using barbarism, and in so doing, create fear, and in fear, gain control. That control permits them to manoeuvre their populations and create intolerable consequences, mostly on the humanitarian side and certainly in the arena where human rights are totally abused, and we find ourselves in front of crimes against humanities in the ultimate abuse which leads us even to genocide.

The issues of suicide bombers, recruitment and indoctrination of those willing to carry out terrorist attacks, particularly important in the case of suicide terrorism, must be looked at and deterred. In 2004, Gareth Evans, a former Australian foreign minister and now head of the International Crisis Group, argued that suicide bombings are now the weapon of choice for terrorism. The Iran terrorism expert, Bruce Hoffman, has argued that the fundamental characteristics of suicide bombing and its strong attraction for the terrorist organizations behind it are universal. Suicide bombings are inexpensive and effective. They are less complicated and compromising than other kinds of terrorist operations. They guarantee media coverage. The suicide terrorist is the ultimate smart bomb. Perhaps most importantly, coldly efficient bombings tear at the fabric of trust that holds societies together. All these reasons doubtless account for the spread of suicide terrorism from the Middle East to Sri Lanka, Turkey, Argentina, Chechnya, Russia, Algeria, and now even to the United States in North America. Suicide bombing is the most fearful of all weapons. While physical defence measures and other cooperation are necessary in an attempt to neutralize the weapons of suicide terrorism, the real key is to realize that the bomber is only the last link in the long chain. Increased intelligence cooperation is necessary in an attempt to disrupt this chain, particularly focusing on those who recruit, train and prepare bombers.

The ultimate aim of this bill is to bring another tool of deterrence to those who might not only use that weapon but ultimately those who actually do use that weapon. More broadly, countries around the world must condemn all such attacks, whether suicide or not, that target innocent civilians and use political circumstances or religions to justify them.

• (1720)

Honourable senators will recall that, after 9/11, Pope John Paul II brought together the heads of the great religions of the world in January of 2002. They sat in Assisi, Italy, for two days and at the end of that one and only conference where the world's great religions were brought together, the Pope was able to extract the concluding statement from the leaders that no religion calls upon people to kill other human beings in the name of religion. It does not exist as a premise.

Honourable senators, all governments, publicly and through diplomatic channels, should refrain from any action that appears to encourage, support or endorse suicide bombings or other attacks against civilians, and should use all possible influence with the perpetrator groups to make them cease such attacks immediately and unconditionally. This is why this amendment is significant. It reinforces that even an attempt to conduct a suicide bombing is a criminal offence under this bill.

More basically, we must always address the root causes that make the recruitment of terrorism and such bombings easier. There is no doubt that terrorism is the expression of rage by the developing world and, despite the walls and instruments that we create in our defence, ultimately the best defence is not a defence around our areas of interest but, rather, by going aggressively to the source of this rage and, ultimately, eliminating it. One of the primary instruments for doing that is not only the application of justice but also the more forceful, useful and quantitative application of international development.

Honourable senators, I present the argument that there is no room for any permission or any possibility for someone to use the civilian population and its destruction as a tool to achieve his or her aims. We must use this bill to close the loophole that allows the possibility for this horrific weapon to continue to exist because it is becoming more and more popular.

Hon. Noël A. Kinsella (Leader of the Opposition): Would the honourable senator take a question?

Senator Dallaire: Yes.

Senator Kinsella: My question speaks to the motivation of the suicide bomber and the propensity, as reported, of some community leaders to glorify suicide bombing as an activity. Honourable senators who were serving on the Special Senate Committee on Anti-terrorism to review the anti-terrorism legislation were briefed on a new piece of legislation adopted by the House in Westminster about one week ago. Under their new law, the glorification of acts of terrorism, such as suicide bombing, is a criminal offence. Would the honourable senator agree that this should be considered for Canada?

Senator Dallaire: Honourable senators, I deem it most innovative of that House to have moved in that direction. The whole idea behind it should be one of eliminating the doctrine that espouses the use of the civilian population as a tool of conflict in order to achieve political, or sometimes power, goals. Any instrument that could eradicate that doctrine would be good.

In the case of the doctrine that espouses the use of children as a tool in conflict, the goal is not to find the social and economic tools that would prevent children from being recruited but, rather, to eradicate those who so much as think of that doctrine in the first place.

Genocide is an instrument that has been used. The ultimate goal in that case is not to bring those who perpetrate it to justice but to eliminate the gestation of such a concept of genocide. In so doing, any such proactive tools to wrest that initiative from those who would use such horrific weapons should be endorsed and pursued.

[*Translation*]

Hon. Marcel Prud'homme: Honourable senators, I am a long-time friend and I have great respect for our retired general and colleague Senator Dallaire. What is going on is horrific. He has addressed the issue very well. I have yet to determine which of the two is worse: to glorify madness or utmost despair.

The honourable senator would apply the same criteria, as a general, not as a senator, to places where the military, for example, would not hesitate to jeopardize civilians used as human shields by the enemy. We have examples. I chaired the Committee on National Defence for 15 years, under Mr. Trudeau. I have met chiefs of staff under previous governments who told me horrific stories where the enemy could be seen, but not the civilians in front of the enemy. The criteria we are discussing today also apply to what I just described.

Second, what lessons from the honourable senator's experience could be drawn from these kinds of blind bombings in Iraq, where, in attempting to hit a specific target, the civilian population ends up suffering the most? We know that more than 30,000 have died in Iraq. It is all hush-hush, of course. We know that it is a tragedy that will not heal. It is sad to say. Those who are familiar with that part of the world know that it can only get worse. I am sorry to say so, and you know I am.

I would appreciate the honourable senator's help in my personal reflection on how far one can go in being modern and saying that some things happened that cannot be condoned and others are taking place which are unacceptable, like the glorification of suicides, for instance. I totally agree with him on that.

The Hon. the Speaker *pro tempore***:** Honourable senator, your time has expired. Perhaps Senator Dallaire could just give a short answer.

Senator Dallaire: Honourable senators, it is rather difficult for a general who has a microphone to be brief, and now that he is a politician, it is almost impossible. As regards the nature of the conflict in which we find ourselves, I will take the example of General Patton, during the Second World War. He stated that, as a principle, the objective is to make the other one die for his

country. However, in the situation in which we find ourselves now, the other one, when dying for his country, often takes you with him, because suicide bombings are frequently used as weapons. We no longer have a scenario where the enemy is easily identifiable. The enemy is often integrated into the population. This is why a civil war is the worst possible scenario. In the current context, the fundamental principle is that we have no authority to wilfully use the civilian population, the non-combatants, as instruments to achieve military goals or objectives of power. That is the fundamental humanitarian law.

[*English*]

On motion of Senator Stratton, debate adjourned.

CANADIAN HUMAN RIGHTS ACT

BILL TO AMEND—SECOND READING—
DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Kinsella, seconded by the Honourable Senator Meighen, for the second reading of Bill S-45, An Act to amend the Canadian Human Rights Act.—(*Honourable Senator Rompkey, P.C.*)

Hon. Bill Rompkey (Deputy Leader of the Government): Honourable senators, I know that Senator Lovelace Nicholas would like to speak to this motion, having discussed it with her earlier today. However, because she is not now in the chamber, I would like to reserve the right to protect her place in speaking to this motion which, I understand, is extremely important to her.

• (1730)

The Hon. the Speaker *pro tempore***:** Is it agreed, honourable senators?

Hon. Senators: Agreed.

DEPARTMENT OF JUSTICE ACT
SUPREME COURT ACT

BILL TO AMEND—DEBATE CONTINUED

On the Order:

> Second reading of Bill S-34, to amend the Department of Justice Act and the Supreme Court Act to remove certain doubts with respect to the constitutional role of the Attorney General of Canada and to clarify the constitutional relationship between the Attorney General of Canada and Parliament.—(*Honourable Senator Cools*)

Hon. Terry Stratton (Deputy Leader of the Opposition): Honourable senators, due to the heavy workload and the fact that Senator Cools is not here, I would like to restart the clock on this issue.

Hon. Bill Rompkey (Deputy Leader of the Government): Agreed.

On motion of Senator Stratton, for Senator Cools, debate adjourned.

EXCISE TAX ACT

BILL TO AMEND—SECOND READING—
POINT OF ORDER—DEBATE SUSPENDED

On the Order:

> Resuming debate on the motion of the Honourable Senator Di Nino, seconded by the Honourable Senator Keon, for the second reading of Bill C-259, An Act to amend the Excise Tax Act (elimination of excise tax on jewellery).
> —(*Honourable Senator Rompkey, P.C.*)

Hon. Jack Austin (Leader of the Government): Honourable senators, the private member's bill before us was introduced in the House of Commons on November 3, 2004. It came to this chamber on June 16, 2005. Since receiving this bill, much has changed. This bill has been overtaken by events; I am referring to Bill C-43, an act to implement certain provisions of the budget tabled in Parliament on February 23, 2005, which we passed on June 28, 2005 and which was given Royal Assent on June 29, 2005.

In passing Bill C-43, the Senate took the decision to eliminate the excise tax on jewellery in stages over four years. Having made that decision, I am obliged to say that this bill, which proposes the immediate elimination of excise tax on jewellery, should not remain on the Order Paper. The Senate already in this session has pronounced itself on this matter. The authorities are quite clear that we should not contemplate in the same session the question for which we have already made our decision.

Erskine May, Parliamentary Practice, twenty-first edition, page 468, chapter 21, states:

> There is no rule or custom which restrains the *presentation* of two or more bills relating to the same subject, and containing similar provisions. But if a decision of the House has already been taken on one such bill, for example, if the bill has been given or refused a second reading, the other is not proceeded with if it contains substantially the same provisions; nor could such a bill be introduced on a motion for leave.

Beauchesne's Parliamentary Rules & Forms, sixth edition, citation 624(3) is identical to Erskine May but adds:

> But if a bill is withdrawn, after having made progress, another bill with the same objects may be proceeded with.

Bourinot's Parliamentary Procedure, fourth edition, chapter IX, section IX, states:

> When a motion has been stated by the speaker to the house, and proposed as a question for its determination, it is then in the possession of the house, to be decided or otherwise disposed of according to the established forms of proceeding. It may then be resolved in the affirmative or passed in the negative; or superseded by an amendment, or withdrawn with the unanimous consent of the house. It is, however, an ancient rule of parliament that "no question or motion can regularly be offered if it is substantially the same

> with one on which the judgment of the house has already been expressed during the current session" (*w*). The old rule of parliament reads: "That a question being once made, and carried in the affirmative or negative, cannot be questioned again, but must stand as a judgment of the house" (*x*). Unless such a rule were in existence, the time of the house might be used in the discussion of motions of the same nature and contradictory decisions would be sometimes arrived at in the course of the same session.

The prohibition against dealing with the same subject matter in the same session also finds a prominent place in *Rules of the Senate of Canada*, and I refer to rule 63(1), which states:

> A motion shall not be made which is the same in substance as any question which, during the same session, has been resolved in the affirmative or negative, unless the order, resolution, or other decision on such question has been rescinded...

In his ruling of October 29, 2003, Speaker Hays stated:

> The purpose of the same question rule is to avoid the wastage of time and effort in reconsidering a question that is already a decision of the House.
>
> ...Within this context, the same question rule applies only to questions that are moved and decided in the Senate.

On February 27, 2001, the Speaker ruled on the same question regarding Bill C-43, an act respecting abortion, and Bill S-7, an act to amend the Criminal Code (protection of the unborn child). He said:

> Although Bill S-7 and C-43 have different objectives and represent alternatives on the subject of abortion, the Chair feels, in that they both deal specifically with amendments to Section 287 of the Criminal Code, a strong case may be made that they are "the same in substance."...

He went on to say:

> I recognize that what defines the term "the same in substance" is a question of judgment and that there may be Honourable Senators who disagree with my opinion and I respect that. The issue itself is an emotional one and feelings understandably run high. The Senate has pronounced itself this session on the question of abortion. Given that the substance of Bill S-7 has been considered and disposed of during the debate on Bill C-43, it is not in order to proceed any further with S-7. The order for second reading should be discharged and the Bill removed from the Senate Order Paper.

Honourable senators, I contend from the precedents and the rulings that I have quoted that it is not in order to proceed with Bill C-259. Our chamber, in examining and adopting Bill C-43, has taken a decision on how to deal with the excise tax on jewellery in this session. Bill C-259 should now be removed from the Senate Order Paper and a message should be sent to the other place forthwith to inform them of our decision.

I am asking, Your Honour, for a ruling. If the ruling should be found not to favour my submission, I would then agree that the bill should proceed to committee. However, if the ruling favours my submission, and I believe strongly that it should, then the matter would be disposed of.

The Hon. the Speaker *pro tempore***:** Are there other senators who wish to participate?

Hon. Consiglio Di Nino: Honourable senators, obviously, it is not a surprise that I would disagree with my honourable colleague opposite as to whether this bill is substantially the same as Bill C-43, the budget bill. I think it is an enormous stretch to suggest that these two bills, although dealing in general terms with the same subject matter, are substantially the same.

I want to remind honourable senators that this bill has been sitting here for five months, as Senator Austin said. We are obviously at a point in time in the life of this Parliament where the government has decided to deal with this issue by what I would suggest is an inappropriate manner. Procedural shenanigans are not the way to deal with substantive issues, particularly when they affect thousands of people across this country directly and millions across this country indirectly. Every city, town and village has a jewellery store. Major department stores sell these kinds of trinkets for two, three, five or ten dollars. This is not a luxury tax.

• (1740)

This is an unfair tax that the rest of the world has said should not exist. We are the only country left that still has it.

Bill C-259 is supported by a pretty wide majority of members in the other place, including some three dozen of the members of my colleague's party on the Liberal side. I think it is a ploy by the government to try to defeat this bill without having the courage to stand up and say, "We do not want this bill" and vote on it.

My position is clear. I do not think it is substantially the same. To you, Your Honour, I suggest that it is an enormous stretch. Obviously, if the government side wants to kill this bill, let them have the courage to stand up and vote against it.

Hon. Noël A. Kinsella (Leader of the Opposition): I take it, honourable senators, that we are at the stage where we are debating a point of order. The Leader of the Government in the Senate did not say he was raising a point of order, but I think the substance of what he was saying is that he is raising a point of order. Am I correct?

Senator Austin: Yes, and I asked for a ruling from the Speaker on the point of order.

Senator Kinsella: On the point of order, rule 63(1) reads:

> A motion shall not be made which is the same in substance as any question which, during the same session, has been resolved in the affirmative or negative...

This is the rule to which the Leader of the Government in the Senate has drawn our reference.

In our companion to the *Rules of the Senate*, I refer honourable senators to some citations on page 187.

What Senator Di Nino said is absolutely right. We must be focused on whether or not Bill C-259 is of the same substance as the bill that the minister made reference to. It is a totally different bill. It is interesting that both bills came from the same other place and that there are no members in the other place who have raised the question. There were two matters before that House that were on the same substance.

More important — and regrettably, in my view — this point of order is raised at this particular time in this chamber. We have had this bill here for some time. This is the first time that an attempt has been made to suggest that it is out of order because it speaks to the same question that another bill dealt with. One has to wonder why that is being raised at this point in time.

Canadians are wondering why we are dealing in the way in which we are dealing with a lot of things this week. I think that it is regrettable that the timing of this point of order is today. It looks very much like a delaying tactic; that if the Speaker has to take a day or so to review this matter, then the matter will not be dealt with and moved on for further consideration by a committee.

During this whole week, we in the opposition have been attempting to be as supportive of moving legislation along as expeditiously as possible, recognizing the political realities in Ottawa and what will happen probably this weekend. We have tried to balance moving things along quickly with maintaining our responsibility of examining legislation, and we have attempted to be as cooperative as we could.

Therefore, I do not understand why the government, at this stage, would come up with this kind of an objection to delay this bill, and not have it go to committee. If it does not go to committee today, by the time there is a ruling from the chair, it will be too late. It looks like a delaying tactic, unless a much stronger argument can be made that somehow this bill is out of order pursuant to rule 63(1), because frankly, it is not.

Hon. Eymard G. Corbin: Honourable senators, I support entirely the argument made by the Leader of the Government in the Senate, but I have a greater concern. It is a touchy matter and I do not want to make it a personal matter, but the Leader of the Government in the Senate has asked the Speaker *pro tempore* to make a ruling as to the acceptability of the bill under the rules.

The Speaker occupies a particular position in this house in terms of his or her participation in debates on matters before the house. As a matter of practice, the rules also provide for the Speaker to vote. If he or she so decides, he or she is usually the first to vote on any motion put before the house.

The situation we have here today raises a number of questions in my mind. The person who is the Speaker *pro tempore*, who has now been asked to make a ruling on this matter, was supportive of the legislation. In fact, the Speaker *pro tempore*, in terms of her ability to participate in debates when she is not in the chair, expressed her intention to vote in favour of Bill C-259. She expressed that view in the very first words of her speech. She ended her speech — I have the French text here — by saying:

[*Translation*]

> I urge my colleagues to finally discard early 20th century tax policy by quickly moving to support Bill C-259.

We have the highest respect for our colleagues who must preside over our proceedings this evening, namely the Speaker of the Senate or the Speaker *pro tempore*. However, I think that, under the circumstances, to avoid any perceived conflict of interest, the Speaker *pro tempore* should personally decide not to rule on the issue raised by Senator Austin. Considering the involvement of the Speaker *pro tempore* in Bill C-259, it should be up to the Speaker himself to rule on the point of order raised by the Leader of the Government in the Senate. To proceed in this fashion would be a very cautious way to deal with this matter.

• (1750)

Otherwise, regardless of the ruling, but particularly if Senator Austin's point is rejected, would the perceived objectivity criterion be respected? I do not know. I am saying this with all due respect for the individuals who sit in the chair. I often sat in it myself. We are often put in tense and even conflicting situations. I invite my honourable colleagues to reflect on my comments.

It is my belief that the person who is in the chair right now should not rule on the point of order raised by Senator Austin.

[*English*]

Senator Kinsella: Honourable senators, Senator Corbin has raised an interesting situation. When dealing with other types of issues, while the Speaker is taking time to reflect on the orderliness of the matter, the debate and the process continue. Perhaps under the circumstances, while awaiting the return of the Speaker, we should allow this bill to continue at second reading stage and perhaps further, depending upon how the Senate decides to deal with it. In that way, the point of order would not hold up the proceedings of the chamber on the matter. It would also help avoid the circumstance that Senator Corbin has brought to our attention.

Hon. Bill Rompkey (Deputy Leader of the Government): I wish to clarify the point of Senator Kinsella. Do I understood correctly that he is suggesting that debate should continue but that there should be no disposition of the matter until the Speaker returns and makes a ruling?

Senator Kinsella: Yes, in the same way as we do when there is a question of whether a Royal Recommendation is required. We often let the Speaker take time to study the matter while proceedings on the item continue.

Senator Di Nino: For clarification, unless we move this forward, that is what will happen in any event. Senator Austin has asked for a ruling from the Speaker. The item will stay on the Order Paper unless we move it forward.

I thought Senator Kinsella had said that, with the agreement of the other side, we would conclude second reading and send the bill to committee, but I do not think that is what was heard on the other side.

Senator Kinsella: I am suggesting that we carry on with second reading debate. If the debate is concluded, there will be a vote taken on whether the bill is accepted at second reading. If it is accepted at second reading, a motion will be made to refer it to a committee. If someone moves the adjournment of the debate, and that meets with the pleasure of the house, the debate will be adjourned. If that does not meet with the pleasure of the house, which would be seen to be another delaying tactic, a vote will be taken on that issue.

Senator Austin: I am not prepared to ignore the point of order that I have presented to the chamber. That must be dealt with. I have no objection to the debate at second reading continuing, which is what I thought Senator Kinsella said in the first instance. If he is suggesting that we should send the bill to committee and await an academic or theoretical decision to come, that is not acceptable. The rules are real, and the rules should be applied.

It is my responsibility to ensure that the rules of this chamber are applied to our processes, which is why I raised this question. It is not a question of the government delaying. The government was operating on a legislative agenda that foresaw an election call before the end of February. There was more than adequate time to deal with this bill on its merits, if it is in order. The timetable has been dramatically altered by events in the other place. That is not an issue for which I will take responsibility.

To answer Senator Kinsella, we are doing our best to deal with bills sent to us by the other place that we know, because they sent the bills to us, the members of that place believe are in the public interest to review, examine and, hopefully, pass. However, we are doing so with public notice that the Leader of the Opposition in the other place will put a motion of non-confidence tomorrow. This is the reality, and it changes the dynamics of the time in which we can deal with various public matters.

Senator Di Nino: The Leader of the Government in the Senate said that we are dealing with bills that came from the other place which members of the other place believe are in the public interest. Is he suggesting that this bill, which passed by a comfortable majority in the other place with support from all parties, is not in the public interest?

Senator Austin: Honourable senators, I am only suggesting that this bill has to proceed in accordance with our rules. I have said that if the ruling is that the bill is not the same in substance as a bill with which this chamber has already dealt, then of course we would be prepared to proceed with the bill expeditiously. However, I do not believe that that is the case, and I believe our rules should be enforced.

It is not unusual for the Leader of the Opposition or the Deputy Leader of the Opposition to rise and argue for the enforcement of our rules. It may be slightly more unusual for the Leader of the Government to do so, but it is my obligation.

Senator Di Nino: This order has been before us since June. Some members opposite responded, but no one presented the government view, or spoke in opposition to this bill to this time. There has been absolutely no response until now from those who may not wish to see this bill go forward.

As Senator Austin has said, and I have a great deal of respect for him, this bill came from the other place where it passed by a wide margin with all-party support, including a large numbers of supporters from his party. The bill is in the public interest and we should have dealt with it, but obviously the honourable senator believes otherwise.

Senator Austin: I am not addressing the merits of this bill and I am not asking for a ruling from the Speaker on its merits. I am asking that consideration be given to the point of order I have raised. After that, we can begin arguments on the merits of the bill.

Hon. Joan Fraser: Honourable senators, I wish to make two points. First, if my memory serves me correctly, Senator Plamondon spoke briefly but eloquently against this bill yesterday.

Second, the Leader of the Government in the Senate and Senator Corbin have both made very serious points. I do not know what the eventual ruling will be. I agree with Senator Corbin that we will place the Speaker *pro tempore* in a very difficult position if we ask her to make the ruling. However, I would like to focus on the fact that second reading is not an empty formality.

Sending a bill to committee is not an empty formality with which we can proceed while awaiting the ruling, regardless of whether it comes from the Speaker *pro tempore* or the Speaker. Second reading is a very important process. It indicates approval in principle of a bill. It is one of the most important things we can do, and it seems to me that, with an objection as substantive as that which has been raised by the Leader of the Government, we owe it to the integrity of the institution not to take that step until we have a ruling on the legitimacy of the bill. Debate is one thing, but I really do not think that the vote should occur until we have a ruling.

Debate suspended.

BUSINESS OF THE SENATE

The Hon. the Speaker *pro tempore***:** Honourable senators, it being six o'clock, is it your wish that we not see the clock?

Hon. Bill Rompkey (Deputy Leader of the Government): I propose that we not see the clock.

Hon. Madeleine Plamondon: No.

The Hon. the Speaker *pro tempore***:** Leave is not granted. I will leave the chair and return at eight o'clock this evening.

The Senate adjourned.

• (2000)

The sitting was resumed.

FIRST NATIONS COMMERCIAL AND INDUSTRIAL DEVELOPMENT BILL

FIRST READING

The Hon. the Speaker *pro tempore* informed the Senate that a message had been received from the House of Commons with Bill C-71, respecting the regulation of commercial and industrial undertakings on reserve lands.

Bill read first time.

The Hon. the Speaker *pro tempore***:** Honourable senators, when shall this bill be read the second time?

Hon. Tommy Banks: I move that the bill be read the second time at the next sitting of the Senate.

The Hon. the Speaker *pro tempore***:** Is leave granted, honourable senators?

Some Hon. Senators: Agreed.

Hon. Terry Stratton (Deputy Leader of the Opposition): We, on this side, have been reasonably cooperative in the situation with which we are faced. We accept that some bills have to be fast-tracked for particular reasons. It was our understanding that four bills, in particular, were required, plus bills that were coming out of committee. Now we are being asked to fast-track two more bills and we have not been given substantial reasons for this, although we can understand the reasoning for the other four.

If John Lynch-Staunton were standing here today, you would get a 15-minute lecture from him on the rule requiring two days' notice for second reading. We believe that, unless a case can be made, we need two days. We are not being stubborn; this is the chamber of sober second thought, which is what we are here to provide. If we break that practice, when will it end? Governments of every party will get into the habit of pushing everything through at the last minute with one day's notice or less, which is wrong for the proceedings of this chamber.

I object, unless someone on the other side can tell me why this bill should proceed with only one day's notice.

Hon. Jack Austin (Leader of the Government): Honourable senators, Senator Stratton makes a valid point. The House of Commons has sent us Bill C-71, and I believe Bill C-57 will also be brought before us today. In addition, as honourable senators know, the other place has approved a ways and means motion that provides for personal and corporate tax reductions. Those two bills are not before us at the moment, but they could be while we are in session.

It is a matter of our understanding the public policy issues that are presented by legislation. It is absolutely true that as a chamber of review we would rather take the time to be careful in our work. It is also true that there are public constituencies in this country that, having done a great deal of work with political parties in the other place to achieve legislative approval for certain proposals, are now hoping that their work was not in vain and will not be thrown away. It is in our discretion to decide what to do at this stage.

• (2010)

Bill C-71 is a First Nations-led initiative developed by a team of Aboriginal First Nations in Alberta, Saskatchewan, Ontario and British Columbia. To put it relatively simplistically, the bill essentially provides authority to a group of First Nations to make the regulations that they need to ensure that their economic projects can move forward.

As has been said in this chamber —

Senator Comeau: Is this a second reading speech?

Senator Austin: I have been asked for an explanation, and I believe that the request is proper because we are being asked to move this legislation forward quickly, and I think the chamber should know the public policy behind that request.

One of the real problems in the Aboriginal system is that a number of these communities do not have regulation-making capacity. The provinces cannot make regulatory provisions for them because they do not come under provincial jurisdiction. Therefore, there needs to be created a capacity through federal legislation to allow communities that wish to opt in to have the authority to make regulations that provide for economic security to lenders and investors with respect to economic projects.

That is the basic purpose of this bill, although it has other purposes. These communities have worked very hard to bring this legislation to this point in order to get on with the economic growth that our Aboriginal Affairs Committee has been working to bring to the attention of the Canadian public, something about which Senator St. Germain has spoken often.

Honourable senators, I would like the chamber to hear, at second reading debate tomorrow, the details of this bill and to make a judgment on whether there is sufficient urgency and common good for the Aboriginal community for us to move forward on it.

Senator Stratton: Did I understand correctly that there are two bills, or is there only the one bill?

The Hon. the Speaker *pro tempore***:** There are other bills, but we are dealing with just this one.

Senator Stratton: If we agree to one day's notice, we would have speeches at second reading tomorrow, Thursday. Then the bill would go to the Aboriginal Affairs Committee. The Aboriginal Affairs Committee does not meet until Wednesday at 6:15, I believe. Therefore, if the government falls or the Prime Minister calls an election, it will not proceed. If we have second reading tomorrow, being Thursday, we would have to have a special meeting of the committee on Friday morning to report the bill back on Saturday.

Senator Austin: You are right, Senator Stratton. That would be the plan.

Senator Stratton: That would be the schedule. In other words, we would be standing on our heads to push something through that we have not even seen, and we would have essentially 24 hours to look at.

There are one or two more bills expected, perhaps tonight. The one that particularly worries me is the tax reduction bill, which we may get tomorrow. If we get it tomorrow, we will be asked to grant leave to have second reading immediately in order to get it through. In other words, we will be asked not only to stand on our heads, but to stand on our heads supported by one hand.

There is a point at which we have to say, for the sake of this chamber, that enough is enough, that we cannot do this. We owe a responsibility to this chamber to examine bills in the appropriate way, to study them thoroughly as they should be studied, because, as we have learned, the other place does not do that. For that reason, unless the leader can make his case in a better fashion, I see no reason to agree to one day's notice.

Senator Austin: Honourable senators, I do not dissent from the concerns that Senator Stratton expresses. This is not a comfortable process for us, but we are ultimately here as trustees for the Canadian people to act in their interest, and we cannot simply take an arbitrary decision that it is uncomfortable; it is rushed; we do not want to put ourselves out because we did not get the bill in an orderly way. We must look at each piece of legislation and make a public policy decision on whether it is in the interests of the Canadian public for us to deal with this issue.

The chamber has not brought on the time constraints under which the Parliament of Canada is now working. We must look at the legislation and we will only really understand it when it is presented at second reading.

With respect to the reference to the ways and means motion and the tax reduction legislation that flows from that, I would have to tell honourable senators that they would have to make a very serious case to this chamber not to give Canadians tax relief if the government proposes to do that.

[*Translation*]

Hon. Madeleine Plamondon: Honourable senators, is leave required to consider a bill tomorrow, or could an objection be raised? I raise an objection, and ask that the bill be considered at second reading two days hence.

[*English*]

Senator Banks: Honourable senators, I would like to add to what the Leader of the Government has said, although it is presumptuous of me to do so. I share the concern of Senator Stratton. I have said so loudly in other places and have sometimes made myself unpopular by so saying.

However, as the leader has said, no aspect of this problem is of our making. The impetus and the initiative for this bill come from the Aboriginal people. It does not create anything, as we will hear whenever we hear the speech of the sponsor of the bill at second reading. The impetus comes from those people, and it is to them that we will be doing a disservice if we do not deal with this bill.

The things contained in this bill are things for which the First Nations have asked. I know that we should not be crass and talk about dollars but, with respect, of the economic development that will accrue to the benefit of the First Nations involved. The cost of not proceeding with this legislation now will be a direct cost to them that will be measured in the billions. That is the scale of direct benefit to First Nations, which advantage will not simply be deferred. I am talking about the cost of deferred development in two specific areas.

Hon. Gerald J. Comeau: Honourable senators, I rise on a point of order. We are at first reading stage, if I understand correctly, and I believe that Senator Banks is into debate. I believe there was a motion on the floor.

Senator Austin: Yes, and we are debating it.

Senator Comeau: Oh, we are debating the motion.

The Hon. the Speaker *pro tempore***:** Given the importance of the issue, we will listen to the rest of the senators who would like to have input on this matter.

Senator Banks: I will not say more, but I was not debating the bill. I was answering Senator Stratton's question about why we ought to proceed in an unusual way with this bill. I think there are good and cogent reasons in this case to do that.

• (2020)

Senator Plamondon: I thought that when I objected I was not granting leave and that was it. Are we still debating at this point even though I did not grant leave?

The Hon. the Speaker *pro tempore***:** Senator Banks has moved that the bill receive second reading at the next sitting. Is leave granted?

Senator Stratton: Senator Plamondon has said no.

The Hon. the Speaker *pro tempore***:** Leave is not granted.

On motion of Senator Banks, bill placed on the Orders of the Day for second reading two days hence.

A BILL TO AMEND CERTAIN ACTS IN RELATION TO FINANCIAL INSTITUTIONS

FIRST READING

The Hon. the Speaker *pro tempore* informed the Senate that a message had been received from the House of Commons with Bill C-57, to amend certain Acts in relation to financial institutions.

Bill read first time.

The Hon. the Speaker *pro tempore*: Honourable senators, when shall this bill be read the second time?

Hon. Bill Rompkey (Deputy Leader of the Government): At the next sitting of the Senate.

The Hon. the Speaker *pro tempore*: Is leave granted?

Some Hon. Senators: Yes.

Some Hon. Senators: No.

The Hon. the Speaker *pro tempore*: Leave is not granted.

On motion of Senator Rompkey, bill be placed on the Orders of the Day for second reading two days hence.

INTERNMENT OF PERSONS OF UKRAINIAN ORIGIN RECOGNITION BILL

FIRST READING

The Hon. the Speaker *pro tempore* informed the Senate that a message had been received from the House of Commons with Bill C-331, to acknowledge that persons of Ukrainian origin were interned in Canada during the First World War and to provide for recognition of this event.

Bill read first time.

The Hon. the Speaker *pro tempore*: Honourable senators, when shall this bill be read the second time?

Hon. Marcel Prud'homme: Honourable senators, I would like to know how many more messages the Senate can anticipate to receive.

Hon. Jack Austin (Leader of the Government): This is a private member's bill.

Senator Prud'homme: I do not care. How many people will we apologize to and beg and plea with? This is becoming a farce.

As a senator, I want to be recorded as protesting very officially and vigorously. I never believed I would work in the Senate of Canada with a gun to my head or a knife to my throat being told to vote or else we will sit until midnight or on Saturday or on Monday. I do not care if we sit on Monday, if honourable senators so desire.

I want to know how many more surprises are in store so we can organize our minds, our agendas and our research. I do not know, but surely the Leader of the Government in the Senate is aware. I say that very courteously to the honourable senator. He is a member of cabinet. What are they up to?

We know there will be an election. Private member or not, I am sure the Leader of the Government in the Senate, with all due respect to my long-time friend since 1961, Mr. David Smith, surely the leader must know what is going on. What is going to happen? That is all I want to know.

Senator Austin: Honourable senators, I have stated already in this discussion that there are two government bills which we were seeking to move forward because of what we believed to be urgent public necessity. In addition, there is the possibility that the House may send us two tax reduction bills as a result of the approval of the ways and means motion today.

The bill the Speaker addressed is a private member's bill. I have no knowledge of what is coming from the House of Commons. It is not a matter of government policy with respect to private member's bills.

Senator Prud'homme was in the House of Commons, and they are sending us bills. If we listen to the Speaker, we will know how many bills there are and what they are about.

The Hon. the Speaker *pro tempore*: When shall this bill be read the second time?

Hon. Terry Stratton (Deputy Leader of the Opposition): Since we have a strange way of presenting bills, and I realize government bills must be presented first, I move that the bill be read the second time at the next sitting.

Senator Austin: Second reading on what? Why make an exception for this bill? Explain the reason.

Senator Kinsella: We like the bill.

Senator Austin: We like the other bills.

Hon. Madeleine Plamondon: Leave is not granted.

The Hon. the Speaker *pro tempore*: We have not asked for leave yet, Senator Plamondon.

Hon. Francis William Mahovlich: I would like to bring to the attention of honourable senators that all of these bills have been approved by all parties in the House of Commons.

The Hon. the Speaker *pro tempore*: Is leave granted?

An Hon. Senator: No.

The Hon. the Speaker *pro tempore*: When shall this bill be read the second time?

Senator Forrestall: Shortly after I get my lighthouse bill.

The Hon. the Speaker *pro tempore*: Honourable senators, when shall this bill be read the second time?

It is moved by Senator Kinsella, seconded by the Honourable Senator Stratton, that this bill be placed on the Orders of the Day for second reading two days hence.

Is it your pleasure, honourable senators, to adopt the motion?

Senator Stratton: I object to being recorded as the seconder. I wanted the bill read the second time at the next sitting. If it is to be two days hence, please identify someone else.

The Hon. the Speaker *pro tempore*: Senator Andreychuk? Senator LeBreton? Senator Comeau?

Senator Comeau: No.

The Hon. the Speaker *pro tempore*: Senator Plamondon? We have Senator Plamondon seconding the bill.

On motion of Senator Kinsella, bill placed on the Orders of the Day for second reading two days hence.

EXCISE TAX ACT

BILL TO AMEND—SECOND READING

On the Order:

> Resuming debate on the motion of the Honourable Senator Di Nino, seconded by the Honourable Senator Keon, for the second reading of Bill C-259, An Act to amend the Excise Tax Act (elimination of excise tax on jewellery).—(*Honourable Senator Rompkey, P.C.*)

The Hon. the Speaker *pro tempore*: We are now resuming debate on the point of order that was before us at six o'clock. Do any other senators wish to speak to this issue?

Hon. Madeleine Plamondon: Honourable senators, someone said that I spoke against the bill, but I only made a comment. I did not speak against Bill C-259. I wanted to make that clear.

SPEAKER'S RULING

The Hon. the Speaker *pro tempore*: Honourable senators, when the second reading of Bill C-259 was reached today, the Leader of the Government in the Senate raised a point of order questioning the propriety of proceeding to the resumed debate on this bill. Citing several rules, decisions and authorities, Senator Austin argued the case that Bill C-259 should not be allowed to proceed. Other senators also spoke to the matter contesting the proposal that debate on the bill should not continue.

I wish to thank honourable senators for the views that were expressed on this point of order. I have considered the arguments that were made and have reviewed the matter sufficiently to make a ruling which I am prepared to give now. In making this decision, I am exercising the authority granted to me under rule 11 and rule 12 of the *Rules of the Senate*, and this authority is no different in its effect and validity than that of the Speaker.

• (2030)

Rule 63(1) stipulates, in part, that "A motion shall not be made which is the same in substance as any question which, during the same session, has been resolved in the affirmative or negative..."

The point of order that has been raised deals with the suggestion that Bill C-259, which deals with the elimination of the excise tax on jewellery, is substantially the same as Bill C-43, a budget implementation bill that was enacted by Parliament last June. To make the case, it should be possible to identify the subject matter or clauses in both bills that address the same subject.

Bill C-43, which is now chapter 30 of the Statutes of Canada, 2005, contains an amendment to Schedule I of the Excise Tax Act that will phase out the excise tax on jewellery through a series of rate reductions over the next four years. Among the items to be affected by this tax change are articles of all kinds made of various materials, including ivory, coral, jade, onyx and semi-precious stones. Other items to benefit from this tax reduction include personal objects made of real or artificial diamonds, as well as gold and silver jewellery.

Of particular interest for the purposes of this point of order is the tax reduction that will be given to clocks. Chapter 30 specifies that the phase-in tax reduction will apply to the following items when their value exceeds $50:

> Clocks and watches adapted to household or personal use, except railway men's watches, and those specially designed for use of the blind.

Bill C-259 is a one-clause bill that provides an immediate 10 per cent reduction for

> Clocks adapted to household or personal use, except those specially designed for the use of the blind ...

if their sale price or duty-paid value exceeds $50.

There is little doubt that these two clauses resemble one another, but they are also different in certain critical respects. The question to be determined is whether they are sufficiently the same to disallow further consideration of Bill C-259 or whether they are sufficiently different to allow Bill C-259 to proceed.

In seeking to answer this question, it should be noted that practice has changed over the years to accommodate the reality of extended sessions that continue through several years. This change has had the consequence of requiring a greater degree of similarity between two items before a bill or other business will be ruled out of order on the basis of the "same question rule."

With respect to this issue, I refer honourable senators to page 898 of *Marleau and Montpetit*. In a ruling by Speaker Fraser made in 1989, with respect to items proposed by private members, that is with respect to items not proposed by the government, the Speaker explained that for two or more items to be substantially the same, "they must have the same purpose and they have to achieve their same purpose by the same means." I am prepared to take this approach as a guide to the consideration of similar items, whether they are sponsored by the government or by senators.

In taking this position, I am also mindful of British practice, which is very clear. *Erskine May* states at page 580 of the twenty-third edition: "There is no rule against the amendment or the repeal of an Act of the same session."

Bill C-259 amends the application of the excise tax on clocks at an accelerated rate in comparison to the proposal enacted through the budget implementation bill adopted earlier this year. The means, therefore, are not the same. If the Senate adopts this bill and it is made law by Royal Assent, it will have the effect

of changing the rate of tax reduction now in place through the enactment of Bill C-43. I do not regard this measure to be the same, based on the criteria established by the decision of Speaker Fraser. The same end is not achieved by the same means. The two measures are substantially different, and I am prepared to rule that debate on Bill C-259 can continue.

Resuming debate, Senator Stratton.

Hon. Terry Stratton (Deputy Leader of the Opposition): Honourable senators, I should like to move second reading.

The Hon. the Speaker *pro tempore*: Is the house ready for the question?

An Hon. Senator: Question!

The Hon. the Speaker *pro tempore*: It was moved by the Honourable Senator Di Nino, seconded by the Honourable Senator Keon, that this bill be read the second time. Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and bill read second time.

REFERRED TO COMMITTEE

The Hon. the Speaker *pro tempore*: Honourable senators, when shall this bill be read the third time?

On motion of Senator Stratton, bill referred to the Standing Senate Committee on Banking, Trade and Commerce.

STUDY ON INTERNATIONAL OBLIGATIONS REGARDING CHILDREN'S RIGHTS AND FREEDOMS

INTERIM REPORT OF HUMAN RIGHTS COMMITTEE ADOPTED

On the Order:

> Resuming debate on the consideration of the nineteenth report (interim) of the Standing Senate Committee on Human Rights, entitled: *Who's in Charge Here? Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, tabled in the Senate on November 3, 2005.—(*Honourable Senator Rompkey, P.C.*)

Hon. Terry Stratton (Deputy Leader of the Opposition): Honourable senators, on behalf of Senator Andreychuk, chair of the Standing Senate Committee on Human Rights; Senator Carstairs, the deputy chairman; and particularly in honour of Senator Landon Pearson, I move that the nineteenth report of the Standing Senate Committee on Human Rights tabled in the Senate on November 3, 2005, be adopted and that, pursuant to rule 131(2), the Senate request a complete and detailed response from the government, with the Minister of Foreign Affairs, the Minister of Justice and the Attorney General of Canada, and the Minister of Canadian Heritage being identified as ministers responsible for responding to the report.

The Hon. the Speaker *pro tempore*: Are honourable senators ready for the question?

Hon. Senators: Question!

The Hon. the Speaker *pro tempore*: It was moved by the Honourable Senator Stratton, seconded by the Honourable Senator LeBreton, that this report be adopted. Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and report adopted.

STUDY ON PRESENT STATE AND FUTURE OF AGRICULTURE AND FORESTRY

INTERIM REPORT OF AGRICULTURE AND FORESTRY COMMITTEE ADOPTED

On the Order:

> Resuming debate on the consideration of the seventh report (interim) of the Standing Senate Committee on Agriculture and Forestry, entitled: *Cattle Slaughter Capacity in Canada*, tabled in the Senate on May 19, 2005. —(*Honourable Senator Fairbairn, P.C.*)

Hon. Joyce Fairbairn: Honourable senators, I am glad to have a final word on the state of our cattle industry, as outlined in the report tabled in this house last May by the Standing Senate Committee on Agriculture and Forestry. As all of us know, never has our industry taken a blow as devastating as the discovery of the existence of bovine spongiform encephalopathy, BSE, in the remains of an animal in Alberta in the spring of 2003. This discovery caused countries around the world to slam their doors against our cattle and beef, with none more painful than the border closure by the United States of America. I will not go into the well-known details and profound frustration, if not fear, which followed that event, other than to note that the manner in which this country responded to the crisis at every level has resulted in a gradual reopening of several of those borders, one by one. Last week, the United States Department of Agriculture indicated that it is putting the finishing touches on a rule that will lift the remaining restrictions on Canadian beef sometime next year. That rule will cause barriers to go down, enabling North American products to move freely among many other countries such as Japan. Canada and all of its trading partners will be wiser and safer as a result of lessons learned during those three difficult years.

• (2040)

Throughout this period, our committee has produced two reports, based on some of the most productive hearings I have participated in during my 21 years sitting with that committee. I want to thank all of the members, and particularly our former chair, Senator Len Gustafson, and Senator Don Oliver, for their leadership in difficult times.

This last report came out soon after the American judicial process, as a result of a court case in Montana, ruled that the border between the U.S. and Canada remain closed, even though the American government, from the president down, was strongly supportive of bringing down the barriers because of our mutual science-based agreements on elements of protection that would govern the health and well-being of the cattle and the process between our two countries. Our committee was holding meetings in Washington on that day, last March 2, when the judgment to keep the border closed was announced in Montana, and we have followed the process closely ever since. All of us profoundly hope that the latest announcement of firm action by the American government will produce a positive conclusion in the New Year.

However, in the meantime, we have moved forward in Canada with ever-increasing cooperation between all levels of government and the industry, working closely together as never before, along with the Canadian people, who have risen to the challenge and consumed even more beef since the border closure paralyzed the trade and forced every part of the industry and government to creatively prepare for that reality.

Our committee is pleased to note that some of our proposals have been followed and, indeed, changes in the system made, stemming from suggestions from witnesses while our hearings were in progress. First among our recommendations was that the industry shift from being live cattle oriented to becoming meat and processed product oriented, which meant an immediate increase in Canadian-based meat processing capacity, a capacity which over the years had dwindled across this country so that most of the domestic processing was done out of two large multinational slaughterhouses in Alberta.

However, as packing plants in the United States began to stop production and lay off workers, in Canada our packing industry responded quickly to the new market conditions, principally by building domestic slaughter capacity, which increased from less than 3.5 million animals in 2003 to nearly 4.5 million by April of this year. At the time of our report, the U.S. border was still closed to all live cattle and meat from animals older than 30 months. Fortunately for our producers, the situation has changed and, since last July, producers have been able to ship livestock under 30 months across that border for feeding and slaughter.

During our hearings, many witnesses stated that confronting U.S. competition when the border fully reopens would be their next major challenge. However, if we learn from this crisis, returning to the same traditional dependence on exports of live cattle is not really the only option for the long-term sustainability of Canada's beef industry. Canadian packing capacity is still growing and is expected to reach 4.9 million animals annually by next month, up from 4.5 million in June of this year.

I feel very strongly, as did all members of our committee, that our challenge is to enhance our slaughter capacity to the point where our producers, feeders, processors and truckers will never again be held hostage to another border closing.

It is true that the consolidation of our meat-packing industry has allowed our processors to increase efficiency and profitability, and enabled the industry to compete internationally. However, consolidation is not the only option. There is also room for smaller packing plants if they can secure their supply of cattle, raise adequate start-up capital and target special niche markets in response to consumer desires at home and abroad.

Through the emergence of these smaller-scale plants, the government could give more power to producers, and they in turn would have more options when they market their livestock and would be able to move up that value chain, a direction which we strongly recommended in an earlier committee report on the value-added processes in agriculture. We want a restructured industry where small-scale plants can thrive alongside consolidated, commodity-based processors to the benefit of cattle producers. I am told that some 17 plants have been built or are in the negotiation period at this time.

We called for more flexibility in federal financial assistance programs for new plants, for plant expansions, and farmer-owned co-ops. We asked government to enhance the existing loan loss reserve program with a matching capital program to address the need for start-up capital. On October 25, we were pleased to learn of the Federal Ruminant Slaughter Equity Assistance Program, under which Agriculture Canada and Agri-Food Canada will contribute up to one half of a producer's investment in a federally registered slaughter capacity.

Clearly, in addition to adequate start-up capital, sound business plans are crucial to the sustainability of new packing capacity, and we suggested that the government allocate funds to enable farm groups to obtain that guidance and get going. Again, we were pleased on August 17 when the government announced a $1-million Ruminant Slaughter Facility Assessment Program to help producer-led groups undertake the preliminary assessment for developing viable slaughter operations.

The committee wanted to ensure that new packing companies have the capacity to meet the highest standards of food safety and that the government work closely to ensure that there be no undue bureaucratic roadblocks in meeting those standards as we had heard from witnesses. By the time we had issued our report, the Canadian Food Inspection Agency, with an allocation of new resources, had already made a number of improvements to streamline and regionalize the process.

We want those new plants to thrive in the best operating environment possible, and the industry faces a rather peculiar challenge under which the current standard for interprovincial trade in meat products is the same as for foreign export trade in those products. Although Canada's provincial packing capacity is relatively small, we asked that the Canadian Food Inspection Agency undertake a legislative review leading to proposals for changes to the relevant acts and regulations in order to develop a domestic standard that will allow trade in meat products among the provinces. Naturally, such a change would have to be carried out with due consideration of all international trade implications, but we hope that that can be managed.

Another recommendation, which already is being tested, is the traceability of food products from the farm of origin to the dinner plate, a process that will become required more and more in world markets. As we heard earlier in Senator Callbeck's speech,

Atlantic Beef Products Inc., which is already operating in Prince Edward Island, has obtained funds from Agriculture and Agri-food Canada and the Atlantic Canada Opportunities Agency to implement a full traceability system for its products. The viability of those results may well lead to development of a traceability program across this country, and we would recommend that the Canadian Food Inspection Agency be given the resources to allow the industry to have such systems in place by 2010 in order to keep our industry ahead of its competitors.

• (2050)

Because of the international respect that Canada has gained with regard to food safety requirements and testing, the committee feels it is important that the federal government facilitates the work of meat-packing plants in terms of quick access to procedures like hot-boning and the removal and disposal of bovine specified risk materials in an environmentally responsible way.

We also hope that Agriculture Minister Mitchell will be able to successfully review Canada's regulations on a continuing irritant that is bothering a vocal group of United States producers concerning our import requirements related to blue tongue and anaplasmosis, two other existing diseases that affect cattle. This is not our issue; it is their issue and it would be helpful to get it out of the way.

To date, our country has faced an unexpected nightmare with courage and innovative thinking among federal and provincial governments, and on the ground through small communities whose very existence rested on a continuing future based on the cattle industry — the ranchers, the feedlots, the packing plants, the truckers — all of which come together in my corner of southwestern Alberta. Certainly, that closed border, which from Lethbridge we can see on a clear day, along with the mountains, has struck fear in the hearts and minds of those who live in the small towns and villages surrounding our cities. Without this basic industry and the commerce it produces, the future of this historic area, and others all across this country, is in grave danger of drifting away; and we are by no means alone in Alberta.

We are proud of our cattlemen and all they represent. We are glad they are now sitting around the tables in Ottawa contributing to the decisions that have been made within government.

We fully support the federal initiative announced last March of a $50-million contribution to the Canadian Cattlemen's Association Legacy Fund to launch an aggressive marketing program to reclaim and expand markets for Canadian beef. The federal government must work hand in hand with industry to further enhance our packing capacity in Canada. Not only will our cattle industry benefit, these measures will also help revitalize rural communities and increase employment, bringing benefits that will be felt all across our society and our economy.

We are proud of the manner in which all levels of government have put aside disagreements and worked warmly and closely together, not just in Alberta but in every part of Canada that has been touched by this issue.

Our committee, of which I am very proud, has worked hard to act as a connecting link between those on the ground and those in the government who have come before us as witnesses. I am enormously thankful to each one of them, the thought and the effort which our senators offered brought the voices of the regions into that committee room. We profoundly hope we will not have to face this particular crisis again, but honourable senators, we will be ready for whatever comes our way.

In conclusion, I would move that this report be adopted by the Senate.

Hon. Senators: Hear, hear!

The Hon. the Speaker *pro tempore*: Senator Fairbairn, are you moving the adoption of the report?

Senator Fairbairn: Yes.

The Hon. the Speaker *pro tempore*: I am sorry, I did not hear you. It is moved by the Honourable Senator Fairbairn, seconded by the Honourable Senator Mahovlich, that this report be adopted. Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and report adopted.

TELECOMMUNICATIONS ACT

BILL TO AMEND—REPORT OF COMMITTEE— REQUEST FOR GOVERNMENT RESPONSE

Leave having been given to revert to Reports of Committees, No. 1:

> Resuming debate on the consideration of the nineteenth report (interim) of the Standing Senate Committee on Human Rights, entitled: *Who's in Charge Here? Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, tabled in the Senate on November 3, 2005.

The Hon. the Speaker *pro tempore*: Honourable senators, with your permission, I would like to return to Reports of Committees, No. 1. When Senator Stratton moved the adoption of Senator Andreychuk's report, he asked that, pursuant to rule 131(2), the Senate request a complete and detailed response from the government, with the Minister of Foreign Affairs, the Minister of Justice and the Attorney General of Canada, and the Minister of Canadian Heritage being identified as ministers responsible for responding to the report. I neglected to add that particular part to the question, that we are asking the government to respond, and I apologize.

Is it your pleasure to adopt that part of the report?

Hon. Senators: Agreed.

[*Translation*]

INFLUENCE OF CULTURE

INQUIRY—DEBATE CONTINUED

On the Order:

> Resuming debate on the inquiry of the Honourable Senator Léger calling the attention of the Senate to the importance of artistic creation to a nation's vitality and the priority the federal government should give to culture, as defined by UNESCO, in its departments and other agencies under its authority.—(*Honourable Senator Champagne, P.C.*)

Hon. Andrée Champagne: Honourable senators, on my very first day in the Senate, as luck would have it, one of the items on the Order Paper was the importance of culture in the life of a country. It will come as no surprise to you that I wanted to take part in the debate arising from Senator Léger's inquiry.

[*English*]

It has been said that luck is preparation meeting opportunity. I am quite prepared to speak about culture, and I thank you for the opportunity. I guess that makes me lucky.

I do believe that it is of the utmost importance that all of us who are fortunate enough to sit in this chamber do our best to foster all aspects of our Canadian culture. Our culture makes us who we are. It also determines who our children are, and what our grandchildren will become.

[*Translation*]

To complement the points made by the three honourable senators who spoke before me, I have chosen to address a somewhat more down-to-earth aspect of the lives of our artists, whatever the artistic discipline to which they devote their energy. I can only hope that you will conclude with me that, if the Senate decided to conduct an in-depth review in the field of culture, we could certainly make a useful contribution, provided, of course, that the government then lent us an attentive ear and sympathetic consideration.

Arts, culture and cultural industries play an important part in our society. In 2001, spinoffs from this sector neared $38 billion, or 3.8 per cent of our GDP. It accounted for more than 600,000 jobs; that is more than 4 per cent of our labour force.

However, total government spending in the same sector totalled $7 billion, the lion's share going, as we all know, to Radio-Canada/CBC. I will come back to that a little later in my remarks.

[*English*]

Honourable senators, what do artists and artisans need to survive, to succeed? Of course they need talent, but perseverance is also an important ingredient. Most of all, they need hope. Hope is their muse, and as long as their hope is alive, we all benefit.

Now where do artists and artisans find hope? In my experience, there are three main sources. First, they believe in tomorrow, when they perform; when they have the opportunity to create, to be recognized, then they have hope.

Allow me to give a small example of how we can so easily destroy their will to create. Artists and artisans are proud when credits are properly shown at the end of a production. They are hurt when, at the end of a film or a television program, a network chooses to split the screen and use the better half to promote an upcoming production, making the artists' names impossible to read. The hope of being recognized as professionals is crushed.

• (2100)

Second, like anyone else, artists believe that their work allows them to feed themselves and those who depend on them. They rely on television networks, theatre companies, film producers, art galleries, editors, concert goers and, yes, patrons. To survive they often have to create their own job opportunities. They might have to risk capital that they do not have, but then they have hope.

[*Translation*]

In addition to talent, artists must also have perseverance. The hard times must one day end or else, after starving for too long, artists have no choice but to do something else. This happens quite frequently, all too frequently, in fact, and it is our great loss. I want to give a few examples.

Pablo is a magnificent tenor with a great stage presence. Originally from Venezuela, he is a new Canadian and speaks five languages. He graduated from McGill. Today, if you travel abroad, he may be the one serving you coffee at 12,000 metres. He could just as easily sing you *La Donna e mobile* or, since you are in space, *E lucevan le stelle*.

Anaïk is a mezzo-soprano with such a rich range that we are reminded of Maureen Forrester. She graduated from Julliard, in New York. Since her return to Canada, she has been running a small translation company.

Five years ago, Isabelle won the International Stepping Stone Competition, the top competition in all categories in Canada. Today, she teaches saxophone at a college in Montreal.

Finally, I want to tell you about Marjolaine, a fine watercolorist who has had a number of showings. Today, she works for a digital marketing company. She almost never takes out her paints and brushes any more. These artists are in their early thirties. Sad? Yes, to the point of tears!

Third, there is hope for our artists when they believe that we are preparing the next generation and that we are setting aside sufficient funding.

Before every show, young painters must buy their colours and canvas, and just the frame for their work costs a fortune. What about the materials that sculptors need? Musicians and singers need to buy scores, and naturally we are not going to encourage photocopying. Writers of novels or plays still have to pay rent and eat. Yes, the Canada Council helps, but it cannot meet all the needs.

In 2004, the annual cost of the Canada Council was $4.77 per Canadian. That funding represented 0.1 per cent of the government's overall spending. It allows our major performing arts companies to count on government assistance for 25 per cent of their revenues. Meanwhile, their counterparts elsewhere were receiving the following amounts: U.K., 53 per cent; France, 97 per cent; Australia, 40 per cent. Might one conclude that Canadian governmental assistance to the performing arts makes us look like the poor relatives?

Could we not, as individuals and as a nation, do better than that? One might perhaps suggest a small percentage of some of that budget surplus. Art and artists are a good investment.

[*English*]

Fortunately, Canada has a few devoted art patrons. Their help is so precious to young artists. Finding new ways to encourage these generous people to help young artists would be a most valuable task for honourable senators. Recently, Montreal became the recipient of the marvellous new Schulich School of Music at McGill University. That same week, I read about a rich American who spent the equivalent to that cost, $20 million, to fly in a Russian spaceship. Mr. Schulich, you make me proud to be Canadian.

Others truly try to bring good music to ears that would not otherwise feel that soothing pleasure with the help of the Canada Council, provincial funding, the Musicians' Performance Trust Fund and a few private sponsors. George Zuckerman has organized tours to the farthest communities in our country. I know that over the last three years, he and three other musicians have visited almost every school in Nunavut and Nunavik. With proper funding, this kind of entertaining workshop could be held in every school in Canada, and why not?

[*Translation*]

Far be it from me to deny our government the right to participate in the cultural field. Of all the monies invested in culture, we all know that a large portion goes to our libraries and museums, and that CBC and Radio-Canada take a big chunk of it. But I am worried.

What help does that network, particularly the French side, give to culture and to our artists today? Over the years, Radio-Canada has made an amazing about-face. It used to produce theatre, concerts, ballets, opera — its live broadcast of the *Barbier de Seville* won an Emmy in New York City — and now it has totally abandoned its cultural mission and bowed to market forces. Our future stars disappeared when *Singing Stars of Tomorrow* was done away with, and it was up to the private networks to pick up the slack with *Star Académie* and *Canadian Idol*. Without a helping hand from radio and television, where will the next generation in our concert halls, our museums, our art galleries, our libraries come from? Where will our young people learn about music, about opera, if not by beginning to pay attention to the lyrics of a song?

Radio has been no better. Even with two FM stations, promoting young Canadian artists is no longer one of Radio-Canada's goals.

Not so long ago, Radio-Canada built professional sound studios filled with expensive instruments. Today, these studios are silent, and the instruments covered in dust. Barely 15 years ago, seven half-hour shows a week were devoted to introducing our artists. None of these programs have survived.

These shows were an opportunity for young instrumentalists and young singers to make a name for themselves. A recital on Radio-Canada often resulted in a public concert in Winnipeg, Calgary, Vancouver, and vice versa. Music is the only language without borders. Young artists gained experience and, in down to earth terms, they were able to pay their rent and eat a bit better and a little more often.

This created generations of artists who lived well and had an excellent national career, from coast to coast; but above all, we gave them hope.

In the 21st century, these same time slots are filled by five or six people playing CDs and, without any warning of any kind, a Mozart quartet ends just as Loco Locass begins. This show is called *Espace musique*. It comes as no big surprise then that nearly 60,000 people have already signed a petition asking the CRTC for a Canadian cultural radio station.

[*English*]

Honourable senators, as I close my first contribution to our house, allow me to reaffirm my complete devotion to culture in our everyday life and my love for those who need our help so that they can create in peace. Honourable senators, if we only try, we can uncover ways to make our government do more and do better to encourage the arts, the artists and their devoted patience. We must find new ways, which we can do and will do.

• (2110)

[*Translation*]

Hon. Marcel Prud'homme: Honourable senators, I am very pleased to get to take part in this debate. I will provide some historical background. When the Right Honourable Jean Chrétien left the Liberal Party in 1986, the Right Honourable John Turner appointed me to replace him as the official foreign affairs critic. My career was very long. After an intense discussion with him following a phone call with Mr. Milton Harris from Toronto, I negotiated my departure from my appointment as foreign affairs critic, which was my lifelong dream. I told you I would recount my memoirs here and not write them. I agreed to become the arts critic appointed by Mr. Turner. I had always been a faithful servant to this great party that I loved and I became the arts critic. I remember very clearly informing the Right Honourable Prime Minister Brian Mulroney in my first speech. I told him: "Tomorrow I am going to beat up — pardon the expression — your Minister of Culture, Marcel Masse." My speech lasted an hour. The honourable senator's comments remind me of my responsibilities. She pointed that out quite well.

I am keeping the rest of my time to better prepare myself in an intelligent manner. I do not have the staff available to me that the large political parties might have, but I will reiterate what I said in

my speech in 1986 or 1987, when I said that Canadians are ignorant not to realize the importance of culture and job creation at little cost to the public. She touched on this point in particular. I am going on memory.

I was appointed and relieved, with my consent, of the duties that were my lifelong dream, and agreed like a good servant to serve as the arts critic.

With leave of the Senate, I would like to adjourn this very important debate in our country, first in terms of the importance of culture in every respect for our national identity and, second, in terms of job creation.

Senator Champagne: Honourable senators, I would like to add to what Senator Prud'homme said. If you bother to read what my female colleagues have said because, until now, only women had spoken on this issue, you will see that we really chose to talk about culture, about the beauty of culture in a country. After spending 50 years immersed in the world of culture, I decided to use the somewhat more down-to-earth side of things to explain what the life of an artist is really like. That was my choice.

On motion of Senator Prud'homme, debate adjourned.

ASSASSINATION OF LORD MOYNE AND HIS CONTRIBUTIONS TO BRITISH WEST INDIES

INQUIRY—ORDER STANDS

On the Order:

Resuming debate on the inquiry of the Honourable Senator Cools calling the attention of the Senate to:

(*a*) November 6, 2004, the sixtieth anniversary of the assassination of Walter Edward Guinness, Lord Moyne, British Minister Resident in the Middle East, whose responsibilities included Palestine, and to his accomplished and outstanding life, ended at age 64 by Jewish terrorist action in Cairo, Egypt; and

(*b*) to Lord Moyne's assassins Eliahu Bet-Tsouri, age 22, and Eliahu Hakim, age 17, of the Jewish extremist Stern Gang LEHI, the Lohamei Herut Israel, translated, the Fighters for the Freedom of Israel, who on November 6, 1944 shot him point blank, inflicting mortal wounds which caused his death hours later as King Farouk's personal physicians tried to save his life; and

(*c*) to the 1945 trial, conviction and death sentences of Eliahu Bet-Tsouri and Eliahu Hakim, and their execution by hanging at Cairo's Bab-al-Khalk prison on March 23, 1945; and

(*d*) to the 1975 exchange of prisoners between Israel and Egypt, being the exchange of 20 Egyptians for the remains of the young assassins Bet-Tsouri and Hakim, and to their state funeral with full military honours and their reburial on Jerusalem's Mount Herzl, the Israeli cemetery reserved for heroes and eminent persons, which state funeral featured Israel's Prime Minister Rabin and Knesset Member Yitzhak Shamir, who gave the eulogy; and

(*e*) to Yitzhak Shamir, born Yitzhak Yezernitsky in Russian Poland in 1915, and in 1935 emigrated to Palestine, later becoming Israel's Foreign Minister, 1980-1986, and Prime Minister 1983-1984 and 1986-1992, who as the operations chief for the Stern Gang LEHI, had ordered and planned Lord Moyne's assassination; and

(*f*) to Britain's diplomatic objections to the high recognition accorded by Israel to Lord Moyne's assassins, which objection, conveyed by British Ambassador to Israel, Sir Bernard Ledwidge, stated that Britain "very much regretted that an act of terrorism should be honoured in this way," and Israel's rejection of Britain's representations, and Israel's characterization of the terrorist assassins as "heroic freedom fighters"; and

(*g*) to my recollections, as a child in Barbados, of Lord Moyne's great contribution to the British West Indies, particularly as Chair of the West India Royal Commission, 1938-39, known as the Moyne Commission and its celebrated 1945 Moyne Report, which pointed the way towards universal suffrage, representative and responsible government in the British West Indies, and also to the deep esteem accorded to Lord Moyne in the British Caribbean. —(*Honourable Senator Prud'homme, P.C.*)

Hon. Marcel Prud'homme: I do not want to deprive Senator Goldstein of his time. I will offer my comments on this very important motion in due course. I like to be the one to calm the storm. I will keep my comments for later; after all, this is only the eighth day on the Order Paper. So I would ask to have this matter stand.

Order stands.

PROVINCE OF ALBERTA

INQUIRY—ORDER STANDS

On the Order:

Resuming debate on the inquiry of the Honourable Senator Mitchell calling the attention of the Senate to the Province of Alberta and the role it plays in Canada. —(*Honourable Senator Prud'homme, P.C.*)

Hon. Marcel Prud'homme: Honourable senators, once again, everyone knows my attachment to Alberta. Those who understand this attachment to Quebec and Alberta, understand that this is real federalism.

[*English*]

It is federalism at its best. Ottawa is only a servant of the creator. I would like Senator Mitchell to be here when I make my speech to celebrate my joy at being a French Canadian from Quebec who is a friend of Alberta. Therefore, I ask that the order stand.

Order stands.

[*Translation*]

INTER-PARLIAMENTARY UNION

INQUIRY—ORDER STANDS

On the Order:

> Resuming debate on the inquiry of the Honourable Senator Fraser calling the attention of the Senate to the work of the IPU.—(*Honourable Senator Prud'homme, P.C.*)

Hon. Marcel Prud'homme: Honourable senators, I have become the unpaid adviser to all the inter-parliamentary associations, and I have a great deal to say about this, particularly with regard to the Inter-Parliamentary Union, which I have always found problematic. So, I want to stand the debate in order to restore a sense of calm, but I will not be very kind when the time comes to continue my remarks.

Order stands.

[*English*]

NEED FOR INTEGRATED DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

INQUIRY—DEBATE CONTINUED

On the Order:

> Resuming debate on the inquiry of the Honourable Senator Andreychuk calling the attention of the Senate to the need for a strong integrated Department of Foreign Affairs and International Trade and the need to strengthen and support the Foreign Service of Canada, in order to ensure that Canada's international obligations are met and that Canada's opportunities and interests are maximized. —(*Honourable Senator Andreychuk*)

Hon. A. Raynell Andreychuk: Honourable senators, in light of the political climate, I simply wish to adjourn the matter in order to rewind the clock.

The Hon. the Speaker *pro tempore***:** Is that agreed, honourable senators?

Hon. Senators: Agreed.

On motion of Senator Andreychuk, debate adjourned.

THE SENATE

MOTION TO URGE GOVERNMENT TO REDUCE CERTAIN REVENUES AND TARGET PORTION OF GOODS AND SERVICES TAX REVENUE FOR DEBT REDUCTION—DEBATE CONTINUED

On the Order:

> Resuming debate on the motion of the Honourable Senator Kinsella seconded by the Honourable Senator Stratton:
>
> That the Senate urge the government to reduce personal income taxes for low and modest income earners;
>
> That the Senate urge the government to stop overcharging Canadian employees and reduce Employment Insurance rates so that annual program revenues will no longer substantially exceed annual program expenditures;
>
> That the Senate urge the government in each budget henceforth to target an amount for debt reduction of not less than 2/7 of the net revenue expected to be raised by the federal Goods and Services Tax; and
>
> That a message be sent to the House of Commons requesting that House to unite with the Senate for the above purpose.—(*Honourable Senator Day*)

Hon. Joseph A. Day: Honourable senators, I will take a cue from my colleague opposite. Much has been happening in the last 15 sitting days since I took the adjournment on this matter. I ask honourable senators to allow me to adjourn the matter and rewind the clock.

The Hon. the Speaker *pro tempore***:** Is it agreed to rewind the clock, honourable senators?

Hon. Senators: Agreed.

On motion of Senator Day, debate adjourned.

• (2120)

[*Translation*]

YEAR OF THE VETERAN

CONTRIBUTIONS OF ABORIGINAL VETERANS—INQUIRY—DEBATE ADJOURNED

Hon. Aurélien Gill rose pursuant to notice of November 22, 2005:

> That he will call the attention of the Senate to the National Year of the Veteran and the contribution of Aboriginal Peoples.

He said: Honourable senators, I know it is late and everyone is tired. I will, with your indulgence, attempt to proceed as quickly as possible. I have a duty to transmit this important message to you this evening.

Honourable senators, as you are no doubt aware, the Government of Canada declared 2005 to be the Year of the Veteran, with its culminating point being Remembrance Day on November 11.

As part of the important official events during this year of commemoration, the Department of Veterans Affairs, under the Honourable Albina Guarnieri, organized ceremonies in Belgium and in France between October 24 and November 3 to honour the memory of Aboriginal soldiers who lost their lives in the tragedies of the first and second world wars.

I had the privilege and honour to be part of the Canadian delegation, along with Her Excellency the Governor General, Minister Guarnieri and a number of representatives of Canada's Aboriginal peoples: veterans, elders, artists, young people and representatives of several Aboriginal organizations and members of the press.

I must admit that I felt a great deal of satisfaction at having been able to take part in these days of commemoration as a senator. I would like to thank the Leader of the Government in the Senate. In a way, that trip was an opportunity for the Canadian State to recognize officially, properly authorized by the Minister of Veterans Affairs, the Aboriginal contribution to the Canadian armed forces.

Sixty years after the events, Canada finally paid tribute to the sacrifice of the several thousands of my Aboriginal fellow citizens who died in action, most of whom had enrolled voluntarily, knowing full well what they were getting into, to defend freedom against unbridled tyranny.

As an Aboriginal, I have to say openly that I am proud of having been part of such a group of individuals fully deserving of the tribute they were paid. It was high time that the outstanding valour of Aboriginal veterans, who have shown a remarkable sense of responsibility for the well-being and freedom of nations, be recognized.

Today, I take advantage of these ceremonies overseas, ceremonies which are filled with memories and strong emotions, to draw attention to and update, on behalf of all my people, and paraphrasing Martin Gray in so doing, the irreplaceable and all too often ignored contribution of historical Canada's first peoples.

I would like to tell you, honourable senators, about the true meaning of the sacrifice made by both my Aboriginal and non-Aboriginal fellow countrymen in the wars. In combat, the bonds between all soldiers were close. They were indeed all equal on the battlefield and equal before death, but when they came home, it was a different story. Many Aboriginals were not even considered Canadian citizens. In many cases, an Aboriginal soldier dying in action meant nothing more, nothing less than falling into complete oblivion. Many of those who came home were not paid any compensation for services rendered.

Allow me to quote Charlie St. Germain, age 81, born in Alberta, who served with the Calgary Highlanders in France, Belgium, Holland and Germany during the war of 1939-45.

[*English*]

> Coming back here hurts me more than anything else I've ever done.
>
> All this being done now. Why wasn't anything done back then? Why wait so long? There's a hell of a lot of them that are now dead. Uncles, fathers, brothers are all gone and they didn't see this. Lost souls. In our thoughts and beliefs, it would have been taken care of long ago.
>
> We joined freely, they didn't have to draft us. They should have given us more considerations. Over here we didn't feel any sense of differences between White, Metis and First Nations. Why were we treated so differently when we got home?
>
> Some got nothing when they were discharged. If you looked Indian they said to apply to Indian Affairs and was turned down. Indians never got more than their Treaty Land. I gave so much to the war. I lost my brother and I got nothing. Three hundred dollars at my discharge, nothing more. I couldn't even join the legion. Some Metis could if they looked white enough. I need dental work done and they won't pay. They won't pay for all my glasses charges, my new frames I needed.

[*Translation*]

These comments speak for themselves. Some political ideologies are softer than others, but are nonetheless full of segregation, exclusion or assimilation.

Fortunately, Canada has changed for the better. It is my firm intention to stay positive, with a strong vision for the future, but I would be remiss if I did not repeat loud and clear how necessary and urgent it is to do everything possible for Aboriginals in Canada to be considered as full citizens, and to give them the means to establish their own institutions.

You should see the huge arch of the Menin Gate in Ypres, Belgium. The monument's walls are covered with the names of soldiers from the Commonwealth countries who died in combat during the great wars. Since the end of the Second World War, a remembrance ceremony has been held there every night at 8 p.m. When I was there, it occurred to me that a similar monument should be erected in Canada with the names of all the Canadian soldiers who died in Flanders Fields, including Aboriginal soldiers, of course.

In this year when Parliament passed a veterans' charter by enacting Bill C-45 last May, the least Ms. Guarnieri's department can do is to create a special committee of Aboriginal veterans. By receiving complaints from Aboriginals, this committee could correct a number of the injustices that never should have happened in Canada.

We have a duty to remember. I want to point out that, in October, the First Nations, the Metis and the Inuit of Canada left a very special mark on France: an inukshuk made of stones given by the First Nations, Metis and Inuit communities across Canada in memory of the soldiers who lost their lives on Vimy Ridge and on Normandy's beaches. The work is by a famous Inuit sculptor from Nunavut, Peter Irniq. This sculpture, in the traditional Inuit style, immortalizes the memory of all Canadian soldiers by including Aboriginals. There is an opening in the inukshuk's head to allow the spirits of those who died on foreign soil to reunite, across the ocean, with the spirits of their ancestors who stayed in their native land.

I would be remiss if I did not congratulate and sincerely thank the Honourable Minister Guarnieri for all the speeches she gave during the official ceremonies in Belgium and France. I must

admit that her words made me extremely glad and proud. I could say a great deal about her extraordinary speeches delivered with such eloquent sincerity, but I will just say that, through her voice, the Government of Canada has at last significantly recognized the exceptional human greatness of these Aboriginal men and women who joined up to go and defend freedom in distant lands while frequently deprived of it on their own lands and in their own country.

If I may have your indulgence, honourable senators, on the occasion of this Year of the Veteran and in light of the numerous observations made to me during my recent trip on the horrors of war, I will share with you a few reflections concerning the role our country must play in connection with peacekeeping.

• (2130)

In the course of my career, I attended a training program at the National Defence College in Kingston. That unforgettable experience afforded me an opportunity to meet some exceptional people, particularly Sister Peggy Butts, later to become a senator herself, and Norm Bélanger of the RCMP, both of them sadly no longer with us.

This program exposed us to some 600 lectures, studies, travel and numerous meetings, and the three of us came away with a nearly identical view of what peacekeeping is all about.

Our trio was known for its positions during heated debates, and we were dubbed the Peaceniks. Not Beatniks, but Peaceniks.

You will recall that we were in the midst of the Cold War at that time, the late 1970s, and the world was weighed down by the terrible threat of a ridiculous arms race. You can well imagine that the subject of the day at that college in Kingston was nearly always the rivalry between the two blocs, the east and the west.

I remember a U.S. army colonel who shocked me when he said that he had been trained to kill the enemy and was dreaming of the day he could practice what he had learned.

The more we talked about it, the more we were convinced that Canada had no other choice but to make a greater commitment to peaceful action by becoming a world leader in the development of peace among peoples.

I can tell you, honourable senators, that my commitment to peace has not changed. How many times since then and during my last trip did I not hear a veteran or a wise elder say in reference to war, "never again."

"Never again" is a powerful call for peace and reason, a mantra I have had the pleasure of hearing on numerous occasions during these historic commemorative ceremonies for the First Nations of Canada.

Given the ever-present threat of the global destruction of mankind, we must strive for it, say it and repeat it now more than ever: "never again," "never again"! Weapons are not what make the world a better, fairer and safer place. As some periods during the 20th century have proven, it takes strong and determined but peaceful action in favour of fundamental human rights to bring about change, to make the world a better, fairer and less dangerous place.

My time in Kingston put me in touch with various members of the Canadian Forces' international mission. I will always remember the peacekeeper at the Suez Canal who told me how proud he was to be Canadian and to belong to this country whose reputation for its actions and positions in favour of peace is unequalled.

However, he condemned the fact that his training as a soldier was not designed to help him develop knowledge and skills to promote peace. This peacekeeper had reached the same conclusion as the Peaceniks: the Canadian army has to train soldiers not for war but rather for sustainable peace and development work.

How could I fail to mention here the war in Iraq? In this regard, Canada has become a model for the rest of the world. In my opinion, despite strong diplomatic pressure, the Canadian government made the only choice possible by not taking part in the invasion of Iraq alongside the American forces. War leads to war, not to peace. "Never again," "never again." Security in the Middle East, as elsewhere, is only possible through peaceful and united action that fosters sustainable development.

For a long time I have had the very strong conviction that we have all the resources necessary to become the peacemakers the world needs. Devoting my entire life to the development of the First Nations of Canada has reinforced this conviction. Is it not obvious that, as long as we hold fast to justice and peace within Canada, we can play an exemplary role on the international scene?

Of course, we must recognize that much has been done in Canada to improve the situation of the first peoples. The very strong conclusions and recommendations of the Erasmus-Dusseault Royal Commission are eloquent testimony to this.

We must, however, follow the course on which Canada has embarked, right to the very end. The wrongs done to Canada's Aboriginal peoples must now be righted, starting of course with veterans. In addition, the First Peoples must now find a way out of the very poor social and economic conditions in which many of them still live.

Everything is in place for this to happen. We are not at an impasse, but at a crossroads leading to the creation of institutions and partnerships consistent with the principle of self-government for First Nations. We owe this, among other things, to the selfless sacrifice of Aboriginal soldiers for freedom.

Peaceful and fair toward its citizens, our country could play an historic and huge role in the world, a role of development, justice and peace in a climate of respect for cultural differences and of dignity.

Honourable senators, such is the role our Aboriginal peoples are asking you to take. In the past, they welcomed newcomers with this sense of justice and peace and respect for cultural differences. It was so that Canada could live up to the cause of peace that our veterans remained loyal to their country and defended other countries in the world when needed, sticking together despite the injustices toward them.

In closing, I want to commend General Dallaire, recently appointed to the Senate of Canada. The publication of his book *Shake Hands With The Devil,* after his involvement in the brutally tragic events that took place in Rwanda in 1994 and the unbearable helplessness he faced, lead me to believe that Senator Dallaire is in a much better position than I to speak of the importance of the sacrifice made by veterans and the human disaster that can result from wars and conflicts.

When one has the courageous generosity to aim at lofty and true ideals, the means for their achievement come quite easily. Is it not true that, if the Government of Canada freed itself of the financial burden associated with the mindset of military armament, the monies freed up would surely give us some powerful ways to unify the people of Canada, thereby becoming an international model and instrument of peace?

Honourable senators, in conclusion, I must tell you the main thing I learned from the elders and veterans during my trip. I heard a message of justice and peace, one which Canada has a duty to carry to the rest of the world and one that requires Canada to give our peacekeepers the necessary training, tools and other means necessary to allow them to continue intervening effectively in conflicts, as a constant reminder of the message we must never forget: "Plus jamais la guerre/Never again."

Hon. Roméo Antonius Dallaire: Honourable senators, I would like to request adjournment of the debate.

Hon. Marcel Prud'homme: Honourable senators, would Senator Dallaire allow a comment first?

The Hon. the Speaker *pro tempore***:** Honourable senators, Senator Gill's time is up.

[*English*]

Senator Prud'homme: I want to make a comment on the honourable senator's speech. I will not delay. Generally, you will want to adjourn the debate. Is there consent?

[*Translation*]

The Hon. the Speaker *pro tempore***:** Honourable senators, is there unanimous consent?

Some Hon. Senators: No.

[*English*]

The Hon. the Speaker *pro tempore***:** We do not have consent.

Senator Prud'homme: This is important when you have a debate. I am just asking to make a comment, and then Senator Dallaire can adjourn the debate. I know one person is very impatient and would like to leave. They can leave. This is the first time I have seen someone refusing.

The Hon. the Speaker *pro tempore***:** I am sorry, senator, permission is not granted.

Senator Prud'homme: I did not hear that.

The Hon. the Speaker *pro tempore***:** Permission was not granted.

Senator Prud'homme: Did the honourable speaker *pro tempore* ask the question?

The Hon. the Speaker *pro tempore***:** Yes.

On motion of Senator Dallaire, debate adjourned.

The Senate adjourned until Thursday, November 24, 2005, at 1:30 p.m.

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Canadian Bankruptcy and Insolvency Law for Commercial Tenancies

David Bish

Chapter 5 THE BINDING NATURE OF CONTRACTS

III. PERMITTED TAMPERING WITH CONTRACTS

C. Selective Interference with Contracts in Favour of Debtors

Whereas bringing a contract to an end in its entirety is conceptually straight-forward and non-controversial for the most part (*i.e.*, insofar as counterparties generally accept that there is a means bywhich one party may cease performing in insolvency, even if there may be from time to time a lack of consensus surrounding the consequences or corollary rights and interests of the parties), there is much more controversy surrounding attempts to selectively ignore or rewrite provisions of a contract that is otherwise to remain in full force and effect and binding on the parties. This is perhaps the single most pressing issue for landlords and tenants in commercial tenancies insolvencies, in all of the forms and manifestations in which it arises. Judicial or statutory clarity would be of considerable assistance given the acrimony, costs, delays and judicial resources consumed by permutations of this issue, without it ever being satisfactorily explained or resolved. It is a central issue to landlords and insolvent commercial tenants.

Again, as a starting point, courts would generally require that a contract be kept or rejected in its entirety — a person cannot unilaterally pick and choose parts of a contract to keep and parts to reject. However, in some instances there may be parts of a contract that are not enforceable in insolvency even though the rest of the contract remains in full force and effect. Herein arises the difficulty; there are unquestionably instances in which portions of a contract will be suspended, ignored or overridden in insolvency. How then is one to determine when

and under what circumstances this may occur? More importantly, is it discretionary, in that a debtor or its representatives are at liberty of attempting to suspend, ignore or override any provision in a contract simply because that result would be advantageous to the debtor?

While it appears at first blush that the case law may be difficult to reconcile, it generally supports (albeit with outliers) that a contract not disclaimed or repudiated will be enforced and a debtor and its representatives and any purchaser thereof not be permitted to deviate from the contract save and except (i) to the extent expressly provided by statute, (ii) as a shield and not as a sword,[1] so as to preserve temporarily the status quo and preclude contractual provisions from altering the status quo due to the insolvency of the debtor or the commencement of insolvency proceedings, and (iii) to mitigate against any wrongdoing or manifestly offensive provisions (*i.e.*, those lacking a *bona fide* commercial purpose, characterized by an intent to circumvent the insolvency process or effect a manifestly offensive result contrary to public policy). There is little, if any, support for the notion that a court may arbitrarily elect to relieve a debtor from a part of its contractual obligations simply as an exercise of judicial discretion in the absence of the criteria above being met.

Importantly, most permitted interference with contract in insolvency is the result of a defensive effort to preserve the status quo. That is, the debtor's insolvency would trigger rights and actions that would, if not relieved, alter the status quo to the detriment of the debtor and its stakeholders. This includes the termination of contracts, the enforcement of security and other such things. Insolvency law establishes a statutory or court-ordered temporary preservation of a status quo in which a debtor may then seek to resolve its crisis. With respect to contracts, there is an established *quid pro quo*; a contractual counterparty is generally stayed with respect to defaults existing at the time of the commencement of insolvency proceedings, but going forward the debtor must fully perform a contract that it wishes to continue, failing which it may disclaim or repudiate such contract. This is a fundamental tenet.

The British Columbia Supreme Court commented on this issue as follows:

> There is no doubt that courts have power under s. 11(4) to interfere with the contractual relations during the restructuring period. It is my opinion, however, that s. 11(4) does not give the power to courts to grant permanent injunctions as a means to permit a debtor company to unilaterally and prospectively vary the terms of a contract to which it is a party.[2]

The ability to interfere with contracts under section 11(4) of the CCAA is, as noted above, an ability to do so defensively to preserve the status quo; it does not extend *carte blanche* to the court in running interference for a debtor seeking to cut itself a better deal than it bargained for.

C. Selective Interference with Contracts in Favour of Debtors

The importance of maintaining the status quo has been emphasized in legal commentary and case law. Houlden and Morawetz, in their analysis of the CCAA, say that "The fundamental purpose of the CCAA [is] to preserve the *status quo* while the debtor prepares a plan."[3] This point has been supported overwhelmingly by Canadian courts. In the case of *Re Forest & Marine Financial Corp.*, the British Columbia Court of Appeal held that preserving the status quo is the "fundamental purpose" of the CCAA.[4]

In the case of *Century Services Inc. v. Canada (Attorney General)*, the Supreme Court of Canada considered judicial decision-making under the CCAA. Justice Deschamps held that, within a CCAA case, "[a] court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor's business to continue, preserving the status quo."[5] She further held that, "The CCAA creates conditions for preserving the status quo while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all."[6]

Much of the confusion surrounding treatment of contracts in insolvency can be viewed through this lens: where contracts would operate to alter the status quo following commencement of insolvency proceedings, there may be relief (statutory or court-ordered) to preclude that from happening.[7] This is one of the extraordinary benefits afforded debtors in insolvency, in that they may preserve the status quo for an interim period of time (but generally not permanently, in the absence of a consensual restructuring agreed to by the requisite majorities of creditors) notwithstanding that contracts purport by their terms to alter the status quo. What is not open to debtors is to seek to use the insolvency law to change — rather than preserve — the status quo. When a debtor seeks a stay of proceedings to prevent an automatic termination of a contract from being effective, that is properly within the scope of its rights; when a debtor seeks to unilaterally alter the contract and employ the courts so as to bind the counterparty, there is no basis at law for such an attempt and it is inconsistent with the objects of the insolvency regime. As noted by Farley J. of the Ontario Superior Court in the CCAA case of *Re JTI-Macdonal Corp.*, "a CCAA stay order…is to be used as a shield, not a sword".[8] In other words, the orders of the court are to be used to preserve the status quo, and not to permit the debtor to change the status quo in its favour at the expense of the stayed parties. The court acts as protector of the debtor, not its hired muscle to beat contractual counterparties into submission.

Consistent with the preservation of the status quo as a foundational object of insolvency proceedings while these

proceedings run their course, there are extensive expressions in the case law of another primary principle; namely, that no creditor's economic or legal position ought to be made worse or its exposure increased from and after the commencement of insolvency proceedings (except where the creditor voluntarily accepts that result, such as where the creditor elects to continue to extend credit to the insolvent party).

As noted by the Ontario Superior Court in *Canada (Attorney General) v. Confederation Life Insurance Co.*, "One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, *as those assets are found at the date of the insolvency*".[9] A debtor may disclaim contracts as permitted where they are found to constitute a liability and not an asset, but where contracts are valuable assets that are retained by the debtor, there is no basis for the debtor to unilaterally alter the asset to make it more valuable through selective re-drafting of the contract. Arguably, to stay all creditors and then selectively and unilaterally make worse the position of some creditors, while the position of other *pari passu* stakeholders is not affected, amounts to a violation of the *pari passu* principle and the fundamental tenet that unsecured creditors be treated equally, as was so vigorously defended by the Court of Appeal in the *Nortel* proceedings.[10] As stated by the court in *Re Nortel*, the *pari passu* principle comprises not only rateable distribution, but also the further requirement that the property of the insolvent person be taken as it stands at the commencement of insolvency proceedings. The Court of Appeal in *Re Nortel* went so far as to say that "… the *pari passu* principle has been said to be the foremost principle in the law of insolvency not just in Canada but around the world".[11]

The development of the Ontario Model Initial CCAA Order provides an interesting example of the initial overreaching and then retreat from unwarranted interference with the status quo and the use of the court as a sword rather than a shield (*i.e.*, not merely defending the debtor against a change in status quo, but going further to impose a change in the status quo on creditors at the behest of the debtor). An earlier form of the Model Order provided as follows:

> 14. THIS COURT ORDERS that, subject to the other provisions of this Order (including the payment of Rent as herein provided) and any further Order of this Court, the Applicant shall be permitted to dispose of any or all of the Property located (or formerly located) at such leased premises without any interference of any kind from landlords (*notwithstanding the terms of any leases*) and, for greater certainty, the Applicant shall have the right to realize upon the Property and other assets in such manner and at such locations, including leased premises, as it deems suitable or desirable for the purpose of maximizing the proceeds and recovery therefrom.[12]

The paragraph was ultimately circular in practice in that it professed to be subject to other provisions of the Order, which other provisions would routinely require compliance with the leases. The provision therefore amounted to a declaration that so long as the tenant was abiding by the terms of its leases, it was free to liquidate its assets

without interference. Such a provision is unnecessary: where a tenant is abiding by the terms of its leases, a landlord will have no ability to interfere with the tenant. The Explanatory Notes that accompanied this form of Model Order included the following observations with respect to this aggressive paragraph:

> Paragraph 14 of the Long Form of CCAA order provides that the Applicant is permitted to dispose of property located at leased premises without interference of any kind from landlords, and "notwithstanding the terms of any leases". *This language clearly alters the status quo ante in favour of the Applicant, and therefore (as noted above), it is assumed that this provision would only be sought on notice to affected parties — in this case landlords. The Committee was divided as to whether this provision is appropriate*, and notes that there may be quite distinct concerns arising, depending on whether the Applicant is involved in retail businesses (where "use" clauses are common) or non-retail businesses. While the language referred to above may assist in a restructuring, it also overrides landlord rights. The position of commercial landlords is that this paragraph should specifically direct the Applicant to abide by the terms of all leases, including in the context of a sale of assets.[13]

This provision was ultimately short-lived, was heavily-amended in practice, and was removed from the Model Order. Doing so maintained the correct balance between the role of the court in preserving the status quo rather than compelling that it be changed unilaterally.

There are a number of statutory provisions that purport to stay or override contractual provisions that would otherwise alter the status quo. For example, section 65.1 of the BIA and section 34 of the CCAA preclude *ipso facto* clauses from being effective (but note that there is no statutory restriction on *ipso facto* clauses in corporate bankruptcy or receivership under the BIA). Any purported amendment or termination of an agreement because of insolvency or the commencement of insolvency proceedings (or the non-payment of obligations prior to commencing proceedings, in the case of certain contracts) is of no force or effect. As discussed in Chapter 4: Commencement of Proceedings and Initial Orders, there are broad statutory and court-ordered stays of proceeding in all commercial insolvency proceedings that stay the termination of contracts and the enforcement of remedies for the recovery of claims, that compel continued supply of goods and services and that preclude interference with the debtor. These trump any contractual provisions to the contrary, all with the aim of preserving the status quo. Importantly, the preservation of the status quo is typically temporary and any permanent changes to contractual rights (*e.g.*, a permanent injunction from acting on an insolvency event of default) are the result of a restructuring plan or proposal that receives requisite creditor and court approval. Even where changes are permanently effected, they tend to be backward-looking in that the contractual counterparty is prohibited from relying on a past event such as insolvency or the commencement of insolvency proceedings, as the basis for taking future action, but in all respects going forward the contract is fully binding in accordance with its terms. In such cases, contracts are essential "re-set" but not fundamentally rewritten. The debtor is given a fresh start under its existing contract, not a unilaterally-altered new contract made binding on the counterparty.

Clearly, a contractual provision that conflicts with an express statutory provision will not stand. In such cases, there is a statutory requirement or prohibition that can be expressly identified, resulting in a real conflict. Such statutory provisions must be constitutionally valid, and there will always be potential considerations where federal insolvency laws purport to permit an overriding of contracts. Example of express contradictions between statute and contract — wherein statute will trump contract — include:

- a purported right (termination, enforcement, *etc*.) that conflicts with a statutory stay of proceedings;
- a purported right to proceed without notice that conflicts with a statutory obligation to give notice (*e.g.*, a BIA section 244 notice requirement) or a contractual provision that requires less notice than stipulated by law (*e.g.*, a tenant may disclaim a lease as statutorily provided even if the lease requires a longer notice period);
- a purported right to cease supplying under an existing agreement that conflicts with a statutory obligation to continue to supply;
- a contractual claim for damages that conflicts with the value given to such claim at law (*e.g.*, a landlord's claim for disclaimer, which is limited by statute irrespective of the lease's contractual provisions, certain penalty clauses or interest claims that contradict the *Criminal Code*);
- a forced assignment of a lease or other contract pursuant to statute notwithstanding contractual requirements for consent;
- a contractual provision that interferes with a court officer in the fulfillment of its mandate (*e.g.*, a clause purporting to deny a trustee, receiver, liquidator or monitor possession of/access to premises or property, books and records, *etc*., contrary to statute);
- any contractual provision purporting to restrict what an insolvency statute permits (*e.g.*, a prohibition against the granting of encumbrances that conflicts with a priority charge provided for by statute); and
- a contractual provision with respect to priority (*e.g.*, "first-ranking lien") that conflicts with priorities in bankruptcy.

Many, but not all, of these examples are consistent with the underlying objective of preserving a status quo rather than changing the landscape. However, it is clear that contracts can be forcibly altered against a counterparty's wishes where there is an express statutory provision to that effect. Changing, rather than preserving, the status quo

is an extraordinary result for which there must be express statutory authority. This is not a power delegated to the courts (*i.e.*, the courts have no authority to selectively decide on an arbitrary basis to rewrite contracts in favour of the debtor). Nonetheless, in the absence of statutory provisions that conflict with contract, many debtors or their representatives may attempt to overcome an undesirable contractual provision by fabricating a conflict through seeking a court order that creates such conflict. More indirectly, debtors may enter into contractual agreements such as interim financing, debtor-in-possession financing agreements or agency agreements that purport to override or alter other contracts, and to then seek court approval so that the negating of other contracts is implicit in the court's approval of the contract in question.[14]

A contractual provision that is triggered by a party's insolvency and that thereby causes subsequent prejudice to the rights of the insolvent party's creditors may be unenforceable as a matter of public policy (*e.g.*, anti-deprivation rule or "fraud upon the insolvency law" doctrine). Any removal of value on insolvency by contractual means is potentially subject to challenge. These instances of negating contract terms are restricted to extraordinary cases where there is wrongdoing or something manifestly offensive about the clause in question. For example:

- *Conversion of Unsecured Debt to Secured Debt* — a contract cannot purport to elevate priority of claims on an insolvency.[15]
- *Automatic Disposition of Assets* — where a contract purports to dispose of assets effective on insolvency or to bestow an advantage on one party, such a provision is not valid. No one may deal with his or her property in such a way as to provide for a different distribution of it in the event of bankruptcy from that which the law provides.[16]
- *Forfeiture of Rights/Interests or Forgiveness of Debt* — a purported contractual loss of rights or interest or the forgiveness of debt on becoming insolvent may be unenforceable.[17] For example, a lease provision for which there is forfeiture of all improvements, materials and effects on bankruptcy is not valid.[18] However, where a lease makes exercise of a purchase option by the tenant conditional on there being no default under the lease, and the tenant is in default by reason of its being insolvent and having commenced restructuring proceedings, such a provision is valid (*i.e.*, does not violate the anti-deprivation rule and is not a fraud on the bankruptcy law, nor is relief from forfeiture available, as non-performance of a condition precedent cannot be excused).[19]
- *Bonus Payable on Bankruptcy* — a loan that provides for a bonus in the event of bankruptcy is not enforceable.[20]

- *Purchase Option / Purchase at Discount* — a contractual right of first refusal on bankruptcy may be valid, but any contractual discount to the purchase price is invalid on grounds of public policy.[21] Similarly, a contractual right to purchase at the lesser of book value or fair value violates the policy of equitable and fair distribution of the property of the bankrupt to unsecured creditors.[22] A purchaser option or agreement with respect to land need not be completed by a trustee in bankruptcy.[23]
- *Rights of Use by Non-Insolvent Party* — a contractual right to take possession of and use the property of a bankrupt on bankruptcy may not be enforceable.[24] However, such a provision may be enforceable if not conditioned on bankruptcy.[25]

In the absence of such wrongdoing or offensive provisions, the courts will typically uphold and give effect to contracts in insolvency, refusing to sanction the overriding or ignoring of select terms. For example:

- *Purchase Options* — an option to purchase property of a bankrupt may be binding on a trustee in bankruptcy. However, this is only true if the disposition is at fair value. If the contract provides for a discounted value, the discount is not enforceable.[26] In a real property lease, the loss of a purchase option on insolvency of the lessee was upheld in BIA proposal proceedings, it being concluded that there was no loss of value to the insolvent lessee.[27]
- *Automatic Conveyance Upon Bankruptcy* — an automatic re-conveyance of a performing arts facility on bankruptcy was upheld on the basis that prior consideration had already been given for this right (and therefore there being no loss of value to the estate).[28]
- *Grant of Exclusive Rights* — exclusive rights granted in an agreement pre-bankruptcy is binding on the trustee and cannot be disclaimed.[29]
- *Automatic Termination / Fee* — a contractual provision that on commission of an act of bankruptcy, the contract was deemed to be terminated the day prior to the act of bankruptcy and a fee became payable, was held to be valid.[30]

The takeaway is clear: a contract, including a commercial lease, may be disclaimed or resiliated in its entirety to the extent statutorily provided in insolvency legislation, but where the debtor wishes to eliminate or ignore selective provisions of a contract, this may only be done (i) where expressly permitted by an *intra vires* insolvency statute (*i.e.*, such that there is an express conflict between the statute and the contract in question), (ii) where the provision of the contract in question purports to fundamentally alter the pre-insolvency status quo between the parties,

typically by reason of the insolvency of the counterparty or its having commenced insolvency proceedings,[31] or (iii) where the provision in question is fundamentally offensive, contrary to public policy or otherwise amounts to serious wrongdoing. Critically, the essence of a contractual provision not honoured or given effect in insolvency is that the provision purports to actively and intentionally inflict harm on the insolvent person or its estate, and the statutes or courts will not permit that harm. At no time are contractual provisions avoided because doing so gives the insolvent person an advantage, appropriation or confiscation. It is not open to an insolvent tenant to selectively cease performing contractual provisions simply because it would find it convenient or advantageous to be freed from compliance, or that it would otherwise benefit. It is one thing for an insolvent tenant to seek to be shielded from a provision that says, for example, that on becoming insolvent rent doubles; it is quite another thing for a tenant to go on the offensive and seek to be freed from its existing obligation to pay rent. The aim is to protect the insolvent person from punitive contractual provisions triggered by its insolvency, not to assist it in taking liberties with contractual counterparties.

Although the courts have shown considerable reluctance to selectively interfere with contracts, the terms of leases may be strictly construed as against landlords where it effects a result the court finds appealing. For example, where (i) a tenant had a right of renewal that was conditional on there being no default at the time of renewal, and (ii) the tenant was insolvent and had commenced insolvency proceedings, each of which was a default under the lease, the court was not prepared to find that it could simply excuse or ignore these restrictions and compel the lease renewal on the landlord. Instead, the court engaged a creative workaround within the four corners of the lease. The court found that the lease provided that, on such defaults, the lease term was immediately forfeited and void; because the landlord had not treated the lease term as void and had not sought a lifting of the stay to permit re-entry, the landlord had not taken steps to rely on the defaults and they could no longer be relied on, effectively having been waived. The path was open to the tenant to renew the lease, as a result.[32]

Footnote(s)

1 See *e.g., New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, [2005] B.C.J. No. 671, 2005 BCCA 192 at para. 33 (B.C.C.A.); *Re JTI-Macdonal Corp.*, [2005] O.J. No. 1202, 10 C.B.R. (5th) 208 at para. 6 (Ont. S.C.J.) (in the context of CCAA proceedings. The same has been said of the BIA and of an application to the courts for equitable relief generally.).

2 *Re Doman Industries Ltd.*, [2003] B.C.J. No. 562, 2003 BCSC 376 at para. 26 (B.C.S.C.).

3 L.W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. looseleaf (Toronto: Thomson Reuters, 2013) at N§63.

4 *Re Forest & Marine Financial Corp.*, [2009] B.C.J. No. 1355, 2009 BCCA 319 at para. 26 (B.C.C.A.).

5 *Century Services Inc. v. Canada (A.G.)*, [2010] S.C.J. No. 60,[2010] 3 S.C.R. 379, 2010 SCC 60 at para. 60 (S.C.C.).

6 *Ibid.,* at para. 77.

7 For example, this was the basis of the Ontario Court of Appeal's endorsement of an "interest stops" rule — it would not permit a contractual entitlement to interest to operate post-commencement of CCAA proceedings because this contractual right altered the status quo. Contracts were interfered with not to alter the status quo, but to preserve it. See *Re Nortel Networks Corp.*, [2015] O.J. No. 5277, 2015 ONCA 681 at paras. 39-40 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 543 (S.C.C.).

8 *Re JTI-Macdonal Corp.*, [2005] O.J. No. 1202, 10 C.B.R. (5th) 208 at para. 6 (Ont. S.C.J.). See also *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, [2005] B.C.J. No. 671, 2005 BCCA 192 at para. 33 (B.C.C.A.).

9 *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610 at para. 20 (Ont. S.C.J.) [emphasis added].

10 *Re Nortel Networks Corporation*, [2015] O.J. No. 5277, 2015 ONCA 681 at paras. 23-25 (Ont. C.A.), leave to appeal refused [2015] S.C.C.A. No. 543 (S.C.C.). This is a long-standing principle; see *e.g., Re Savin*, (1872) L.R. 7 Ch. App. 760 at 764 (C.A.), in which it was held that "… the theory in bankruptcy is to stop all things at the date of the bankruptcy, *and to divide the wreck of the man's property as it stood at that time*" [emphasis added].

11 *Re Nortel Networks Corporation*, *ibid.*, at para. 23.

12 Prior version of the Ontario Model Long Form Initial CCAA Order (no longer available), at para. 14 [emphasis added].

13 Notes to the Ontario Model Long Form Initial CCAA Order (no longer available) [emphasis added]. The current drafts of Ontario's Model Orders no longer contain explanatory notes or editorial commentary.

14 Frequently, the nature of the conflict created is not fully disclosed to the court. Generic language in the agreements before the court may provide that "notwithstanding anything to the contrary in any lease or other contract …", but there is no clarity or evidence given to the court as to what the effect of the clause is or the rights and interests purportedly negated.

15 *Ex parte Mackay. Ex parte Brown. In re Jeavons*, (1873) 8 L.R. Ch. App. 643 (Ch. C.A.).

16 See *e.g., ibid.*; *Re Westerman*, [1998] A.J. No. 1285, 1998 ABQB 946 at para. 23 (Alta. Q.B.), revd on other grounds [1999] A.J. No. 1076, 1999 ABQB 708 (Alta. Q.B.).

17 See *e.g., Re Knechtel Furniture Ltd.*, [1985] O.J. No. 1265, 56 C.B.R. (N.S.) 258 at para. 21 (Ont. H.C.J.); *Price (Trustee of) v. Beach Gardens Resort Hotel Ltd.*, [1994] B.C.J. No. 1512, 28 C.B.R. (3d) 156 at para. 23 (B.C.S.C.), affd [1995] B.C.J. No. 2873, 39 C.B.R. (3d) 31 (B.C.C.A.); *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, [2013] O.J. No. 655, 2013 ONCA 95 at para. 12 (Ont. C.A.).

18 *Ex Parte Jay. In re Harrison* (1879), 14 Ch.D. 19 (Ch. C.A.).

19 *1183882 Alberta Ltd. (c.o.b. Sok's Contracting) v. Valin Industrial Mills Installations Ltd.*, [2011] A.J. No. 770, 2011 ABQB 440 at paras. 43-47, 64 (Alta. Q.B.), affd [2012] A.J. No. 183, 2012 ABCA 62 (Alta. C.A.), leave to appeal refused [2012] S.C.C.A. No. 180 (S.C.C.).

20 *Civano Const. Inc. (Syndic de) v. Qué (Society/Societé de Prêts & de Placements)*, 4 C.B.R. (N.S.) 294 (Que. S.C.).

21 *Daoust v. Cie de gestion Gar-Vin Inc.*, [1982] C.S. 482, 138 D.L.R. (3d) 61, 42 C.B.R. (N.S.) 50 at para. 23 (Que. S.C.).

22 *Canadian Imperial Bank of Commerce v. Bramalea Inc.*, [1995] O.J. No. 4884, 33 O.R. (3d) 692 at paras. 6-7 (Ont. Gen. Div.); *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, [2013] O.J. No. 655, 2013 ONCA 95 at para. 12 (Ont. C.A.).

23 *Re Bakermaster Foods Ltd.*, [1985] O.J. No. 1752, 56 C.B.R. (N.S.) 314 at para. 7 (Ont. H.C.J.); *Malka (Trustee of) v. Tye-Sil Corp.*, [1990] Q.J. No. 1449, 1 C.B.R. (3d) 305 at para. 46 (Que S.C.), affd [1997] J.Q. no 270, 23 C.B.R. (4th) 191 (Que. C.A.).

24 *Re Barrington & Vokey Ltd.*, [1996] N.S.J. No. 532, 48 C.B.R. (3d) 270 at paras. 21-22 (N.S.S.C.); *Ex Parte Jay. In re Harrison* (1880), 14 Ch. Div. 19 (C.A.).

25 *Ex parte Newitt. In re Garrud* (1880), 16 Ch. Div. 522 (Ch. C.A.).

26 *Daoust v. Cie de gestion Gar-Vin Inc.*, [1982] C.S. 482, 138 D.L.R. (3d) 61, 42 C.B.R. (N.S.) 50 at para. 24 (Que. S.C.).

27 *1183882 Alberta Ltd. (c.o.b. Sok's Contracting) v. Valin Industrial Mills Installations Ltd.*, [2011] A.J. No. 770, 2011 ABQB 440 at para. 45 (Alta. Q.B.), aff'd [2012] A.J. No. 183, 2012 ABCA 62 (A.B.C.A.), leave to appeal refused [2012] S.C.C.A. No. 180 (S.C.C.).

28 *Capitol Theatre and Arts Centre (Windsor) (Trustee of) v. Windsor (City)*, [2008] O.J. No. 3038, 46 C.B.R. (5th) 283 at para. 63 (Ont. S.C.J.).

29 *Re Erin Features No. 1 Ltd.*, [1991] B.C.J. No. 3330, 8 C.B.R. (3d) 205 at para. 3 (B.C.S.C.); *Armadale Properties Ltd. v. 700 King Street (1997) Ltd.*, [2001] O.J. No. 1727, 25 C.B.R. (4th) 198 at para. 12 (Ont. S.C.J.).

30 *P.I.A. Investments Inc. v. Deerhurst Ltd. Partnership*, [1999] O.J. No. 2831, 13 C.B.R. (4th) 128 at para. 27 (Ont. S.C.J.), affd [2000] O.J. No. 3291, 20 C.B.R. (4th) 116 (Ont. C.A.).

31 Such alteration of the status quo must typically be of a drastic and highly prejudicial nature. A contractual provision providing for a default rate of interest on an event of default (including an insolvency default), for example, will be valid notwithstanding that it in some sense alters the status quo insofar as it results in a change in the interest rate paid by the counterparty. To be objectionable, a more fundamental change is required, such as the purported termination of the agreement, the forfeiture of property or rights, *etc*. In essence, it is not simply an altering of the status quo that is subject to being stayed from being effective, but rather an offensive or improper or unfair change to the status quo. Within reason, contractual parties ought to be permitted to consider and provide for their respective positions on the insolvency of the counterparty. Only where the parties go too far (which is, admittedly, a fact-specific and subjective determination made in the circumstances of each case), such that there is profound harm suffered by the insolvent party or its stakeholders, will the courts intervene to shield the insolvent debtor from such a provision.

32 *853571 B.C. Ltd. v. Spruceland Shopping Centre Inc.*, [2009] B.C.J. No. 1747, 2009 BCSC 1187 (B.C.S.C.).

End of Document

TAB 3

See page 2

Black's Law Dictionary (12th ed. 2024), condition

CONDITION

CONDITION
Black's Law Dictionary (12th ed. 2024) *(Approx. 7 pages)*

Preface to the Twelfth Edition | Guide to the Dictionary | Legal Maxims | Bibliography of Books Cited

condition *n.* [Middle English *condicion*, fr. Old French *condicion*, fr. Latin *condiciŌnem*, accusative of *condiciŌ* (also spelled *conditiŌ*) "a compact, stipulation, agreement," fr. Latin vb. *condīcere* "to agree upon," fr. *con-* "together, with" + *dīcere* "to declare, tell, say."] (14c)
1. A future and uncertain event on which the existence or extent of an obligation or liability depends; an uncertain act or event that triggers or negates a duty to render a promised performance. • For example, if Jones promises to pay Smith $500 for repairing a car, Smith's failure to repair the car (an implied or constructive condition) relieves Jones of the promise to pay.

> "'Condition' is used in this Restatement to denote an event which qualifies a duty under a contract. It is recognized that 'condition' is used with a wide variety of other meanings in legal discourse. Sometimes it is used to denote an event that limits or qualifies a transfer of property. In the law of trusts, for example, it is used to denote an event such as the death of the settlor that qualifies his disposition of property in trust. Sometimes it is used to refer to a term in an agreement that makes an event a condition, or more broadly to refer to any term in an agreement (e.g., 'standard conditions of sale'). For the sake of precision, 'condition' is not used here in these other senses." Restatement (Second) of Contracts § 224 cmt. a (1981).

> "Strictly, a condition is a fact or event on the occurrence of which some legal right or duty comes into existence; a party may promise that this fact is so, or that the event will take place, but it is equally possible that no party to the contract promises this. An insurance company promises to pay £10,000 to an insured person if his house is destroyed by fire; the destruction of the house by fire is a condition of the insurer's promise to pay, but neither party promises to burn the house." P.S. Atiyah, *An Introduction to the Law of Contract* 146 (3d ed. 1981).

> "Promises and the duties they generate can be either unconditional ('I promise to pay you $100,000') or conditional ('I promise to pay you $100,000 if your house burns down'). Lawyers use *condition* in several senses. Sometimes they use it to refer to the term in the agreement that makes the promise conditional … However, lawyers also use *condition* to refer to an operative fact rather than to a term. According to the Restatement Second a condition is 'an event, not certain to occur, which must occur, unless occurrence is excused, before performance under a contract becomes due.' This use of the word has the support of leading writers." E. Allan Farnsworth, *Contracts* § 8.2, at 519–20 (3d ed. 1999).

2. A stipulation or prerequisite in a contract, will, or other instrument, constituting the essence of the instrument. • If a court construes a contractual term to be a condition, then its untruth or breach will entitle the party to whom it is made to be discharged from all liabilities under the contract.

- **affirmative condition** See *positive condition*.
- **casual condition** (1873) *Civil law.* A condition that depends on chance; one that is not within the power of either party to an agreement.
- **collateral condition** (17c) A condition that requires the performance of an act having no relation to an agreement's main purpose.
- **compulsory condition** (1876) A condition expressly requiring that a thing be done, such as a tenant's paying rent on a certain day.
- **concurrent condition** (1840) A condition that must occur or be performed at the same time as another condition, the performance by each party separately operating as a condition precedent; a condition that is mutually dependent on another, arising when the parties to a contract agree to exchange performances simultaneously. — Also termed *condition concurrent*.

> "*Conditions concurrent* are acts that the parties to a contract are under duties of performing concurrently, the act of each party being separately operative as a condition precedent. The act is not concurrent with the legal relation affected, but only with the act of the other party." William R. Anson, *Principles of the Law of Contract* 412–13 (Arthur L. Corbin ed., 3d Am. ed. 1919).

- **condition implied by law** See *constructive condition*.
- **condition implied in law** See *constructive condition*.
- **condition precedent** (prə-**seed**-ənt *also* **pres**-ə-dənt) (1818) An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. • If the condition does not occur and is not excused, the promised performance need not be rendered. The most common condition contemplated by this phrase is the immediate or unconditional duty of performance by a promisor.

> "Conditions precedent are such as must be punctually performed before the Estate can vest; but on a Condition subsequent, the Estate is immediately executed; yet the Continuance of such Estate dependeth on the Breach or Performance of the Condition.
>
> "As if I grant, that if *A*. will go to such a Place about my Business, that he shall have such an Estate, or that he shall have £10 &c., this is a Condition precedent.
>
> "So if I retain a Man for 40 *s*. to go with me to *Rome*, this is a condition precedent, for the Duty commences by going to *Rome*.
>
> "So if a Man, by Will, devises certain Legacies, and then devises all the Residue of his Estate to his Executor, after Debts, Legacies, &c. paid and discharged; this is a Condition precedent, so that the Executor cannot have the Residue of the Estate before the Debts and Legacies are discharged." 1 Matthew Bacon, *A New Abridgment of the Law* 405 (2d ed. 1762).

- **condition subsequent** (1818) A condition that, if it occurs, will bring something else to an end; an event the existence of which, by agreement of the parties, discharges a duty of performance that has arisen.

> "A condition subsequent affects an interest which is already vested; and it either diminishes or defeats that interest. Thus a conveyance to A and his heirs, but if he marry B, then to him only for his life, and an estate to C for years or for life or in fee, provided, however, that he is to lose it if D come

back from Rome, or if he fail to erect a building upon it, are estates on condition subsequent.

"When a condition is seen to affect an estate, the courts prefer to treat it, if reasonably possible, as subsequent rather than precedent. This is a very strong and frequently illustrated preference; and it is also a conspicuous application of the general principle, running through all the common law, that a right or an interest once conveyed or transferred, which may be looked upon as great and important or as of lesser significance, shall be treated and construed preferably in the former sense. The determination of whether a condition is precedent or subsequent depends ultimately on the intention of the parties as ascertained from their language and all the facts of the case; but, when such intent does not clearly appear, the rule now followed, and based on this principle of preference, is that 'if the act or condition required do not necessarily precede the vesting of the estate, but may accompany or follow it, or if the act may as well be done after as before the vesting of the estate,' then the condition is subsequent." Alfred G. Reeves, *A Treatise on Special Subjects of the Law of Real Property* § 419, at 589–90 (1904).

"If … the deed or will uses such words as 'but if,' 'on condition that,' 'provided, however,' or 'if, however,' it will generally be assumed that a condition subsequent was intended." Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 50 (2d ed. 1984).

- **constructive condition** (1837) A condition contained in an essential contractual term that, though omitted by the parties from their agreement, a court has supplied as being reasonable in the circumstances; a condition imposed by law to do justice. • The cooperation of the parties to a contract, for example, is a constructive condition. — Also termed *implied-in-law condition*; *condition implied by law*; *condition implied in law*. Cf. *implied-in-fact condition*.

> "[C]onstructive conditions are imposed by law to do justice. … The dividing line between an express condition … and constructive conditions is often quite indistinct. Yet, the distinction is often of crucial importance. The general rule governing an express condition is that it must be strictly performed. The general rule as to constructive conditions is that substantial compliance is sufficient." John D. Calamari & Joseph M. Perillo, *The Law of Contracts* § 11.8, at 402 (4th ed. 1998).

- **contingent condition** (17c) An event that is outside either party's control but whose occurrence or nonoccurrence could determine whether a contractual promise is enforceable. • Examples include a pianist's agreement to entertain at an outdoor reception unless it rains, and a potential partner's agreement to manage a store if the other partners can secure funding.
- **copulative condition** (**kop**-yə-lə-tiv *or* -lay-tiv) (18c) A condition requiring the performance of more than one act. Cf. *disjunctive condition*; *single condition*.
- **dependent condition** (1807) A mutual covenant that goes to the consideration on both sides of a contract.
- **disjunctive condition** (17c) A condition requiring the performance of one of several acts to be chosen by the performer. Cf. *copulative condition*; *single condition*.
- **dissolving condition** See *resolutory condition*.
- **express condition** (16c)
1. A condition that is the manifested intention of the parties.
2. A condition that is explicitly stated in an instrument; a contractual condition that the parties have reduced to writing.

> "[E]xpress conditions … are conditions created through the agreement of the parties. This is so whether the intention to have the duty subject to a condition be manifested in words, or through any other conduct or type of utterance." John Edward Murray Jr., *Murray on Contracts* § 143, at 290 (2d ed. 1974).

- **implied condition** (17c) A condition that is not expressly mentioned, but is imputed by law from the nature of the transaction or the conduct of the parties to have been tacitly understood between them as a part of the agreement. See *constructive condition*; *implied-in-fact condition*.
- **implied-in-fact condition** (1946) A contractual condition that the parties have implicitly agreed to by their conduct or by the nature of the transaction. Cf. *constructive condition*.
- **implied-in-law condition** See *constructive condition*.
- **inherent condition** (18c) A condition that is an intrinsic part of an agreement; a condition that is not newly imposed but is already present in an agreement.
- **lawful condition** (16c) A condition that can be fulfilled without violating the law.
- **mixed condition** (18c) *Civil law.* A condition that depends either on the will of one party and the will of a third person, or on the will of one party and the happening of a causal event.
- **negative condition** (17c) A condition forbidding a party from doing a certain thing, such as prohibiting a tenant from subletting leased property; a promise not to do something, usu. as part of a larger agreement. — Also termed *restrictive condition*. See *negative easement* under EASEMENT.
- **positive condition** (17c) A condition that requires some act, such as paying rent. — Also termed *affirmative condition*.
- **potestative condition** (**poh**-tes-tə-tiv) (17c) *Civil law.* A condition that it is within the power (*potestas*) or will of the obligor to fulfill. • A condition is purely potestative when its fulfillment depends solely on the will of a party. Louisiana no longer uses this term, instead providing that a condition that depends solely on the whim of the obligor makes the obligation null. La. Civ. Code art. 1770. Cf. *suspensive condition*; *resolutory condition*.
- **precondition** (1825) A stipulated act or event that must occur before either party to a contract will be bound by the contract; a prerequisite.
- **preexisting condition** (1921) *Insurance.* A physical or mental condition evident during the period before the effective date of a medical-insurance policy.
- **promissory condition** (1874) A condition that is also a promise.

> "The distinction between a condition which is also a promise, and a condition which is not the subject of a promise, is often one of great difficulty and importance, especially where the term is implied and not expressed, and it is unfortunate that legal usage has sanctioned the word 'condition' for two such different concepts. It would at least be desirable if lawyers could be persuaded to refer to conditions which are the subject of a promise as 'promissory conditions,' a usage which it is proposed to adopt here." P.S. Atiyah, *An Introduction to the Law of Contract* 147 (3d ed. 1981).

- **resolutory condition** (rə-**zol**-yə-tor-ee) (1839) *Civil law.*
1. A condition that upon fulfillment terminates an already enforceable obligation and entitles the parties to be restored to their original positions.
2. *Louisiana law.* A conditional obligation that may be immediately enforced but will come to an end when an uncertain event that is specified occurs. La. Civ. Code art. 1767. — Also termed *resolutive condition*; *dissolving condition*. See RESOLUTORY. Cf. *potestative condition*.
- **restrictive condition** See *negative condition*.
- **single condition** (17c) A condition requiring the performance of a specified thing. Cf. *copulative condition*; *disjunctive condition*.

- **suspensive condition** (17c) *Civil law.* A condition that makes an obligation mandatory only if a specified but uncertain event occurs. Cf. *potestative condition*.
- **testamentary condition** (1905) A condition that must be satisfied before a gift made in a will becomes effective.
- **triggering condition** (1972) A circumstance that must exist before a legal doctrine applies; esp., in criminal law, a circumstance that must exist before an actor will be entitled to a justification defense.
- **unlawful condition** (17c) A condition that cannot be fulfilled without violating the law.

3. Loosely, a term, provision, or clause in a contract.

> "This term *condition* is generally used to describe any fact, subsequent to the formation of a contract, which operates to make the duty of a promisor immediately active and compelling. Such a fact may be described as such in a term of the contract or it may not. In either event, the *term* of the contract should not itself be called the *condition* … It is not uncommon, popularly, to speak of a condition of the contract as synonymous with *term* or *provision* of the contract. This should be avoided." William R. Anson, *Principles of the Law of Contract* 226 n.1 (Arthur L. Corbin ed., 3d Am. ed. 1919).

> "The word 'condition' is used in the law of property as well as in the law of contract and it is sometimes used in a very loose sense as synonymous with 'term,' 'provision,' or 'clause.' In such a sense it performs no useful service." *Id*. at 409.

4. A qualification attached to the conveyance of property providing that if a particular event does or does not take place, the estate will be created, enlarged, defeated, or transferred.

5. A state of being; an essential quality or status. — **condition,** *vb.*

- **artificial condition** (1793) A physical characteristic of real property, brought about by a person's affirmative act instead of by natural forces.
- **dangerous condition** (17c)

1. A property defect creating a substantial risk of injury when the property is used in a reasonably foreseeable manner. • A dangerous condition may result in waiver of sovereign immunity.

2. A property risk that children, because of their immaturity, cannot appreciate or avoid. Cf. *attractive nuisance* under NUISANCE.

- **defective condition** (17c) An unreasonably dangerous state that might well cause physical harm beyond that contemplated by the ordinary user or consumer who purchases the product. See PRODUCTS LIABILITY.

6. *Insurance.* In a liability-insurance policy, an event under the control of an insured, policyholder, or insurer that, unless excused, must have occurred or not occurred before performance under the policy becomes due.

End of Document

TAB 4

See page 116

Bill C-55: clause by clause analysis (cl00908)

BIA: Crown Priorities

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 69
Section No. 86(2)(a)
Topic: Crown claims

Proposed Wording

86. (2)(a) to claims that are secured by a security or **charge** of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

Rationale

Subsection 86(2)(a) was amended to comply with the Federal government's Harmonization Program aimed at changes to federal legislation to reflect the appropriate civil and common law terminology.

Present Law

86. (2)(a) to claims that are secured by a security or privilege of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

Senate Recommendation

None.

Bill Clause No. 70

Section No. 87(1)

Topic: Crown security

Proposed Wording

87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the **initial bankruptcy event**.

Rationale

Subsection (1) was amended to simplify the language.

Present Law

87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered, before the earliest of

(a) the date a petition is filed against the debtor,

(b) the date the debtor makes an assignment,

(c) the date the debtor files a notice of intention under section 50.4, and

(d) the date on which a proposal is filed,

pursuant to a prescribed system of registration.

Senate Recommendation

None.

BIA: Preferences and transfers at undervalue

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 71
Section No. 91
Topic: Preferences and Transfers at Undervalue

Proposed Wording

Preferences (Title)

Rationale

Section 91 of the BIA (Bankruptcy and Insolvency Act), which deals with settlements is replaced by another concept in clause 73, section 96.1 - transfers at undervalue. The term "settlements" was eliminated from the title.

Present Law

Settlements and Preferences (Title)

Senate Recommendation

None.

Bill Clause No. 72
Section No. 94
Topic: Assignment of Book Debt

Proposed Wording

72. Section 94 of the Act is repealed.

Rationale

The assignment of book debt registration requirement is now dealt with under provincial regimes.

Present Law

94. (1) Where a person engaged in any trade or business makes an assignment of his existing or future book debts or any class or part thereof and subsequently becomes bankrupt, the assignment of book debts is void against the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

(2) This section does not apply to an assignment of book debts that is registered pursuant to any statute of any province providing for the registration thereof if the assignment is valid in accordance with the laws of the province.

(3) Nothing in this section renders void any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Senate Recommendation

None.

Bill Clause No. 73
Section No. 96 and s.96.1
Topic: Undervalue Transfers and Preferences

Proposed Wording

96. If the transfer, charge, payment, obligation or judicial proceeding **referred** to in section 95 **has the effect of giving a creditor who is not at arm's length a preference over other creditors**, the period referred to in subsection 95(1) **is** one year instead of three months.

96.1 (1) If a debtor has entered into a transaction with another party, the court may, on the application of the trustee, inquire into whether the transaction was a transfer at undervalue and whether or not the other party was at arm's length with the debtor.

(2) If the court finds that the other party in the transaction was at arm's length with the debtor and that the transaction was a transfer at undervalue, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the debtor or against all those persons for the difference between the actual consideration given or received by the debtor and the fair market value, as determined by the court, of the property or services concerned in the transaction, if

***(a)* the transaction occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy; and**

***(b)* the debtor was insolvent at the time of, or was rendered insolvent by, the transaction, and the debtor intended to defeat the interests of creditors.**

(3) If the court finds that the other party in the transaction was not at arm's length with the debtor and that the transaction was a transfer at undervalue, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the debtor or against all those persons for the difference between the actual consideration given or received by the debtor and the fair market value, as determined by the court, of the property or services concerned in the transaction, if the transaction occurred during the period

***(a)* that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy; or**

***(b)* that begins five years before the date of the initial bankruptcy event and that ends one day before one year before the date of the initial bankruptcy event in the case where**

(i) the debtor was insolvent at the time of, or was rendered insolvent by, the transaction, or
(ii) the debtor intended to defeat the interests of creditors.

(4) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services concerned in the transaction and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor in the transaction, and the values on which the court makes any finding under this section are the values so stated by the trustee unless other values are proved.

Rationale

The proposed reform is a complete framework for challenging transactions that may diminish the value of the insolvent debtor's estate, reducing the amount of money available for distribution to the creditors. These types of transactions are called preferences and transfers at undervalue. A preference occurs when an insolvent debtor pays one or more creditors at the expense of other creditors. A transfer at undervalue is a transaction in which the consideration received by a person is conspicuously less than the fair market value of the property or services sold or disposed of by the person in the transaction. This improved framework will provide fairness and predictability when dealing with these types of transactions in the insolvency system.

Section 96, regarding preferences, clarifies that there is no requirement to prove that the debtor intended to prefer a non arm's length creditor. The clarification recognizes the difficulty and expense required to prove intent. The timeframe for looking back on preferences with a non arm's length creditor remains one year. Other amendments to this section modernize the language.

Section 96.1 deals with transfers at undervalue. Subsection 96.1 (1) enables the trustee to apply to the court so that the court may determine as a question of fact whether the transaction was a transfer at undervalue and whether or not the other party was at arm's length with the debtor in relation to the transfer.

Subsection 96.1 (2) deals with the situation where the court has found the transaction to be a transfer at undervalue and that the parties were dealing at arm's length. In these cases, if the court determines that the transaction occurred within one year of the bankruptcy, the debtor was insolvent at the time of the transaction, and the debtor intended to defeat the interests of the creditors, the court may then grant judgment to the trustee against the other party to the transaction. The judgment may be for the difference between the actual consideration given and the fair market value as determined by the court.

Subsection 96.1 (3) deals with the situation where the court has found the transaction to be a transfer at undervalue and that the parties were not dealing at arm's length. In these cases, if the court determines that the transaction occurred within one year of the bankruptcy, the court may grant judgment to the trustee for the difference between the actual consideration given and the fair market value as determined by the court. However, in cases where the transaction occurred prior to the one year before the bankruptcy and up to five years before the bankruptcy, the court must find that the debtor was insolvent at the time of the transaction or that the debtor intended to defeat the interests of the creditors before it may grant judgment in favour of the trustee against the other party to the transaction. The judgment may be for the difference between the actual consideration given and the fair market value as determined by the court.

Subsection 96.1 (4) provides that the trustee in making the application to the court shall state what the trustee believes to be the fair market value of the property and what the value of the actual consideration was. The court will base its decision on the values given by the trustee unless other values are proven to the court.

Present Law

96. If the transfer, charge, payment, obligation or judicial proceeding mentioned in section 95 is in favour of a person related to the insolvent person, the period referred to in subsection 95(1) shall be one year instead of three months.

Senate Recommendation

The proposed reform follows the Senate Committee's recommendation.

Bill Clause No. 74
Section No. 97 (1)
Topic: Transfers at Undervalue

Proposed Wording

97. (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and **transfers at undervalue**:

Rationale

This is a technical amendment replacing the term "reviewable transactions" with "transfers at undervalue."

Present Law

97. (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting settlements, preferences and reviewable transactions:

Senate Recommendation

None.

Bill Clause No. 75
Section No. 98.1
Topic: Assignment of Book Debts

Proposed Wording

98.1 (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts, or any class or part of those debts, and subsequently becomes bankrupt, the assignment of book debts is void as against, or, in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

(2) Subsection (1) does not apply to an assignment of book debts that is registered under any statute of any province providing for the registration of assignments of book debts if the assignment is valid in accordance with the laws of the province.

(3) Nothing in subsection (1) renders void or, in the Province of Quebec, null any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Rationale

This proposed reform is a re-numbering of an existing section and a modernization of the language.

Present Law

94. (1) Where a person engaged in any trade or business makes an assignment of his existing or future book debts or any class or part thereof and subsequently becomes bankrupt, the assignment of book debts is void against the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

(2) This section does not apply to an assignment of book debts that is registered pursuant to any statute of any province providing for the registration thereof if the assignment is valid in accordance with the laws of the province.

(3) Nothing in this section renders void any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Senate Recommendation

None.

Bill Clause No. 76
Section No. 100
Topic: Transfers at Undervalue

Proposed Wording

76. Section 100 of the Act is repealed.

Rationale

The concept of reviewable transactions has been replaced with a new general cause of action for undervalue transfers.

Present Law

100. (1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.

(2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

(3) In making an application under this section, the trustee shall state what in his opinion was the fair market value of the property or services concerned in the transaction and what in his opinion was the value of the actual consideration given or received by the bankrupt in the transaction, and the values on which the court makes any finding pursuant to this section shall be the values so stated by the trustee unless other values are proven.

Senate Recommendation

None.

BIA: Administration of estates

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to

amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 77
Section No. 102(3)
Topic: Information and Notice

Proposed Wording

102. (3) In the case of the bankruptcy of an individual, the trustee shall set out in the notice, in the prescribed form, information concerning the financial situation of the bankrupt and the obligation of the bankrupt, **if any**, to make payments required under section 68 to the estate of the bankrupt.

Rationale

The proposed reform is a technical amendment to correct the the fact that the notice will include whether or not the bankrupt is obligated to make surplus income payments. The proposed wording is also designed to streamline the system and improve its efficiency by eliminating unnecessary notifications.

Present Law

102. (3) In the case of the bankruptcy of an individual, the trustee shall

(a) set out in the notice, in the prescribed form, information concerning the financial situation of the bankrupt and the obligation of the bankrupt to make payments required under section 68 to the estate of the bankrupt; and

(b) forthwith advise the official receiver, and any creditors who have requested such information, of

(i) any material change relating to the financial situation of the bankrupt, and
(ii) any amendment made under subsection 68(4) to the amount that the bankrupt is required to pay to the estate of the bankrupt.

Senate Recommendation

The proposed reform follows the Senate Committee's recommendation.

Bill Clause No. 78
Section No. 104 (1)
Topic: Creditor Meetings

Proposed Wording

104. (1) Meetings of creditors other than the first shall be called by sending a notice of the time and place **of the meeting together with an agenda outlining the items for discussion with a reasonable explanation of what is expected to be discussed for each item**, not less than five days before the time of each meeting to each creditor at the address given in the creditor's proof of claim.

Rationale

The amendment is intended to encourage more creditors to participate in the process by providing them with information they need to make informed decisions.

Present Law

104. (1) Meetings of creditors other than the first shall be called by sending a notice of the time and place thereof not less than five days before the time of each meeting to each creditor at the address given in the creditor's proof of claim.

Senate Recommendation

None.

Bill Clause No. 79
Section No. 105(4)
Topic: Minutes of creditors' meeting

Proposed Wording

105. (4) The **chair** of any meeting of creditors shall, **within a reasonable time after each meeting**, cause minutes of the proceedings at the meeting to be **prepared**. The minutes shall be signed by **the chair** or by the **chair** of the next meeting and shall be **retained as part of the books, records and documents referred to in section 26 relating to the administration of the estate.**

Rationale

The reform is intended to increase the integrity of the insolvency system by mandating that the minutes of creditors' meetings are prepared relatively soon after each meeting and by mandating that the minutes be retained as part of the records of the estate.

Present Law

105. (4) The chairman of any meeting of creditors shall cause minutes of the proceedings at the meeting to be drawn up and entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

Senate Recommendation

None.

Bill Clause No. 80

Section No. 109 (1), (6) and (7)

Topic: Voting at the meeting of creditors

Proposed Wording

109. (1) A person is not entitled to vote as a creditor at any meeting of creditors unless **the person** has duly proved a claim provable in bankruptcy and the proof of claim has been duly **filed** with the trustee before the time appointed for the meeting.

(6) If, in respect of the vote on any particular matter at a meeting of creditors, the chair is of the opinion that the outcome of the vote was determined by the vote of a person who did not deal with the debtor at arm's length at any time within the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, the chair shall redetermine the outcome of the vote by not including the votes of all such creditors, and that new outcome, as redetermined by the chair, is the outcome of the vote, unless an application is made to the court within 10 days by one of the creditors whose vote was not included and the court, if it decides to include the vote of the applicant, determines another outcome for the vote.

Rationale

The reform to subsection (1) is a technical amendment to modernize language use.

The reform, as set out in subsection (6) is intended to simplify and streamline the voting process at creditors' meetings. Parties not at arm's length were barred from voting unless they obtained court approval to vote prior to the meeting. The provision will be amended to allow parties not at arm's length to vote at the meeting, ensuring that the meeting is not delayed while the party seeks court permission to vote, and only if the votes of non-arm's length parties affect the outcome will court approval be required.

Subsection (7) was repealed because matters dealt with within that subsection were moved to subsection (6).

Present Law

109. (1) A person is not entitled to vote as a creditor at any meeting of creditors unless he has duly proved a claim provable in bankruptcy and the proof of claim has been duly lodged with the trustee before the time appointed for the meeting.

(6) Except as otherwise provided by this Act, a creditor is not entitled to vote at any meeting of creditors if the creditor did not, at all times within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the debtor and ending on the date of the bankruptcy, both dates included, deal with the debtor at arm's length.

(7) A creditor who is not entitled to vote at a meeting of creditors by virtue of subsection (6) may with leave of the court vote at the meeting of creditors when all the creditors who have dealt with the debtor at arm's length do not together represent at least twenty per cent in value of the claims against the debtor.

Senate Recommendation

The reforms meet the objectives of the Senate recommendation while simplifying the voting process for the trustee. The Senate recommendation was:

The Bankruptcy and Insolvency Act be amended to provide voting rights to non-arm's length creditors who have been dealing with the debtor at non-arm's length in the year prior to the bankruptcy, if they represent together more than 40% of the value of the total claims. In the event that the non-arm's length creditors vote changes the outcome of the

vote, any interested party should then seek leave of the Court to have the vote included.

Bill Clause No. 81
Section No. 110(1)
Topic: Voting

Proposed Wording

110. (1) No person is entitled to vote on a claim acquired after the **date of** bankruptcy **in respect** of a debtor unless the entire claim is acquired.

Rationale

The reform is a technical amendment to clarify that the claim must be acquired prior to the date of the bankruptcy, as defined. The definition for the date of the bankruptcy includes specific, measurable triggers that should make it easier to determine if the claim was acquired at the proper time.

Present Law

110. (1) No person is entitled to vote on a claim acquired after the bankruptcy of a debtor unless the entire claim is acquired.

Senate Recommendation

None.

Bill Clause No. 82
Section No. 113(1), (2) and (3)
Topic: Voting

Proposed Wording

113. (1) If the trustee is a **proxyholder** for a creditor, **the trustee may** vote as a creditor at any meeting of creditors.

(2) The vote of the trustee **—** or of **the partner**, clerk or legal counsel **of the trustee, or of the** clerk **of the** legal counsel **of the trustee —** as **proxyholder** for a creditor, shall not be **counted in respect of** any resolution affecting the remuneration or conduct of the trustee.

(3) The following persons are not entitled to vote on the appointment of a trustee — **and except with the permission of the court and on any condition that the court may impose, the following persons are not entitled to vote on the appointment of** inspectors:

(a) the father, mother, child, sister, brother, uncle or aunt, by blood, adoption, marriage or common-law partnership, or the spouse or common-law partner, of the bankrupt;

(b) where the bankrupt is a corporation, any officer, director or employee thereof; and

(c) where the bankrupt is a corporation, any wholly owned subsidiary corporation or any officer, director or employee thereof.

Rationale

The amendments to subsections (1) and (2) eliminate the possibility that a person could be both trustee and creditor in the same file as this would be a conflict of interest and contrary to the Code of Ethics for trustees. The language is also modernized.

The amendment to subsection (3) is intended to allow related parties to vote on the appointment of inspectors, who act as representatives of the creditors, in appropriate circumstances — for example, where the majority creditors are related parties.

Present Law

113. (1) Where the trustee is a creditor or a proxy for a creditor, he may vote as a creditor at any meeting of creditors.

(2) The vote of the trustee or of his partner, clerk, legal counsel or legal counsel's clerk, either as creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee.

(3) The following persons are not entitled to vote on the appointment of a trustee or inspectors:

(a) the father, mother, child, sister, brother, uncle or aunt, by blood, adoption, marriage or common-law partnership, or the spouse or common-law partner, of the bankrupt;

(b) where the bankrupt is a corporation, any officer, director or employee thereof; and

(c) where the bankrupt is a corporation, any wholly owned subsidiary corporation or any officer, director or employee thereof.

Senate Recommendation

None.

Bill Clause No. 83
Section No. 116(1)
Topic: Appointment of inspectors

Proposed Wording

116. (1) At the first or a subsequent meeting of creditors, the creditors shall, **by resolution**, appoint **up to** five inspectors of the estate of the bankrupt **or agree not to appoint any inspectors**.

Rationale

The amendment to subsection (1) clarifies that creditors are not required to appoint inspectors. This accords with the current practice. In many files, creditors are not interested in appointing or acting as inspectors. Concurrent amendments to the Act provide the trustee with the authority to act unilaterally where inspectors are not appointed.

Present Law

116. (1) At the first or a subsequent meeting of creditors, the creditors shall appoint one or more, but not exceeding five, inspectors of the estate of the bankrupt.

Senate Recommendation

None.

Bill Clause No. 84
Section No. 118
Topic: Inspectors

Proposed Wording

118. If the inspectors fail to exercise the powers conferred on them, the trustee shall call a meeting of the creditors for the purpose of substituting other inspectors **and for the purpose of** taking **any** action or giving **any** directions **that** may be necessary.

Rationale

The reform is a technical amendment intended to reflect concurrent amendments, which clarified that creditors are not required to appoint inspectors.

Present Law

118. Where there are no inspectors of the estate of the bankrupt or where the inspectors fail to exercise the powers conferred on them, the trustee shall call a meeting of the creditors for the purpose of appointing inspectors or substituting other inspectors, taking such action or giving such directions as may be necessary.

Senate Recommendation

None.

Bill Clause No. 85
Section No. 120(3)
Topic: Duties of inspectors

Proposed Wording

120. (3) **In addition to the other duties that are attributed to them under this Act, the** inspectors shall from time to time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

Rationale

The reform is intended to clarify that inspectors have duties, in addition to those set out in this provision, pursuant to the Act.

Present Law

120. (3) The inspectors shall from time to time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

Senate Recommendation

None.

Bill Clause No. 86
Section No. 124(5)
Topic: Proof of Claims

Proposed Wording

86. Subsection 124(5) of the Act is repealed.

Rationale

The requirement that the creditor set out whether the claim is secured or preferred is removed as many creditors lack the knowledge to make this determination. It is a duty of the trustee to determine the status of claims.

Present Law

124. (5) The proof of claim shall state whether the creditor is or is not a secured or preferred creditor.

Senate Recommendation

None.

Bill Clause No. 87
Section No. 126(1) and (2)
Topic: Proof of claim

Proposed Wording

126. (1) Every creditor who has **filed** a proof of claim is entitled to see and examine the proofs of other creditors.

(2) Proofs of claims for wages of workers and others employed by the bankrupt may be made in one proof by the bankrupt, by someone on the bankrupt's behalf, by a representative of a federal or provincial ministry responsible for labour matters, by a representative of a union representing workers and others employed by the bankrupt **or by a court-appointed representative, and that proof is to be made** by attaching to it a schedule setting out the names and addresses of the workers and others and the amounts severally due to them, but that proof does not disentitle any worker or other wage earner to file a separate proof on **his or her** own behalf.

Rationale

The language use in the English version of subsection (1) was modernized.

The reform to subsection (2) authorizes the court to appoint a representative to file claims on behalf of employees. The amendment is intended to create greater efficiency by ensuring that in all cases there is a person to file the claims. In some cases, especially in bankruptcies where there are few assets, no party is willing to complete the task because it is unlikely that the person will be compensated for the work.

Present Law

126. (1) Every creditor who has lodged a proof of claim is entitled to see and examine the proofs of other creditors.

(2) Proofs of claims for wages of workers and others employed by the bankrupt may be made in one proof by the bankrupt or someone on behalf of the bankrupt or by a representative of a federal or provincial ministry responsible for labour matters or a representative of a union representing workers and others employed by the bankrupt, by attaching thereto a schedule setting out the names and addresses of the workers and others and the amounts severally due to them, but that proof does not disentitle any worker or other wage-earner to file a separate proof on their own behalf.

Senate Recommendation

None.

BIA: Administration of estates

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 88
Section No. 136(1)
Topic: Priorities

Proposed Wording

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(d) **the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;**

(d.01) **the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;**

(d.02) **the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;**

Rationale

The reforms related to unpaid wages and unremitted pension contributions effectively create a super-priority for those amounts. Because secured creditors may find that their security is compromised by the operation of the super-priority, a preferred claim will be created to provide the secured creditor with better relief than they would otherwise be entitled to under the current priority scheme. Without the preferred claim, a creditor that should be secured would be treated as an unsecured creditor.

Paragraph (d) effectively mirrors the current provision.

Paragraph (d.01) creates a preferred claim in favour of secured creditors whose security was defeated by the operation of new sections that create a super-priority in favour of unpaid wages.

Paragraph (d.02) creates a preferred claim in favour of secured creditors whose security was defeated by the operation of new sections that create a super-priority in favour of unremitted pension contributions.

Present Law

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(d) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during the six months immediately preceding the bankruptcy to the extent of two thousand dollars in each case, together with, in the case of a travelling salesman, disbursements properly incurred by that salesman in and about the bankrupt's business, to the extent of an additional one thousand dollars in each case, during the same period, and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six month period, shall be deemed to have been earned therein;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)*(b)* or *(c)*, if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

Senate Recommendation

The reform follows Senate recommendation #20.

None.

Bill Clause No. 89
Section No. 137(1)
Topic: ADMINISTRATION (POWERS OF MINISTER)

Proposed Wording

137. (1) A creditor who, at any time **before** the bankruptcy of a debtor, entered into a transaction with **the** debtor **and who was not at arm's length with the debtor at that time** is not entitled to claim a dividend in respect of a claim arising out of that transaction until all claims of the other creditors have been satisfied, unless the transaction was in the opinion of the trustee or of the court a proper transaction.

Rationale

The reform is a technical amendment reflecting concurrent amendments that replaced provisions relating to "reviewable transactions" with "transfers at undervalue".

Present Law

137. (1) A creditor who entered into a reviewable transaction with a debtor at any time prior to the bankruptcy of the debtor is not entitled to claim a dividend in respect of a claim arising out of that transaction until all claims of the other creditors have been satisfied unless the transaction was in the opinion of the trustee or of the court a proper transaction.

Senate Recommendation

None.

Bill Clause No. 90
Section No. 140.1
Topic: Equity claims

Proposed Wording

140.1 A creditor is not entitled to claim a dividend in respect of a claim arising from the rescission of a purchase or sale of a share or unit of the bankrupt — or in respect of a claim for damages arising from the purchase or sale of a share or unit of the bankrupt — until all claims of the other creditors have been satisfied.

Rationale

Investors in a business willingly engage in the taking of risk — the risk of profit or loss based on the business' operations. When the investor has been fraudulently mislead into investing in a business, and has suffered a financial loss, that investor has a legal action against the company, the directors and others who were party to the deception. When the company is in financial distress, however, there may not be the means to make good the losses suffered by investors.

The intention of the reform is to put shareholders at the bottom of the priorities list. Section 140.1 provides that claims arising from the purchase or sale of equity of the bankrupt are subordinated to all other claims.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #40:

The *Bankruptcy and Insolvency Act* be amended to provide that the claim of a seller or purchaser of equity securities, seeking damages or rescission in connection with the transaction, be subordinated to the claims of ordinary creditors. Moreover, these claims should not participate in the proceeds of a restructuring or bankruptcy until other creditors of the debtor have been paid in full.

Bill Clause No. 91
Section No. 147(1)
Topic: Superintendent's levy

Proposed Wording

English Version

147. (1) For the purpose of defraying the expenses of the supervision by the Superintendent, there shall be payable to the Superintendent for deposit with the Receiver General a levy on all payments, except the costs referred to in subsection 70(2), made by the trustee by way of dividend or otherwise on account of the creditor's claims, including Her Majesty in right of Canada or of a province claiming in respect of taxes or otherwise.

French Version

147. (1) Afin de défrayer le surintendant **des dépenses qu'il engage dans le cadre de sa mission de surveillance**, il lui est versé pour depot **auprès** du receveur général un prélèvement sur tous paiements, à l'exception des frais mentionnés au paragraphe 70(2), opérés par le syndic par voie de dividende ou autrement pour le compte des réclamations de créanciers, y compris **les réclamations fiscales** et autres de Sa Majesté du chef du Canada ou d'une province.

Rationale

The reform to the English version of the Act is a technical amendment intended to modernize the language use.

The reform to the French version of the Act is a technical amendment intended to clarify the meaning of the provision.

Present Law

English Version

147. (1) For the purpose of defraying the expenses of the supervision by the Superintendent, there shall be payable to the Superintendent for deposit with the Receiver General a levy on all payments, except the costs referred to in subsection 70(2), made by the trustee by way of dividend or otherwise on account of the claims of creditors, whether unsecured, preferred or secured creditors, and including Her Majesty in right of Canada or a province claiming in respect of taxes or otherwise.

French Version

147. (1) Afin de défrayer la surveillance du surintendant, il est versé au surintendant pour dépôt entre les mains du receveur général un prélèvement sur tous paiements, à l'exception des frais mentionnés au paragraphe 70(2), opérés par le syndic par voie de dividende ou autrement pour le compte des réclamations de créanciers, que ces créanciers soient privilégiés, garantis ou non garantis, et y compris Sa Majesté du chef du Canada ou d'une province réclamant à l'égard d'impôts ou autrement.

Senate Recommendation

None.

Bill Clause No. 92
Section No. 149(1), (4) and (5)
Topic: Final dividend

Proposed Wording

149. (1) The trustee may, after the first meeting of the creditors, send a notice, **in the prescribed manner**, to every person with a claim of which the trustee has notice or knowledge but whose claim has not been proved. **The notice must inform the person** that, if that person does not prove **the** claim within a period of 30 days after the **sending** of the notice, the trustee will proceed to declare a dividend or final dividend without regard to that person's claim.

(4) Despite subsection (2), a claim may be filed for an amount payable under the following provisions within the time limit referred to in subsection (2), or within three months after the time the return of income or other evidence of the facts on which the claim is based is filed or comes to the attention of the Minister of National Revenue or, in the case of an amount payable under a provision referred to in paragraph (c), the minister in that province responsible for the provision:

***(a)* subsection 224(1.2) of the *Income Tax Act*;**

***(b)* any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts;**

***(c)* any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, if the sum**

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or
(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection;

***(d)* subsection 82(1.1) of the *Excise Tax Act*;**

***(e)* subsection 284(1.1) of the *Excise Act*, 2001;**

***(f)* subsections 97.22(1) and (5) of the *Customs Act*; and**

(g)* subsection 72(1.1) of the *Air Travellers Security Charge Act.

(5) Unless the trustee retains sufficient funds to provide for payment of any claims that may be filed under **a provision referred to in any of paragraphs (4)*(a)* to *(g)***, no dividend shall be declared until the **expiry** of three months after the trustee has filed all returns that the trustee is required to file.

Rationale

The reform to subsection (1) will increase efficiency by providing alternative and less costly methods for delivering the requisite notice.

The reform to subsection (4) provides a greater number of taxes, charges and levies to which the provision will apply.

Subsection (5) is a restatement of the existing subsection (4).

Present Law

149. (1) The trustee may, after the first meeting of the creditors, give notice by registered or certified mail to every person with a claim of which the trustee has notice or knowledge but whose claim has not been proved that if that person does not prove his claim within a period of thirty days after the mailing of the notice the trustee will proceed to declare a dividend or final dividend without regard to that person's claim.

(4) Unless the trustee retains sufficient funds to provide for payment of any claims that may be filed under the *Income Tax Act*, no dividend shall be declared until the expiration of three months after the trustee has filed all returns that the trustee is required to file.

Senate Recommendation

None.

Bill Clause No. 93
Section No. 152(1) and (5)
Topic: Statement of receipts and disbursements

Proposed Wording

152. (1) The trustee's final statement of receipts and disbursements shall contain

(a) a complete account of

(i) all moneys received by the trustee out of the **bankrupt's** property or otherwise,
(ii) the amount of interest received by the trustee,
(iii) all moneys disbursed and expenses incurred **by the trustee**,
(iv) all moneys disbursed by the trustee for services provided by persons related to the trustee, and
(v) the remuneration claimed by the trustee; and

(b) full particulars of, and a description and value of, all **the bankrupt's** property that has not been sold or realized together with the reason why it has not been sold or realized and the disposition made **of that property**.

(5) After the Superintendent has commented on the taxation of the trustee's accounts or advised the trustee that the Superintendent has no comments to make and the trustee's accounts have been taxed, the trustee shall **send, in the** prescribed manner, to every creditor whose claim has been proved, to the registrar, to the Superintendent and to the bankrupt

(a) a copy of the final statement of receipts and disbursements;

(b) a copy of the dividend sheet; and

(c) a notice, in the prescribed form, of the *trustee's* intention to pay a final dividend after the expiry of 15 days from the *sending* of the notice, statement and dividend sheet and to apply to the court for his *or her* discharge on a subsequent date that is not less than 30 days after the payment of the dividend.

Rationale

The amendment to subsection (1) creates an obligation for the trustee to explicitly describe moneys disbursed to related parties. The intention of the reform is to attempt to restrict any conflicts of interest caused by related party transactions by requiring such transactions to be brought to the attention of all interested parties.

The reform to subsection (5) will increase efficiency by providing alternative and less costly methods for delivering the requisite notice.

Present Law

152. (1) The trustee's final statement of receipts and disbursements shall contain a complete account of all moneys received by the trustee out of the property of the bankrupt or otherwise, the amount of interest received by the trustee, all moneys disbursed and expenses incurred and the remuneration claimed by the trustee, together with full particulars, description and value of all property of the bankrupt that has not been sold or realized, setting out the reason why the property has not been sold or realized and the disposition made thereof.

(5) After the Superintendent has commented on the taxation of the trustee's accounts or advised the trustee that the Superintendent has no comments to make and the trustee's accounts have been taxed, the trustee shall, in the prescribed manner, forward to every creditor whose claim has been proved, to the registrar, to the Superintendent and to the bankrupt

(1) a copy of the final statement of receipts and disbursements;

(2) a copy of the dividend sheet; and

(3) a notice in the prescribed form of his intention to pay a final dividend after the expiration of fifteen days from the mailing of the notice, statement and dividend sheet and to apply to the court for his discharge on a subsequent date not less than thirty days after the payment of the dividend.

Senate Recommendation

None.

Bill Clause No. 94
Section No. 155(d), (d.1) and (k)
Topic: Summary administration

Proposed Wording

155. The following provisions apply to the summary administration of estates under this Act:

(d) all notices, statements and other documents shall be sent **in the** prescribed manner;

(d.1) if a first meeting of the creditors is requested by the official receiver or by creditors who have in the aggregate at least 25% in value of the proven claims, the trustee shall call the meeting, in the prescribed form and manner, and it must be held within 21 days after being called;

(j) notwithstanding subsections 41(1), (5) and (6), the procedure for the trustee's discharge shall be as prescribed; **and**

***(k)* the court's authorization referred to in subsection 30(4) for a sale or disposal of any of the bankrupt's property to a person who is related to the bankrupt is required only if the creditors decide that the authorization is required.**

Rationale

The reform to paragraph (d) will increase efficiency by providing alternative and less costly methods for delivering the notices, statements and other documents.

The reform to paragraph (d.1) is a technical amendment intended to recognize that the current practice is more efficient than the process contemplated by the Act. The present provision requires that a creditor or the Official Receiver request a meeting within 30 days, however, this has proven to be impracticable. By removing this limitation, more parties will be able to participate in summary administration bankruptcies, creating a greater fairness in the process.

Subsection (k) is intended to streamline the process by only requiring the courts authorization if the creditors request it. In summary administration bankruptcies, the assets are very minor and court action would be expensive. Provided the creditors do not object to the transaction, court approval should not be mandated in these cases.

Present Law

155. The following provisions apply to the summary administration of estates under this Act:

(d) all notices, statements and other documents shall be sent by ordinary mail or by any prescribed manner;

(d.1) a first meeting of the creditors

(i) is required to be called by the trustee only if it is requested within thirty days after the date of the bankruptcy by the official receiver or by creditors who have in the aggregate at least twenty-five per cent in value of the proven claims,
(ii) must be called in the prescribed form and manner, and
(iii) must be held within twenty-one days after being called;

(j) notwithstanding subsections 41(1), (5) and (6), the procedure for the trustee's discharge shall be as prescribed.

Senate Recommendation

None.

Bill Clause No. 95
Section No. 156.1
Topic: Agreement to pay fees

Proposed Wording

156.1 An individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction and who is not required to make payments under section 68 to the estate of the bankrupt may enter into an agreement with the trustee to pay the trustee's fees and disbursements if the

total amount required to be paid under the agreement is not more than the prescribed amount and that total amount is to be paid before the expiry of the 12-month period after the bankrupt's discharge. The agreement may be enforced after the bankrupt's discharge.

Rationale

The addition of section 156.1 is intended to provide a mechanism which will enhance accessibility to the insolvency system for individuals who do not have surplus income and who may otherwise have difficulty paying the costs associated with the administration of a bankruptcy. In some circumstances, especially bankruptcies with small estates, it is difficult for a person to find a trustee willing to act for them because the trustees require payment for their services. If the estate is too small, no trustee will act. This has the effect of leaving the vulnerable person without professional assistance during a difficult experience. By providing that the bankrupt may pay for the trustee's services after the bankruptcy period, the reform should ensure that more people get the assistance they need. Balancing this reform is the limit on fees that can be charged by a trustee pursuant to the rules.

Present Law

None.

Senate Recommendation

The *Bankruptcy and Insolvency Act* be amended to allow trustees to enter into voluntary payment agreements with bankrupts who do not have surplus income. Fees payable to the trustee in accordance with such an agreement should not exceed the minimum legal amount established for summary administration bankruptcies.

BIA: Discharge of bankrupts

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

- **Bill Clause No.** 96 - BIA (Bankruptcy and Insolvency Act) Section 157.1(3)
- **Bill Clause No.** 97 - BIA (Bankruptcy and Insolvency Act) Section 161(2) and (2.1)
- **Bill Clause No.** 98 - BIA (Bankruptcy and Insolvency Act) Section 162(2)
- **Bill Clause No.** 99 - BIA (Bankruptcy and Insolvency Act) Section 166
- **Bill Clause No.** 100 - BIA (Bankruptcy and Insolvency Act) Section 168.1 and s.168.2
- **Bill Clause No.** 101 - BIA (Bankruptcy and Insolvency Act) Section 169(1), (2), (5) and (6)
- **Bill Clause No.** 102 - BIA (Bankruptcy and Insolvency Act) Section 170(1)
- **Bill Clause No.** 103 - BIA (Bankruptcy and Insolvency Act) Section 170.1(1) to (5)

Bill Clause No. 96
Section No. 157.1(3)
Topic: Effect on Automatic Discharge

Proposed Wording

157.1 (3) **Subsection** 168.1(1) does not apply to an individual bankrupt who has refused or neglected to receive counselling **under** subsection (1).

Rationale

The proposed wording is a technical amendment and a modernization of the language.

Present Law

157.1 (3) Paragraph 168.1(1)(f) does not apply to an individual bankrupt who has refused or neglected to receive counselling provided pursuant to subsection (1).

Senate Recommendation

None.

Bill Clause No. 97
Section No. 161(2) and (2.1)
Topic: Examinations

Proposed Wording

161. (2) The official receiver shall make **a record** of **the** examination and shall forward a copy of the **record** to the Superintendent **and** the trustee.

(2.1) **If** the examination is held

(a) before the first meeting of creditors, the **record of the examination** shall be communicated to the creditors at the meeting; or

(b) after the first meeting of creditors, the **record of examination** shall be made available to any creditor who requests **it**.

Rationale

Subsections (2) and (2.1) were modernized and modified to reflect current practice.

Present Law

161. (2) The official receiver shall make notes of an examination made under subsection (1) and shall forward a copy of the notes to the Superintendent, the trustee and the court for deposit therein.

(2.1) Where the examination under subsection (1) is held

(a) before the first meeting of creditors, the notes shall be communicated to the creditors at the meeting; or

(b) after the first meeting of creditors, the notes shall be made available to any creditor who requests them.

Senate Recommendation

None.

Bill Clause No. 98
Section No. 162(2)
Topic: Inquiry by Official Receiver

Proposed Wording

98. Subsection 162(2) of the Act is repealed.

Rationale

This provision is out of date and is no longer relevant.

Present Law

162. (2) Where, pursuant to subsection (1), an inquiry or investigation is made by the official receiver on the direction of the Superintendent, the Superintendent shall, out of the moneys appropriated by Parliament to defray the expenses of the office of the Superintendent, reimburse the official receiver for such reasonable costs and expenses incurred by him in connection with the inquiry or investigation, not being ordinary costs or expenses of his office, as are approved by the Superintendent.

Senate Recommendation

None.

Bill Clause No. 99
Section No. 166
Topic: Examinations

Proposed Wording

166. If the bankrupt fails to present himself **or herself** for examination before the official receiver as required by paragraph 158(c) or **if the bankrupt** or any other person is served with an appointment or a summons to attend for examination and is paid or tendered the proper conduct money and witness fees as fixed by the General Rules but refuses or neglects to attend as required by the appointment or summons, the court may, on the application of the trustee **or the official receiver**, by warrant cause the bankrupt or other person so in default to be apprehended and brought up for examination.

Rationale

Section 166 provides a mechanism for the official receiver to apply to the court directly without having to ask the trustee to do it.

Present Law

166. Where the bankrupt fails to present himself for examination before the official receiver as required by paragraph 158(c) or where he or any other person is served with an appointment or summons to attend for examination and is paid or tendered the proper conduct money and witness fees as fixed by the General Rules but refuses or neglects to attend as required by the appointment or summons, the court may, on the application of the trustee, by warrant cause the bankrupt or other person so in default to be apprehended and brought up for examination.

Senate Recommendation

None.

Bill Clause No. 100

Section No. 168.1 and s.168.2

Topic: Discharge of Bankrupts

Proposed Wording

168.1 (1) Subject to subsections (2) and 157.1(3), the following provisions apply in respect of an individual bankrupt other than a bankrupt referred to in subsection 172.1(1):

***(a)* in the case of a bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction, the bankrupt is automatically discharged**

(i) on the expiry of 9 months after the date of bankruptcy unless, in that 9-month period, an opposition to the discharge has been filed or the bankrupt has been required to make payments under section 68 to the estate of the bankrupt, or
(ii) 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; and

***(b)* in the case of a bankrupt who has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction, the bankrupt is automatically discharged**

(i) on the expiry of 24 months after the date of bankruptcy unless, in that 24-month period, an opposition to the discharge has been filed or the bankrupt has been required to make payments under section 68 to the estate of the bankrupt, or
(ii) 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.

(2) Nothing in subsection (1) precludes a bankrupt from applying to the court for a discharge before the **bankrupt would otherwise be automatically discharged**, and **that** subsection ceases to apply to a bankrupt who makes such an application.

(3) The provisions of this Act concerning the discharge of bankrupts apply in respect of an individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction, to the extent that those provisions are not inconsistent with this section, whether or not the bankrupt applies to the court for a discharge referred to in subsection (2).

(4) The trustee shall, not less than 15 days before the date of a bankrupt's automatic discharge, give notice of the impending discharge, in the prescribed form, to the Superintendent, the bankrupt and every creditor who has proved a claim, at the creditor's latest known address.

(5) An automatic discharge is deemed, for all purposes, to be an absolute and immediate order of discharge.

(6) Without delay after a bankrupt has been automatically discharged, the trustee shall issue a certificate to the discharged bankrupt, in the prescribed form, declaring that the bankrupt is discharged and is released from all debts except those matters referred to in subsection 178(1). The trustee shall send a copy of the certificate to the Superintendent.

168.2 (1) The following provisions apply in respect of oppositions to the automatic discharge of an individual bankrupt:

***(a)* if the Superintendent opposes the discharge, the Superintendent must give notice of the opposition, together with the grounds for it, to the trustee and to the bankrupt before the automatic discharge would otherwise take effect;**

***(b)* if a creditor opposes the discharge, the creditor must give notice of the opposition, together with the grounds for it, to the Superintendent, to the trustee and to the bankrupt before the automatic discharge would otherwise take effect; and**

***(c)* if the trustee opposes the discharge, the trustee must give notice of the opposition in the prescribed form and manner, together with the grounds for the opposition, to the bankrupt and the Superintendent before the automatic discharge would otherwise take effect.**

(2) If the Superintendent, a creditor or the trustee opposes the automatic discharge of an individual bankrupt, the trustee shall, unless the matter is to be dealt with by mediation under section 170.1, apply without delay to the court for an appointment for the hearing of the opposition in the manner referred to in sections 169 to 176, and the hearing must be held

***(a)* within 30 days after the day on which the appointment is made; or**

***(b)* at any later time that may be fixed by the court at the bankrupt's or trustee's request.**

Rationale

The trustee currently has the discretion to recommend whether or not the bankrupt should make surplus income payments to the bankruptcy estate for up to an additional 12 months. This discretion is not always applied consistently, leading to a perceived lack of fairness in the system. Furthermore, debtors may be selecting a trustee based on whether the trustee is likely to require the additional payments.

The proposed reform under section 168.1 specifies the circumstances in which a first-time bankrupt is eligible for an automatic discharge, taking into consideration whether the bankrupt is required to make surplus income payments or whether an opposition to the automatic discharge is filed. If surplus income payments are required, the proposed reform specifies the length of time for which the bankrupt must make these payments, thereby increasing the money available to the creditors. In addition, eligibility for an automatic discharge would be available to second time bankrupts under certain circumstances. Second-time bankrupts with surplus income will have to make payments for a longer time period as set out in the proposed reform. The expansion of the accessibility to an automatic discharge streamlines the bankruptcy process by eliminating the necessity of a court appearance in certain cases. It is important to note, however, that this streamlining does not remove any of the creditors' rights to oppose a discharge. Bankrupts who have been bankrupt one time before must wait longer before becoming eligible for an automatic discharge and must make surplus income payments for a longer period, which are discernible consequences for individuals using the system a second time.

Paragraph 168.1 (1) (a) sets out the conditions under which a first-time bankrupt is eligible for an automatic discharge. Specifically, the first-time bankrupt is eligible for an automatic discharge 9 months after the date of bankruptcy unless an opposition to the discharge has been filed or the bankrupt has been required to make surplus income payments. If surplus income payments are required, the first-time bankrupt is eligible for an automatic discharge 21 months after the date of bankruptcy unless an opposition has been filed before the automatic discharge takes effect.

Paragraph 168.1 (1) (b) sets out the conditions under which a second-time bankrupt is eligible for an automatic discharge. Specifically, the second-time bankrupt is eligible for an automatic discharge 24 months after the date of bankruptcy unless an opposition to the discharge has been filed or the bankrupt has been required to make surplus income payments. If surplus income payments are required, the second-time bankrupt is eligible for an automatic discharge 36 months after the date of bankruptcy unless an opposition has been filed before the automatic discharge takes effect.

Subsection 168.1 (2) removes the nine-month time frame for an automatic discharge and replaces it with wording that will include all the new time frames for an automatic discharge set out in Subsection 168.1 (1).

Subsection 168.1 (3) remains the same.

Subsection 168.1 (4) maintains the trustee's duty to notify the Superintendent, the bankrupt, and every creditor who has proved a claim of the bankrupt's automatic discharge. This notice must still be provided not less than 15 days before the date that the bankrupt's automatic discharge will take effect.

Subsection 168.1 (5) is re-numbered.

Subsection 168.1 (6) provides the trustee with the duty to issue a certificate of automatic discharge to the discharged bankrupt with a copy to the Superintendent, confirming that the bankrupt is released from all debts except those referred to in subsection 178(1) of the Act.

Section 168.2 sets out the protocol to follow when an automatic discharge is opposed. Specifically, if any party opposes an automatic discharge, that party must give notice to the other parties including the grounds for the opposition before the automatic discharge would otherwise take effect. This section clarifies that notice must be given only if an opposition is actually filed and not if there is an intention to file an opposition. Unless the matter is to be dealt with by mediation under section 170.1, the trustee shall apply to the court for an appointment for the hearing, which is to be held within 30 days after the day on which the appointment is made or at a later date fixed by the court at the bankrupt or trustee's request.

Present Law

168.1 (1) Except as provided in subsection (2), the following provisions apply in respect of an individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction:

(a) the trustee shall, before the end of the eight month period immediately following the date on which a receiving order is made against, or an assignment is made by, the individual bankrupt, file a report prepared under subsection 170(1) with the Superintendent and send a copy of the report to the bankrupt and to each creditor who requested a copy;

(a.1) the trustee shall, not less than fifteen days before the date of automatic discharge provided for in paragraph *(f)*, give notice of the impending discharge, in the prescribed form, to the Superintendent, the bankrupt and every creditor who has proved a claim, at the creditor's latest known address;

(b) where the Superintendent intends to oppose the discharge of the bankrupt, the Superintendent shall give notice of the intended opposition, stating the grounds therefor, to the trustee and to the bankrupt at any time prior to the expiration of the nine month period immediately following the bankruptcy;

(c) where a creditor intends to oppose the discharge of the bankrupt, the creditor shall give notice of the intended opposition, stating the grounds therefor, to the Superintendent, to the trustee and to the bankrupt at any time prior to the expiration of the nine month period immediately following the bankruptcy;

(d) where the trustee intends to oppose the discharge of the bankrupt, the trustee shall give notice of the intended opposition in prescribed form and manner, stating the grounds therefor, to the bankrupt and the Superintendent at any time prior to the expiration of the nine month period immediately following the bankruptcy;

(e) where the Superintendent, the trustee or a creditor opposes the discharge of the bankrupt, the trustee shall, unless the matter is to be dealt with by mediation under section 170.1, forthwith apply to the court for an appointment for the hearing of the opposition in the manner referred to in sections 169 to 176, which hearing shall be held

(i) on the expiration of that nine month period, the bankrupt is automatically discharged, and
(ii) forthwith after the expiration of that nine month period, the trustee shall issue a certificate to the discharged bankrupt, in the prescribed form, declaring that the bankrupt is discharged and is released from all debts except

those matters referred to in subsection 178(1), and shall send a copy of the certificate to the Superintendent.

(2) Nothing in subsection (1) precludes an individual bankrupt from applying to the court for discharge before the expiration of the nine month period immediately following the bankruptcy, and subsection (1) ceases to apply to an individual bankrupt who makes such an application before the expiration of that period.

(3) The provisions of this Act concerning the discharge of bankrupts apply in respect of an individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction, to the extent that those provisions are not inconsistent with this section, whether or not the bankrupt applies to the court for a discharge referred to in subsection (2).

(4) An automatic discharge by virtue of paragraph (1)*(f)* is deemed, for all purposes, to be an absolute and immediate order of discharge.

Senate Recommendation

The proposed reform follows the Senate Committee's recommendation.

Bill Clause No. 101
Section No. 169(1), (2), (5) and (6)
Topic: Application for discharge

Proposed Wording

169. (1) The making of a bankruptcy order against, or an assignment by, a person **other than** a corporation **or an individual in respect of whom subsection 168.1(1) applies** operates as an application for discharge.

(2) The trustee, before proceeding to **his or her** discharge and in any case not earlier than three months and not later than one year **after** the bankruptcy of a person **for whom there is an application for discharge by virtue of subsection (1)** shall, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application **for the bankrupt's discharge, and the hearing must be held within** 30 days after the **day on which** the appointment **is** made or at **any** other time **that** may be fixed by the court at the bankrupt's or trustee's request.

(6) The trustee, on obtaining or being served with an appointment for hearing an application for discharge, shall, not less than 15 days before the day appointed for the hearing of the application, send a notice **of the hearing**, in the prescribed form and **manner**, to the Superintendent, the bankrupt and every **known** creditor, at the creditor's latest known address.

French Version

169. (5) Le tribunal peut, avant **de délivrer** une convocation, si le syndic le requiert, exiger que soit déposée **auprès de celui-ci telle somme**, ou que **lui** soit fournie telle garantie que le tribunal estime **appropriées**, pour le paiement de ses honoraires et débours occasionnés **par** la demande **de libération**.

Rationale

The amendment to subsection (1) clarifies that this section does not apply to anyone who is entitled for an automatic discharge under the proposed regime. It removes the possibility of the debtor waiving his discharge, which would be contrary to the spirit of the BIA (Bankruptcy and Insolvency Act).

Subsection (2) was amended to make it consistent with changes to subsection 169(1) of the BIA (Bankruptcy and Insolvency Act). As well, subsection 169(3) of the Act is repealed because of the amendments to subsections 169(1) and (2).

Subsection (5) was amended in French to specify that this subsection refers to the application for discharge.

Subsection (6) was amended to modernize the language.

Present Law

English Version

169. (1) Subject to section 168.1, the making of a bankruptcy order against, or an assignment by, any person except a corporation operates as an application for discharge, unless the bankrupt, by notice in writing, files in the court and serves on the trustee a waiver of application before being served by the trustee with a notice of the trustee's intention to apply to the court for an appointment for the hearing of the application as provided in this section.

(2) The trustee, before proceeding to the discharge and in any case not earlier than three months and not later than one year following the bankruptcy of any person who has not served a notice of waiver on the trustee, shall on five days notice to the bankrupt apply to the court for an appointment for a hearing of the application on a date not more than thirty days after the date of the appointment or at such other time as may be fixed by the court at the request of the bankrupt or trustee.

(3) A bankrupt who has given a notice of waiver as provided in subsection (1) may, at any time at the bankrupt's own expense, apply for a discharge by obtaining from the court an appointment for a hearing, which shall be served on the trustee not less than twenty-one days before the date fixed for the hearing of the application, and the trustee on being served therewith shall proceed as provided in this section.

(6) The trustee, on obtaining or being served with an appointment for hearing on application for discharge, shall, not less than fifteen days before the day appointed for the hearing of the application, send a notice thereof in the prescribed form to the Superintendent, the bankrupt and every creditor who has proved a claim, at the creditor's latest known address.

French Version

(5) Le tribunal peut, avant d'émettre une convocation, si le syndic le requiert, exiger que soit déposé chez le syndic tel montant, ou que soit fournie au syndic telle garantie, que le tribunal estime appropriés, pour le paiement de ses honoraires et débours occasionnés au sujet de la demande.

Senate Recommendation

None.

Bill Clause No. 102
Section No. 170(1)
Topic: 170(1)

Proposed Wording

170. (1) The trustee shall, **in the prescribed circumstances and at the prescribed times**, prepare a report, in the prescribed form, with respect to

Rationale

The amendment to subsection (1) is intended to streamline the process; it will limit the circumstances under which the report must be prepared. It is anticipated that the section 170 report will only be required where: the bankrupt has surplus income; when an opposition to the bankrupt's discharge has been filed; when the bankrupt has been bankrupt on a previous occasion; when there is any reason that would require a court hearing of the discharge; or when the trustee, for other reasons, determines that the report would be required.

Present Law

140

170. (1) The trustee shall prepare a report in the prescribed form with respect to

Senate Recommendation

The *Bankruptcy and Insolvency Act* be reviewed in order to identify opportunities that will contribute to greater efficiency within the insolvency system, including efforts regarding the adoption of new technologies.

Bill Clause No. 103
Section No. 170.1(1) to (5)
Topic: Mediation request

Proposed Wording

170.1. (1) If the discharge of **an individual** bankrupt is opposed by a creditor or the trustee in whole or in part on a ground referred to in paragraph 173(1)*(m)* or *(n)*, the trustee shall send an application for mediation, in the prescribed form, to the official receiver within five days after **the day on which the bankrupt would have been automatically discharged had the opposition not been made**, or within **any** further time **after that day** that the official receiver may allow.

Rationale

The amendment to subsection (1) clarifies that the subsection will apply only in cases where there is surplus income. This change reflects other amendments that were made to the Act concerning surplus income.

Present Law

170.1. (1) The report prepared under subsection 170(1) shall include a recommendation as to whether or not the bankrupt should be discharged subject to conditions, having regard to the bankrupt's conduct and ability to make payments.

(2) The trustee shall consider the following matters in making a recommendation under subsection (1):

(a) whether the bankrupt has complied with a requirement imposed on the bankrupt under section 68;

(b) the total amount paid to the estate by the bankrupt, having regard to the bankrupt's indebtedness and financial resources; and

(c) whether the bankrupt, if the bankrupt could have made a viable proposal, chose to proceed to bankruptcy rather than to make a proposal as the means to resolve the indebtedness.

(3) A recommendation that the bankrupt be discharged subject to conditions is deemed to be an opposition to the discharge of the bankrupt.

(4) Where the bankrupt does not agree with the recommendation of the trustee, the bankrupt may, before the expiration of the ninth month after the date of the bankruptcy, send the trustee a request in writing to have the matter determined by mediation.

(5) Where a request for mediation has been made under subsection (4) or the discharge of the bankrupt is opposed by a creditor or the trustee in whole or in part on a ground referred to in paragraph 173(1)*(m)* or *(n)*, the trustee shall send an application for mediation in prescribed form to the official receiver within five days after the expiration of the nine month period referred to in subsection (4) or within such further time as the official receiver may allow.

Senate Recommendation

None.

BIA: Discharge of bankrupts

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 104
Section No. 172
Topic: Court Order of Discharge

Proposed Wording

172. (1) On the hearing of an application of a bankrupt for a discharge, **other than a bankrupt referred to in section 172.1**, the court may

(a) grant or refuse an absolute order of discharge;

(b) suspend the operation of **an absolute** order **of discharge** for a specified time; or

(c) grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to the **bankrupt's** after-acquired property.

(2) The court shall, on proof of any of the facts **referred to** in section 173 **given orally under oath or by affidavit**,

(2.1) If the court imposes as a condition of discharge that the bankrupt pay money, the court may direct that the bankrupt pay the money to any creditor, to any class of creditors, to the trustee or to the trustee and one or more creditors, in any amount and manner that the court considers appropriate.

Rationale

Subsection (1) maintains the existing court discretion with regard to granting or refusing an order of discharge. However, this subsection now excludes bankrupts under section 172.1 given that they have different requirements with respect to their application for a discharge hearing.

Subsection (2) adds the provision that evidence supporting an opposition to discharge may be submitted in affidavit form or in person. Nothing in the current Act specifies that the opposing party must appear in person, and the Act is silent on whether an affidavit would suffice. This amendment clarifies this point. Current practice has been to require the opposing party to appear in person. This practice can act as a disincentive for creditors to bring information regarding the bankrupt's conduct to the attention of the court because creditors faced with the expense of a court appearance may not consider it worth their while in cases where the probability of increased dividends is unknown or small. This clarification allowing for affidavit evidence will enable more creditors to participate in the system.

Subsection (2.1) provides the court with discretion when ordering payments under a conditional discharge order. The current legislation does not provide the court with the ability to order payments to be made to any particular party. Currently, payments under a conditional discharge order are made to the bankruptcy estate to be apportioned in accordance with the existing priority scheme. The amendment would allow the court to apportion the payments under a conditional discharge order to the trustee and/or to one or more creditors.

Present Law

172. (1) On the hearing of an application of a bankrupt for a discharge, the court may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to his after-acquired property.

(2) The court shall on proof of any of the facts mentioned in section 173

Senate Recommendation

None.

Bill Clause No. 105
Section No. 172.1
Topic: Bankrupts with High Income Tax Debt

Proposed Wording

172.1 (1) In the case of a bankrupt who has $200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims, the hearing of an application for a discharge may not be held before the expiry of

(a) if the bankrupt has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction,

(i) 9 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 9 months, or
(ii) 21 months after the date of bankruptcy, in any other case;

(b) if the bankrupt has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction,

(i) 24 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 24 months, or
(ii) 36 months after the date of bankruptcy, in any other case; and

(c) in the case of any other bankrupt, 36 months after the date of the bankruptcy.

(2) Before proceeding to the trustee's discharge and before the first day that the hearing could be held in respect of a bankrupt referred to in subsection (1), the trustee must, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application for the bankrupt's discharge.

(3) On the hearing of an application for a discharge referred to in subsection (1), the court shall, subject to subsection (4),

(a) refuse the discharge;

(b) suspend the discharge for any period that the court thinks proper; or

(c) require the bankrupt, as a condition of his or her discharge, to perform any acts, pay any moneys, consent to any judgments or comply with any other terms that the court may direct.

(4) In making a decision in respect of the application, the court must take into account

(a) the circumstances of the bankrupt at the time the personal income tax debt was incurred;

(b) the efforts, if any, made by the bankrupt to pay the personal income tax debt;

(c) whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and

(d) the bankrupt's financial prospects for the future.

(5) If the court makes an order suspending the discharge, the court shall, in the order, require the bankrupt to file income and expense statements with the trustee each month and to file all returns of income required by law to be filed.

(6) If, at any time after the expiry of one year after the day on which any order is made under this section, the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in any manner and on any conditions that it thinks fit.

(7) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

(8) For the purpose of this section, "personal income tax debt" means the amount payable, within the meaning of subsection 223(1) of the *Income Tax Act* without reference to paragraphs *(b)* to *(c)*, by an individual and the amount that is payable by an individual under any provincial legislation that imposes a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, including, for greater certainty, the amount of any interest, penalties or fines imposed under the *Income Tax Act* or the provincial legislation.

Rationale

This new section introduces a new procedure for discharging bankrupts with high personal income tax debt. It is aimed at those individuals who have an outstanding personal income tax debt (federal and/or provincial) in excess of $200,000 (including principal, interest and penalties) where the amount owing represents 75% or more of the bankrupt's total unsecured proven claims. This new section is designed to ensure that bankrupts with significant personal income tax debt do not abuse the insolvency system by paying their other creditors to the exclusion of the government. These bankrupts will not be eligible for an automatic discharge and an application for discharge will be required. The onus will be on the debtor to justify any relief to be granted by the court.

Paragraph (1)*(a)* specifies the earliest date for the hearing of an application for discharge for a bankrupt who has never been bankrupt before, i.e., the hearing may not be held before the expiry of 9 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankruptcy

or 21 months after the date of bankruptcy in any other case.

Paragraph (1)*(b)* specifies the earliest date for the hearing of an application for a discharge for a bankrupt who has been bankrupt one time before, i.e., the hearing may not be held before the expiry of 24 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankruptcy or 36 months after the date of bankruptcy in any other case.

Paragraph (1)*(c)* specifies the earliest date for the hearing of an application for a discharge for a bankrupt who has been bankrupt two or more times before, i.e., the hearing may not be held before the expiry of 36 months after the date of bankruptcy in all cases.

Subsection (2) provides that the trustee must give five days notice to the bankrupt before applying to the court for an appointment for the hearing of the bankrupt's application for discharge.

Subsection (3) specifies the types of orders that the court may to make on the hearing of a bankrupt's application for discharge. The options available to the court include: refusing the discharge; suspending the discharge; requiring the bankrupt to perform any acts, pay any moneys, consent to any judgements or comply with any other terms that the court may direct.

Subsection (4) sets out the factors the court shall take into account when making a decision with respect to the bankrupt's discharge. The onus is on the bankrupt to justify the relief requested of the court. The factors for consideration are: the bankrupt's circumstances at the time the personal income tax debt was incurred; the efforts made by the bankrupt to pay the personal income tax; whether the bankrupt paid other debts while failing to make reasonable efforts to pay the personal income tax debt; and the bankrupt's financial prospects for the future.

Subsection (5) specifies that if the court suspends the discharge, the court shall also order the bankrupt to provide the trustee with monthly income and expense statements and to file all income tax returns and remittances required by law during the period the discharge is suspended.

Subsection (6) enables the court to modify the order if the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the terms of the order. The court may modify the order after one year.

Subsection (7) grants the court with the power to suspend and attach conditions to a bankrupt's discharge concurrently.

Subsection (8) defines "personal income tax" in the context of the *Income Tax Act*. It also specifically includes any amount payable by an individual under any provincial legislation that imposes a tax similar in nature to that under the *Income Tax Act*. The amount also includes any interest, penalties or fines.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 106
Section No. 175
Topic: Certificates Granted by the Court

Proposed Wording

106. Section 175 of the Act is repealed.

Rationale

There is no need for a certificate confirming that the bankruptcy was caused by misfortune and not misconduct. This requirement should be eliminated.

Present Law

175. (1) A statutory disqualification on account of bankruptcy ceases when the bankrupt obtains from the court his discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part.

(2) The court may, if it thinks fit, grant a certificate mentioned in subsection (1), and a refusal to grant such a certificate is subject to appeal.

Senate Recommendation

None.

Bill Clause No. 107
Section No. 178
Topic: Debts Not Released by Order of Discharge

Proposed Wording

178. (1) An order of discharge does not release the bankrupt from

(e) any debt or liability for obtaining property **or services** by false pretences or fraudulent misrepresentation;

(g) any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student; or

(1.1) At any time after **five** years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the **debt**; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay **the debt**.

Rationale

The amendment to paragraph (1)(e) is intended to clarify that the treatment of debt owed for services or property fraudulently obtained should be the same. The reform will contribute to increased fairness to the insolvency process.

The amendment to paragraph (1)(g) is intended to reduce the waiting period during which a former student may not have student loan debts discharged by bankruptcy from ten years to seven years. The shorter period correlates the discharge rules in bankruptcy to the student loan rules on repayment of debt. A restrictive, seven-year period presents a sufficiently high barrier to prevent individuals from taking student loans with the intention of going bankrupt upon graduation, thereby ensuring the integrity of the student loan system.

The reform to subsection (1.1) reduces the waiting period during which a student cannot seek a hardship exemption from the application of paragraph 178(1)(g), which prohibits the discharge of student loan debts until the waiting period in that provision is over. Pursuant to this provision, a student who has previously filed for bankruptcy may, after

the waiting period is over, apply to a court for a special dispensation to have their student loan debts discharged. In a concurrent reform, the discharge waiting period is to be reduced to seven years. The five year hardship discharge period reflects the federal loan programs period of interest relief.

Present Law

178. (1) An order of discharge does not release the bankrupt from

(e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation;

(g) any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(ii) within ten years after the date on which the bankrupt ceased to be a full- or part-time student; or

(1.1) At any time after ten years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the loan; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the liabilities under the loan.

Senate Recommendation

The Senate recommended that the BIA (Bankruptcy and Insolvency Act) be amended to require that fraud be proven in order for debt to survive discharge from bankruptcy and that the provisions apply to both property and services fraudulently obtained. The first part of the recommendation was not followed because it would put the onus on the legitimate creditor to expend further resources to collect the debt. The current regime is sufficient because it allows the debtor to seek clarification from the court that the debt is discharged without requiring a creditor to pay more. The second part was followed as it is a good clarification of the policy intention.

The Senate recommended that the BIA (Bankruptcy and Insolvency Act) be amended to reduce, to five years following the conclusion of full- or part-time studies, the waiting period for the discharge of student debt. Changes to the Canada Student Loan Program, however, were made after the Senate Report. Under the new rules, students in financial difficulty can benefit from various relief measures for seven years.

The Senate recommended that the Act allow the Court the discretion to confirm the discharge of all or a portion of student loan debt in a period of time shorter than five years where the debtor can establish that the burden of maintaining the liability for some or all of the student debt creates undue hardship. Changes to the Canada Student Loan Program, however, were made following the Senate Report. Under the new rules, students in financial difficulties are eligible for interest relief for 5 years, which allows them to make no payments (principal or interest) for five years.

Bill Clause No. 108
Section No. 179
Topic: Discharge order

Proposed Wording

179. An order of discharge does not release a person who at the **time** of the bankruptcy was a partner or co-trustee with **the bankrupt** or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for **the bankrupt**.

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Rationale

The wording of section 179 was modernized.

Present Law

179. An order of discharge does not release a person who at the date of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with him, or a person who was surety or in the nature of a surety for him.

Senate Recommendation

None.

Bill Clause No. 109
Section No. 181(3)
Topic: Statement of Receipts and Disbursements

Proposed Wording

181. (3) If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.

Rationale

The amendment to subsection (1) is intended to ensure that the trustee accounts for the administration even when the bankruptcy is annulled by the court.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 110
Section No. 197(5) and (6.1) to (8)
Topic: Opposition to discharge

Proposed Wording

197. (6.1) **If** a creditor opposes the discharge of a bankrupt, the court may, if it grants **the** discharge on the condition that the bankrupt pay an amount or consent to a judgment to pay an amount, award costs, **including legal costs**, to the opposing creditor out of the estate in an amount **that is not more than** the amount realized by the estate under the conditional order, including any amount brought into the estate **under** the consent to the judgment.

(7) If a creditor opposes the discharge of a bankrupt and the court finds the opposition to be frivolous or vexatious, the court may order the creditor to pay costs, including legal costs, to the estate.

Rationale

Subsection (5) was repealed to reflect current practice since the Tariff of costs is outdated.

Subsection (6.1) was amended to make it consistent with current practice.

Subsection (7) provides an anti-abuse mechanism to reduce the likelihood that creditors will oppose the bankrupt's discharge for frivolous or vexatious reasons.

Subsection (8) was repealed.

Present Law

197. (5) Legal costs shall be paid according to the tariff provided by the General Rules or according to the item in the tariff most nearly analogous or comparable to the services rendered, or, where no provision may be found therein applicable to the particular services rendered or disbursements made, according to the tariff in effect in other civil matters.

(6.1) Where a creditor opposes the discharge of a bankrupt, the court may, if it grants the discharge on condition that the bankrupt pay an amount or consent to a judgment to pay an amount, award costs to the opposing creditor out of the estate in an amount not exceeding the amount realized by the estate under the conditional order, including any amount brought into the estate pursuant to the consent to judgment.

(7) Notwithstanding anything in this section, the total legal costs exclusive of disbursements for all legal services specified in paragraph (6)(e) shall not exceed ten per cent of the gross receipts less amounts paid to secured creditors, except with the approval of the inspectors and the court, and, where the amount thereby available or authorized for payment of the legal fees is insufficient, the fees shall be abated proportionately.

(8) Where the gross receipts, less amounts paid to secured creditors, are certified by the trustee to be not more than one thousand dollars, or more than one thousand dollars but not more than two thousand dollars, the legal costs payable, other than disbursements, shall be reduced by one-half and one-third, respectively.

Senate Recommendation

The *Bankruptcy and Insolvency Act* be amended to repeal the Tariff of Costs. Instead, costs should be paid in accordance with civil Court tariffs as they apply from place to place throughout Canada.

Bill Clause No. 111
Section No. 199(b)
Topic: Undischarged bankrupt

Proposed Wording

199. *(b)* obtains credit to a total of **$1,000** or more from any person or persons without informing **them** that the undischarged bankrupt is an undischarged bankrupt,

Rationale

The amendment of subsection (b) is intended to update the threshold amount to better reflect modern expenses.

Present Law

199. *(b)* obtains credit to a total of five hundred dollars or more from any person or persons without informing such persons that the undischarged bankrupt is an undischarged bankrupt,

Senate Recommendation

None.

Bill Clause No. 112
Section No. 202(1)(h) and (5)
Topic: Mediation request

Proposed Wording

202. (1)(h) being a trustee, makes any arrangement under any circumstances with the bankrupt, or any legal counsel, auctioneer or other person employed in connection with a bankruptcy, for any gift, remuneration or pecuniary or other consideration or benefit whatever beyond the remuneration payable out of the estate, or accepts any such consideration or benefit from any such person, or makes any arrangement for giving up, or gives up, any part of **the remuneration**, either as a receiver **within the meaning of subsection 243(2)** or trustee, to the bankrupt or any legal counsel, auctioneer or other person employed in connection with the bankruptcy,

(5) Every person who fails, without valid excuse, to comply with a subpoena, request or summons issued under subsection 14.02(1.1) is guilty of an offence punishable on summary conviction and liable to a fine of not more than $1,000.

Rationale

The proposed change to subsection (1)(h) clarifies the language.

Subsection (5) provides an offence for the new subpoeana powers that were created in 14.02(1.1).

Present Law

202. (1)(h) being a trustee, makes any arrangement under any circumstances with the bankrupt, or any solicitor, auctioneer or other person employed in connection with a bankruptcy, for any gift, remuneration or pecuniary or other consideration or benefit whatever beyond the remuneration payable out of the estate, or accepts any such consideration or benefit from any such person, or makes any arrangement for giving up, or gives up, any part of his remuneration, either as a receiver or trustee, to the bankrupt or any solicitor, auctioneer or other person employed in connection with the bankruptcy,

Senate Recommendation

None.

Bill Clause No. 113
Section No. 209(2)
Topic: Tabling of Rules

Proposed Wording

113. Subsection 209(2) of the Act is repealed.

Rationale

This requirement makes the amendments to the Rules very cumbersome and is unnecessary.

Present Law

209. (2) All the General Rules, as from time to time made, shall be laid before Parliament within three weeks after being made or, if Parliament is not then sitting, within three weeks after the beginning of the next session of Parliament.

Senate Recommendation

None.

Bill Clause No. 114
Section No. 215.1
Topic: Claims in international currency

Proposed Wording

215.1 A claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency

(a) in the case of a proposal in respect of an insolvent person and unless otherwise provided in the proposal, if a notice of intention was filed under subsection 50.4(1), as of the date the notice was filed or, if no notice was filed, as of the date the proposal was filed with the official receiver under subsection 62(1);

(b) in the case of a proposal in respect of a bankrupt and unless otherwise provided in the proposal, as of the date of the bankruptcy; or

(c) in the case of a bankruptcy, as of the date of the bankruptcy.

Rationale

The proposed change to section 215.1 is intended to facilitate the processing of international claims.

Present Law

None.

Senate Recommendation

None.

BIA: Bankrupts with High Income Tax Debt

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

- **Bill Clause No.** 105 - BIA (Bankruptcy and Insolvency Act) Section 172.1

Bill Clause No. 105
Section No. 172.1
Topic: Bankrupts with High Income Tax Debt

Proposed Wording

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172.1 (1) In the case of a bankrupt who has $200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims, the hearing of an application for a discharge may not be held before the expiry of

(a) if the bankrupt has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction,

(i) 9 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 9 months, or

(ii) 21 months after the date of bankruptcy, in any other case;

(b) if the bankrupt has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction,

(i) 24 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 24 months, or

(ii) 36 months after the date of bankruptcy, in any other case; and

(c) in the case of any other bankrupt, 36 months after the date of the bankruptcy.

(2) Before proceeding to the trustee's discharge and before the first day that the hearing could be held in respect of a bankrupt referred to in subsection (1), the trustee must, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application for the bankrupt's discharge.

(3) On the hearing of an application for a discharge referred to in subsection (1), the court shall, subject to subsection (4),

(a) refuse the discharge;

(b) suspend the discharge for any period that the court thinks proper; or

(c) require the bankrupt, as a condition of his or her discharge, to perform any acts, pay any moneys, consent to any judgments or comply with any other terms that the court may direct.

(4) In making a decision in respect of the application, the court must take into account

(a) the circumstances of the bankrupt at the time the personal income tax debt was incurred;

(b) the efforts, if any, made by the bankrupt to pay the personal income tax debt;

(c) whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and

(d) the bankrupt's financial prospects for the future.

(5) If the court makes an order suspending the discharge, the court shall, in the order, require the bankrupt to file income and expense statements with the trustee each month and to file all returns of income required by law to be filed.

(6) If, at any time after the expiry of one year after the day on which any order is made under this section, the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in any manner and on any conditions that it thinks fit.

(7) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

(8) For the purpose of this section, "personal income tax debt" means the amount payable, within the meaning of subsection 223(1) of the *Income Tax Act* without reference to paragraphs *(b)* to *(c)*, by an individual and the amount that is payable by an individual under any provincial legislation that imposes a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, including, for greater certainty, the amount of any interest, penalties or fines imposed under the *Income Tax Act* or the provincial legislation.

Rationale

This new section introduces a new procedure for discharging bankrupts with high personal income tax debt. It is aimed at those individuals who have an outstanding personal income tax debt (federal and/or provincial) in excess of $200,000 (including principal, interest and penalties) where the amount owing represents 75% or more of the bankrupt's total unsecured proven claims. This new section is designed to ensure that bankrupts with significant personal income tax debt do not abuse the insolvency system by paying their other creditors to the exclusion of the government. These bankrupts will not be eligible for an automatic discharge and an application for discharge will be required. The onus will be on the debtor to justify any relief to be granted by the court.

Paragraph (1)*(a)* specifies the earliest date for the hearing of an application for discharge for a bankrupt who has never been bankrupt before, i.e., the hearing may not be held before the expiry of 9 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankruptcy or 21 months after the date of bankruptcy in any other case.

Paragraph (1)*(b)* specifies the earliest date for the hearing of an application for a discharge for a bankrupt who has been bankrupt one time before, i.e., the hearing may not be held before the expiry of 24 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankruptcy or 36 months after the date of bankruptcy in any other case.

Paragraph (1)*(c)* specifies the earliest date for the hearing of an application for a discharge for a bankrupt who has been bankrupt two or more times before, i.e., the hearing may not be held before the expiry of 36 months after the date of bankruptcy in all cases.

Subsection (2) provides that the trustee must give five days notice to the bankrupt before applying to the court for an appointment for the hearing of the bankrupt's application for discharge.

Subsection (3) specifies the types of orders that the court may to make on the hearing of a bankrupt's application for discharge. The options available to the court include: refusing the discharge; suspending the discharge; requiring the bankrupt to perform any acts, pay any moneys, consent to any judgements or comply with any other terms that the court may direct.

Subsection (4) sets out the factors the court shall take into account when making a decision with respect to the bankrupt's discharge. The onus is on the bankrupt to justify the relief requested of the court. The factors for consideration are: the bankrupt's circumstances at the time the personal income tax debt was incurred; the efforts made by the bankrupt to pay the personal income tax; whether the bankrupt paid other debts while failing to make reasonable efforts to pay the personal income tax debt; and the bankrupt's financial prospects for the future.

Subsection (5) specifies that if the court suspends the discharge, the court shall also order the bankrupt to provide the trustee with monthly income and expense statements and to file all income tax returns and remittances required by law during the period the discharge is suspended.

Subsection (6) enables the court to modify the order if the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the terms of the order. The court may modify the order after one year.

Subsection (7) grants the court with the power to suspend and attach conditions to a bankrupt's discharge concurrently.

Subsection (8) defines "personal income tax" in the context of the *Income Tax Act*. It also specifically includes any amount payable by an individual under any provincial legislation that imposes a tax similar in nature to that under the *Income Tax Act*. The amount also includes any interest, penalties or fines.

Present Law

None.

Senate Recommendation

None.

BIA: Student Loans

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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- **Bill Clause No.** 107 - BIA (Bankruptcy and Insolvency Act) Section 178

Bill Clause No. 107
Section No. 178
Topic: Debts Not Released by Order of Discharge

Proposed Wording

178. (1) An order of discharge does not release the bankrupt from

(e) any debt or liability for obtaining property **or services** by false pretences or fraudulent misrepresentation;

(g) any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(ii) within seven years after the date on which the bankrupt ceased to be a full- or part-time student; or

(1.1) At any time after **five** years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the **debt**; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay **the debt**.

Rationale

The amendment to paragraph (1)(e) is intended to clarify that the treatment of debt owed for services or property fraudulently obtained should be the same. The reform will contribute to increased fairness to the insolvency process.

The amendment to paragraph (1)(g) is intended to reduce the waiting period during which a former student may not have student loan debts discharged by bankruptcy from ten years to seven years. The shorter period correlates the discharge rules in bankruptcy to the student loan rules on repayment of debt. A restrictive, seven-year period presents a sufficiently high barrier to prevent individuals from taking student loans with the intention of going bankrupt upon graduation, thereby ensuring the integrity of the student loan system.

The reform to subsection (1.1) reduces the waiting period during which a student cannot seek a hardship exemption from the application of paragraph 178(1)(g), which prohibits the discharge of student loan debts until the waiting period in that provision is over. Pursuant to this provision, a student who has previously filed for bankruptcy may, after the waiting period is over, apply to a court for a special dispensation to have their student loan debts discharged. In a concurrent reform, the discharge waiting period is to be reduced to seven years. The five year hardship discharge period reflects the federal loan programs period of interest relief.

Present Law

178. (1) An order of discharge does not release the bankrupt from

(e) any debt or liability for obtaining property by false pretences or fraudulent misrepresentation;

(g) any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred

(ii) within ten years after the date on which the bankrupt ceased to be a full- or part-time student; or

(1.1) At any time after ten years after a bankrupt who has a debt referred to in paragraph (1)(g) ceases to be a full- or part-time student, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the loan; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the liabilities under the loan.

Senate Recommendation

The Senate recommended that the BIA (Bankruptcy and Insolvency Act) be amended to require that fraud be proven in order for debt to survive discharge from bankruptcy and that the provisions apply to both property and services fraudulently obtained. The first part of the recommendation was not followed because it would put the onus on the legitimate creditor to expend further resources to collect the debt. The current regime is sufficient because it allows the debtor to seek clarification from the court that the debt is discharged without requiring a creditor to pay more. The second part was followed as it is a good clarification of the policy intention.

The Senate recommended that the BIA (Bankruptcy and Insolvency Act) be amended to reduce, to five years following the conclusion of full- or part-time studies, the waiting period for the discharge of student debt. Changes to the Canada Student Loan Program, however, were made after the Senate Report. Under the new rules, students in financial difficulty can benefit from various relief measures for seven years.

The Senate recommended that the Act allow the Court the discretion to confirm the discharge of all or a portion of student loan debt in a period of time shorter than five years where the debtor can establish that the burden of maintaining the liability for some or all of the student debt creates undue hardship. Changes to the Canada Student Loan Program, however, were made following the Senate Report. Under the new rules, students in financial difficulties are eligible for interest relief for 5 years, which allows them to make no payments (principal or interest) for five years.

BIA: Appointment of receivers

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

- **Bill Clause No.** 115 - BIA (Bankruptcy and Insolvency Act) Section 243
- **Bill Clause No.** 116 - BIA (Bankruptcy and Insolvency Act) Section 244(4)
- **Bill Clause No.** 117 - BIA (Bankruptcy and Insolvency Act) Section 253
- **Bill Clause No.** 118 - BIA (Bankruptcy and Insolvency Act) Section 256(1)(d)
- **Bill Clause No.** 119 - BIA (Bankruptcy and Insolvency Act) Section 261
- **Bill Clause No.** 120 - BIA (Bankruptcy and Insolvency Act) Section 262(2) and (3)
- **Bill Clause No.** 121 - BIA (Bankruptcy and Insolvency Act) Section 263(3)

Bill Clause No. 115
Section No. 243
Topic: Secured Creditors and Receivers

Proposed Wording

243. (1) On the application of a secured creditor, the court may appoint a person to act as a receiver to take possession or control of all or substantially all of the inventory, the accounts receivable or the other property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

(2) Subject to **subsections** (3) **and (4)**, in this Part, "receiver" means a person who has been appointed to take, or has taken, possession or control, **under**

(a) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(b) a court order made under **subsection** (1) that provides for or authorizes the appointment of a receiver or receiver-manager, of all or substantially all of

(c) the inventory,

(d) the accounts receivable, or

(e) the other property

of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)*(a)* or *(b)*.

Rationale

The proposed reform will allow the bankruptcy court to appoint a receiver with the power to act nationally. Subsection (1) refers to the "court," which is defined in a proposed amendment to section 2 of the Act. In the proposed section 2, the amendment broadens the definition of "court" to include a judge exercising jurisdiction under the Bankruptcy and Insolvency Act. The expanded definition will provide the court with the authority to appoint a receiver who has the power to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver.

Subsection (2) is amended to modernize the language.

Subsection (4) is added to specify that a receiver appointed either by the court or under the terms of a security agreement to take control of all or substantially all of the inventory, accounts receivable, or other property must be a licenced trustee. It is important to note, however, that this requirement that the receiver be a licenced trustee does not apply when a secured creditor is acting as its own receiver.

Present Law

243. (1) In paragraphs (2)*(b)* and 250(2)*(a)* and *(b)*, "court" means

(a) any court other than a court as defined in section 2; and

(b) a court as defined in section 2 when not exercising jurisdiction in bankruptcy.

(2) Subject to subsection (3), in this Part, "receiver" means a person who has been appointed to take, or has taken, possession or control, pursuant to

(a) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(b) an order of a court made under any law that provides for or authorizes the appointment of a receiver or receiver-manager, of all or substantially all of

(c) the inventory,

(d) the accounts receivable, or

(e) the other property

of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

Senate Recommendation

None.

Bill Clause No. 116
Section No. 244(4)
Topic: Enforcing a Security

Proposed Wording

244. (4) This section does not apply **with respect to the inventory, accounts receivable or other property of** an insolvent person **or of a bankrupt if there** is a receiver.

Rationale

The reform proposed for subsection (4) clarifies the case law in that there is no need to provide a section 244 notice if the debtor is a bankrupt.

Present Law

244. (4) This section does not apply where there is a receiver in respect of the insolvent person.

Senate Recommendation

None.

Bill Clause No. 117
Section No. 253
Topic: Definitions

Proposed Wording

253. "customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered **or recorded in the appropriate manner** in the name of the customer or are in the process of being so registered **or recorded**, but does not include securities registered **or recorded in the appropriate manner** in the name of the customer that, by endorsement or otherwise, **are** negotiable **by the securities firm**;

"deferred customer" means a customer whose misconduct, **either in the customer's capacity as a customer or otherwise**, caused or materially contributed to the insolvency of a securities firm;

"hold", in relation to a security, includes holding it in electronic form;

Rationale

The reform is a technical amendment to provide clarity to the application of the provision.

"Customer name securities" has been amended to clarify that securities recorded electronically (for example, mutual fund units) rather than registered in a traditional corporate share registry may still be considered customer name securities. A recent court decision had difficulty coming to this conclusion due to the requirement of the provision that the securities be "registered". Some securities are not "registered" but are, nonetheless, non-negotiable by any party other than the customer of a securities firm.

"Deferred customer" has been amended to clarify that the misconduct of a person does not need to be connected to their role as a customer of a securities firm to allow for the application of the definition.

A definition of "hold" has been added to clarify that a person does not need to be physically in possession of a security to be considered to be the holder of it.

Present Law

253. "customer name securities" means securities that on the date of bankruptcy of a securities firm are held by or on behalf of the securities firm for the account of a customer and are registered in the name of the customer or are in the process of being so registered, but does not include securities registered in the name of the customer that, by endorsement or otherwise, are in negotiable form;

"deferred customer" means a customer whose misconduct caused or materially contributed to the insolvency of a securities firm;

Senate Recommendation

The reform follows Senate recommendation #27.

Bill Clause No. 118
Section No. 256(1)(d)
Topic: Receiver in respect of Securities Firm

Proposed Wording

256. (1) In addition to any creditor who may petition in accordance with sections 43 to 45, a petition for a receiving order against a securities firm may be filed by

(d) a person who, in respect of property of a securities firm, is a receiver **within the meaning of subsection 243(2)**, a receiver-manager, a liquidator or **any** other person with similar functions appointed under a federal or provincial enactment relating to securities that provides for the appointment of that other person, if the securities firm has committed an act of bankruptcy referred to in section 42 within the six months before the filing of the application.

Rationale

The reform is a technical amendment to clarify that a receiver must be a receiver over all or substantially all of the inventory, accounts receivable or other property of the securities firm.

Present Law

256. (1) In addition to any creditor who may petition in accordance with sections 43 to 45, a petition for a receiving order against a securities firm may be filed by

(d) a person who, in respect of property of a securities firm, is a receiver, receiver-manager, liquidator or other person with similar functions appointed under a federal or provincial enactment relating to securities that provides for the appointment of such other person, where the securities firm has committed an act of bankruptcy referred to in section 42 within the six months before the filing of the petition.

Senate Recommendation

None.

Bill Clause No. 119
Section No. 261
Topic: Treatment of Cash

Proposed Wording

261. (1) If a securities firm becomes bankrupt, **the following securities and cash** vest in the trustee:

(a) securities owned by the securities firm;

(b) securities and cash held by **any person** for the account of the securities firm; and

(c) **securities and cash held by the securities firm for the account of a customer, other than customer** name securities.

Rationale

The intention of the reform is to clarify that all securities and cash, held by or for the securities firm, excluding customer name securities, are subject to the distribution rules in Part XIII of the BIA (Bankruptcy and Insolvency Act).

Present Law

261. (1) Where a securities firm becomes bankrupt, securities owned by the securities firm and securities and cash held by or for the account of the securities firm or a customer, other than customer name securities, vest in the trustee.

Senate Recommendation

The reform follows Senate recommendation #27.

Bill Clause No. 120
Section No. 262(2) and (3)
Topic: Distribution in Kind

Proposed Wording

262. (2) To the extent that securities of a particular type are available in the customer pool fund, the trustee shall distribute them to customers with claims to **the** securities, in proportion to their claims to **the** securities, up to the appropriate portion of their net equity, **unless the trustee determines that, in the circumstances, it would be more appropriate to sell the securities and distribute the proceeds to the customers with claims to the securities in proportion to their claims to the securities.**

(3) Property in the general fund shall be allocated in the following priority:

***(a)* to creditors in the order set out in subsection 136(1);**

Rationale

The intention of the reform is to grant a trustee the authority to sell low value securities rather than requiring the trustee to distribute them in kind. In some circumstances, the transfer costs related to distributing the securities would exceed the value of the securities or would be substantial in relation to the value of the securities. In these cases, the better result would be to sell the securities on the market and distribute the resulting cash.

Present Law

262. (2) To the extent that securities of a particular type are available in the customer pool fund, the trustee shall distribute them to customers with claims to such securities, in proportion to their claims to such securities, up to the appropriate portion of their net equity.

(3) Property in the general fund shall be allocated in the following priority:

(a) to preferred creditors in the order set out in subsection 136(1)

Senate Recommendation

None.

Bill Clause No. 121
Section No. 263(3)
Topic: Customer Debts

Proposed Wording

263. (3) If a customer to whom customer name securities belong and who is indebted to the securities firm on account of customer name securities not fully paid for, or on another account, does not discharge their indebtedness in full, the trustee may, on notice to the customer, sell sufficient customer name securities to discharge the indebtedness, **and those** securities are then free of any right, title or interest of the customer. **If** the trustee so discharges the customer's indebtedness, the trustee shall deliver any remaining customer name securities to the customer.

Rationale

A technical amendment to correct for grammatical errors.

Present Law

263. (3) Where a customer to whom customer name securities belong and who is indebted to the securities firm on account of customer name securities not fully paid for, or on another account, does not discharge their indebtedness in full, the trustee may, on notice to the customer, sell sufficient customer name securities to discharge the indebtedness, which securities are thereupon free of any lien, right, title or interest of the customer. Where the trustee so discharges the customer's indebtedness, the trustee shall deliver any remaining customer name securities to the customer.

Senate Recommendation

None.

BIA : International insolvency / UNCITRAL

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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Bill Clause No. 122
Section No. 267
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

267. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtors;

(d) the protection and the maximization of the value of debtors' property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

Rationale

Section 267 is the first section dealing with cross-border insolvencies in Part XIII of the *Bankruptcy and Insolvency Act*. It provides a summary statement of the basic policy objectives of Part XIII. Although it may not be customary in Canada to set out purpose statements of policy in legislation, this section is useful in providing a general orientation and in assisting in the interpretation of Part XIII.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 268
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

268. (1) The following definitions apply in this Part.

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor has the centre of the debtor's main interests.

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding" means a judicial or an administrative proceeding, **including an interim proceeding, in a jurisdiction** outside Canada dealing with **creditor's** collective interests generally under **any** law relating to **bankruptcy or** insolvency in which a **debtor's property and affairs are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation.**

"foreign representative" means a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding in respect of a debtor, to

(a) administer the debtor's property or affairs for the purpose of reorganization or liquidation; or

(b) act as a representative in respect of the foreign proceeding.

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor's registered office and, in the case of a debtor who is an individual, the debtor's ordinary place of residence are deemed to be the centre of the debtor's main interests.

Rationale

Subsection 268(1) adds a series of definitions in alphabetical order for terms that are specific to Part XIII of the Bill on cross-border insolvencies. The definition of "foreign court" includes non-judicial authorities so that foreign proceedings receive the same treatment irrespective of whether they have been commenced and supervised by a judicial body or an administrative body. By specifying required characteristics of the "foreign proceeding" and "foreign representative", the definitions limit the scope of application of the Model Law. The definition of "debtor" was excluded from this provision because it is it is not different from what is already provided for in section 2 of the current legislation. Subsection 268(2) creates a presumption - where the debtor has his place of residence or registered office is deemed to be the centre of the debtor's main interests.

Present Law

267. In this Part,

"debtor" means an insolvent person who has property in Canada, a bankrupt who has property in Canada or a person who has the status of a bankrupt under foreign law in a foreign proceeding and has property in Canada;

"foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor, under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;

"foreign representative" means a person, other than a debtor, holding office under the law of a jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee, liquidator, administrator or receiver appointed by the court.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 269
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

269. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)*(a)* and *(b)* as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

(4) In the absence of the documents referred to in paragraphs (2)*(a)* and *(b)*, the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

(5) The court may require a translation of any document accompanying the application.

Rationale

Subsection 269(1) allows the foreign representative to apply to the court for recognition of a foreign proceeding in Canada. Subsection 269(2) describes the procedural requirements for an application, by a foreign representative, for recognition of a foreign proceeding in Canada. It provides a simple, expeditious process. Paragraph c) requires that an application for recognition be accompanied by a statement identifying all known foreign proceedings in respect of the debtor. This information is needed by the court for any decision granting relief in favour of the foreign proceeding. In order to ensure that the relief is consistent with any other insolvency proceeding concerning the same debtor, the courts needs to know of all foreign proceedings that may be under way in a third State.

Subsection 269(3) provides that documents submitted in support of the application for recognition need not be authenticated in any special way. The court is entitled to presume that they are authentic unless there is evidence to the contrary. This approach provides the court flexibility and avoids legalization procedures, which may be cumbersome and time-consuming.

In order not to prevent recognition because of non-compliance with a mere technicality, subsection 269(4) allows evidence other than that specified in paragraphs a) and b) to be taken into account. However, this provision does not compromise the court's authority to insist on the presentation of evidence acceptable to it.

Subsection 269(5) entitles, but does not compel, the court to require a translation of some or all documents accompanying the application for recognition. This discretion is compatible with the procedures of the court under the current legislation.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to

ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 270
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

270. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Rationale

Section 270 provides that if the application for recognition meets the requirements set out in section 269, recognition will be granted by the court as a matter of course. It also draws a basic distinction between foreign proceedings categorized as "main" proceedings and those that are not, depending on the jurisdictional basis of the foreign proceeding.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 271
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

271. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding,

***(a)* no person shall commence or continue any action, execution or other proceedings concerning the debtor's property, debts, liabilities or obligations;**

***(b)* if the debtor carries on a business, the debtor shall not, outside the ordinary course of the business, sell or otherwise dispose of any of the debtor's property in Canada that relates to the business and shall not sell or**

otherwise dispose of any other property of the debtor in Canada; and

(c) **if the debtor is an individual, the debtor shall not sell or otherwise dispose of any property of the debtor in Canada.**

(2) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor at the time the order recognizing the foreign proceeding is made.

(3) The prohibitions in paragraphs (1)(a) and (b) are subject to the exceptions specified by the court in the order recognizing the foreign proceeding that would apply in Canada had the foreign proceeding taken place in Canada under this Act.

(4) Nothing in subsection (1) precludes the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act or the Winding-up and Restructuring Act* in respect of the debtor.

Rationale

Subsection 271(1) provides for an automatic stay of proceedings when an order recognizing a foreign main proceeding, is made by the court. The automatic consequences envisaged in subsection 271(1) are necessary to allow steps to be taken to organize an orderly and equitable cross-border insolvency proceeding. Recognition, therefore, has its own effects rather than importing the consequences of the foreign law into the Canadian insolvency regime.

Subsection 271(2) ensures that existing proceedings commenced under Canadian insolvency laws are not subject to the automatic stay when an order recognizing a foreign main proceeding, with regards to the same debtor, is made by the court. This ensures that Canadian proceedings are only subject to Canadian insolvency rules.

Because recognition has its own effects rather than importing the consequences of the foreign law into the Canadian insolvency system, recognition could, in a given case, produce results that would be contrary to the legitimate interests of an interested party, including the debtor. Subsection 271(3) protects those interests by providing that prohibitions in paragraphs 271(1)(a) and (b) are subject to exceptions, as specified by the court, that would apply in Canadian insolvency proceedings. It is important, from a policy standpoint, for persons that are adversely affected by the automatic stay to have an opportunity to be heard by the court and for the court to be allowed to modify or terminate those effects.

Subsection 271(4) merely clarifies that the automatic stay in subsection 271(1) does not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and from participating in that proceeding.

Present Law

271. (2) On application by a foreign representative in respect of a foreign proceeding commenced for the purpose of effecting a composition, an extension of time or a scheme of arrangement in respect of a debtor or in respect of the bankruptcy of a debtor, the court may grant a stay of proceedings against the debtor or the debtor's property in Canada on such terms and for such period as is consistent with the relief provided for under sections 69 to 69.5 in respect of a debtor in Canada who files a notice of intention or a proposal or who becomes bankrupt in Canada, as the case may be.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined

that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 272
Topic:UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

272. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 271(1)*(a)* to *(c)* and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;

(c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and

(d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,

(i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and

(ii) to take any other action that the court considers appropriate.

(2) If any proceedings under this Act have been commenced in respect of the debtor at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Companies' Creditors Arrangement Act or the Winding-up and Restructuring Act* in respect of the debtor.

Rationale

Subsection 272(1) provides the court with discretionary powers to grant post-recognition relief. Orders listed in this subsection are typical in insolvency proceedings. However, the list is not exhaustive. The court is not restricted in its ability to grant any type of relief that is available under Canadian law and needed in the circumstances of the case.

Subsection 272(2) provides that any order made under subsection 272(1) must be consistent with any prior court orders, made in existing proceedings, commenced under Canadian insolvency laws. This ensures that all Canadian court orders in respect of a debtor are consistent.

Subsection 272(3) merely clarifies that court orders made, pursuant to subsection 272(1), do not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and from participating in that proceeding.

Present Law

268. (3) The court may, in respect of a debtor, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

271. (3) On application by a foreign representative in respect of a debtor, the court may, where it is satisfied that it is necessary for the protection of the debtor's estate or the interests of a creditor or creditors,

(a) appoint a trustee as interim receiver of all or any part of the debtor's property in Canada, for such term as the court considers appropriate; and

(b) direct the interim receiver to do all or any of the following:

(i) take conservatory measures and summarily dispose of property that is perishable or likely to depreciate rapidly in value,

(ii) take possession of all or part of the debtor's property mentioned in the appointment and exercise such control over the property and over the debtor's business as the court considers appropriate, and

(iii) take such other action as the court considers appropriate.

271. (5) On application of a foreign representative in respect of a debtor, the court may authorize the examination under oath by the foreign representative of the debtor or of any person in relation to the debtor who, if the debtor were a bankrupt referred to in subsection 163(1), would be a person who could be examined under that subsection.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 273
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

273. An order under this Part may be made on **any** terms and conditions **that** the court considers appropriate in the circumstances.

Rationale

Section 273 is the same as the current subsection 268(4) of the *Bankruptcy and Insolvency Act*. It provides the court with much discretion to impose whatever conditions it deems appropriate upon any order with respect to cross-border proceedings. This discretion is in line with basic principles of Canadian insolvency laws.

Present Law

268. (4) An order of the court under this Part may be made on such terms and conditions as the court considers appropriate in the circumstances.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

BIA : International insolvency / UNCITRAL

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 122
Section No. 274
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

274. If an order recognizing a foreign proceeding is made, the foreign representative may commence **or** continue **any** proceedings **under** sections 43, 46 to **47.1** and **49** and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor of the debtor, or the debtor, as the case may be.

Rationale

Section 274 is the same as the current section 270 of the *Bankruptcy and Insolvency Act*, except that 1) reference to section 47.2 (orders respecting fees and expenses) has been taken out because it is not relevant to this section and 2) section 43 (bankruptcy petition) has been added to allow a foreign representative to file an assignment in bankruptcy,

which is the only insolvency proceeding not presently covered in section 270.

Present Law

270. A foreign representative may commence and continue proceedings pursuant to sections 43 and 46 to 47.2 and subsections 50(1) and 50.4(1) in respect of a debtor as if the foreign representative were a creditor, trustee, liquidator or receiver of property of the debtor, or the debtor, as the case may be.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 275
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

275. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

(2) If any proceedings under this Act have been commenced in respect of a debtor and an order recognizing a foreign proceeding is made in respect of the debtor, every person who exercises any powers or performs duties and functions in any proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Rationale

The purpose of section 275 is to enable courts and insolvency administrators from two or more countries to be efficient and achieve optimal results. In cross-border insolvencies, cooperation is often the only realistic way, for example, to prevent the dissipation of assets, to maximize the value of assets or to find the best solutions for the reorganization of businesses.

Section 275 not only authorizes cross-border cooperation, it mandates it. This is useful in eliminating any uncertainties that may exist with regards to the court or administrator's discretion to operate outside areas of express statutory authorization in order to cooperate with the foreign representative or foreign court in cross-border cases. This section also allows Canadian courts to communicate with foreign courts in order to accelerate cooperation.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined

that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 276
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

276. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor that becomes known to the foreign representative; and

(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Rationale

Paragraph 276 (a) ensures that the court is informed of any important change regarding the foreign proceeding. It is possible that, after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition. For example, the foreign proceeding may be terminated or transformed from a liquidation proceeding into a reorganization proceeding or the terms of the appointment of the foreign representative may be modified or terminated.

Paragraph 276(b) is modelled on clause 131 of the Bill, subparagraph 23(1)(a)(i) of the CCAA (Companies' Creditors Arrangement Act). It provides a specific mechanism to ensure that all parties who may be affected by any substantial changes to the recognized foreign proceeding or in respect of the foreign representative receive adequate notice of these changes, allowing them to better protect their interests.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 277
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

277. If any proceedings under this Act in respect of a debtor are commenced at any time after an order recognizing the foreign proceeding is made,

(a) the court shall review any order made under section 272 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order; and

(b) if the foreign proceeding is a foreign main proceeding, the court shall make an order terminating the application of the prohibitions in paragraphs 271(1)(a) to (c) if the court determines that those prohibitions are inconsistent with any similar prohibitions imposed in the proceedings under this Act.

Rationale

Section 277 gives the court guidance to deal with cases where the same debtor is subject to a foreign proceeding followed by a local proceeding. The most important principle in this section is that the commencement of a local proceeding does not terminate the recognition of a foreign proceeding. This principle allows Canadian courts to provide relief in favour of the foreign proceeding in all circumstances. However, section 277 maintains a pre-eminence of the local proceeding over the foreign proceeding (i.e., any relief that has already been granted to the foreign proceeding must be reviewed to ensure consistency with the local proceeding and if the foreign proceeding is a main proceeding, the automatic effects pursuant to section 271 are to be terminated if inconsistent with the local proceeding).

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 278
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

278. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor, an order recognizing a foreign main proceeding is made in respect of the debtor, the court shall review any order made under section 272 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor, an order recognizing another foreign non-main proceeding is made in respect of the debtor, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order made under section 272 in respect of the first recognized proceeding and amend or revoke that order if it considers it appropriate.

Rationale

Section 278 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in Canada.

The objective of section 278 is similar to that of section 277 in that the key issue when there are concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Such consistency is achieved by appropriately tailoring relief to be granted or by modifying or terminating relief already granted.

The only priority in this section is given to the foreign main proceeding. That priority is reflected in the requirement that any relief in favour of a foreign non-main proceeding must be consistent with the foreign main proceeding (subsection 278(1)).

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 279
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

279. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

Rationale

The purpose of section 279 is to allow Canadian insolvency administrators, appointed in Canadian insolvency proceedings, to act abroad as foreign representatives of those proceedings. The lack of such authorization has proven, in some cross-border cases, to be an obstacle to effective international cooperation. This section is aimed at avoiding just that.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 280
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

280. An application by a foreign representative **for any order under this Part** does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other court order.

Rationale

Section 280 is the same as the current section 272 of the BIA (Bankruptcy and Insolvency Act). Language was simply added to reflect the fact that the new Part XIII on cross-border insolvencies has introduced the concept of court "orders" recognizing foreign insolvency proceedings. These "orders" give foreign insolvency proceedings standing in Canada.

Present Law

272. An application to the court by a foreign representative under this Part does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this Part conditional on the compliance by the foreign representative with any other order of the court.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 281
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

281. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

Rationale

Section 281 is the same as the current section 273 of the BIA (Bankruptcy and Insolvency Act). It was only renumbered.

Present Law

273. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application where such proceedings have been taken, grant relief as if the proceedings had not been taken.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 282
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

282. For the purposes of this Part, if a bankruptcy, an insolvency or a reorganization or a similar order has been made in respect of a debtor in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor is insolvent and proof of the appointment of the foreign representative made by the order.

Rationale

Section 282 is the same as the current subsection 268(1) of the BIA (Bankruptcy and Insolvency Act).

Present Law

268. (1) For the purposes of this Part, where a bankruptcy, insolvency or reorganization or like order has been made in respect of a debtor in a foreign proceeding, a certified or exemplified copy of the order is, in the absence of evidence to the contrary, proof that the debtor is insolvent and proof of the appointment of the foreign representative made by the order.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined

that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 283
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

283. (1) If a bankruptcy order, a proposal or **an** assignment is made in respect of a debtor under this Act, **the following** shall be taken into account in the distribution of dividends to the debtor's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the debtor; and

(b) the value of any property of the debtor that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if **the transfer** were subject to this Act, would be a **preference over other creditors or a transfer at undervalue.**

(2) **Despite subsection** (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph **(1)*(a)*** and the value referred to in paragraph **(1)*(b)*** is of that creditor's claim.

Rationale

Section 283 is the same as the current section 274 of the BIA (Bankruptcy and Insolvency Act). It was only reorganized and adapted to reflect the changes made to the preferences and transfers at undervalue provisions in clauses 71-76 of the Bill.

Present Law

274. If any bankruptcy order, proposal or assignment is made in respect of a debtor under this Act,

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the debtor, and

(b) the value of any property of the debtor that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be set aside or reviewed under sections 91 to 101.2,

shall be taken into account in the distribution of dividends to creditors of the debtor in Canada as if they were a part of that distribution, and the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend, the amount of which is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph *(a)* and the value referred to in paragraph *(b)* is of that creditor's claim.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to

ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 122
Section No. 284
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

284. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying **any** legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives **that** are not inconsistent with the provisions of this Act.

(2) Nothing in this Part requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

Rationale

Section 284 is the same as current subsections 268(5) and (6) of the BIA (Bankruptcy and Insolvency Act).

Present Law

268. (5) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.

(6) Nothing in this Part requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

BIA: Review of the Act

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to

amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

- **Bill Clause No.** 122 - BIA (Bankruptcy and Insolvency Act) Section 285
- **Bill Clause No.** 123 - BIA (Bankruptcy and Insolvency Act) Section 36(2), 51(3), 52, 66.16, 105, 106, 108 and 114

Bill Clause No. 122
Section No. 285
Topic: Review Clause

Proposed Wording

285. (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to those provisions.

(2) The report stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that is designated or established for that purpose, which shall

(a) as soon as possible after the laying of the report, review the report; and

(b) report to the Senate, the House of Commons or both Houses of Parliament, as the case may be, within one year after the laying of the report of the Minister, or any further time authorized by the Senate, the House of Commons or both Houses of Parliament.

Rationale

The Canadian insolvency regime must meet the needs of the economy, whose needs rarely stand still but continue to evolve due to competition, external pressures and the changing marketplace. By providing for a review every five years, Industry Canada will be able to address issues that have developed and adjust previous amendments to ensure that they are accomplishing what was intended when they were made.

Present Law

216. (1) This Act shall, on the expiration of five years after the coming into force of this section, stand referred to such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established to review the administration and operation of this Act.

(2) The committee shall, within one year after beginning the review or within such further time as the Senate, the House of Commons or both Houses of Parliament, as the case may be, may authorize, submit a report on the review to that House or both Houses, including a statement of any changes to this Act that the committee would recommend.

Senate Recommendation

The reform follows Senate recommendation #45.

Bill Clause No. 123
Section No. 36(2), 51(3), 52, 66.16, 105, 106, 108 and 114
Topic: Chair

Proposed Wording

123. The English version of the Act is amended by replacing the word "chairman" with the word "chair" wherever it occurs in the following provisions:

(a) subsection 36(2):

(b) subsection 51(3);

(c) section 52;

(d) section 66.16;

(e) sections 105 and 106;

(f) section 108; and

(g) section 114.

Rationale

Sections 36(2), 51(3), 52, 66.16, 105, 106, 108 and 114 were modernized by removing gender specific terminology.

Present Law

None.

Senate Recommendation

None.

CCAA: Definition and scope of application

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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- **Bill Clause No.** 124 - CCAA (Companies' Creditors Arrangement Act) Section 2
- **Bill Clause No.** 125 - CCAA (Companies' Creditors Arrangement Act) Section 3(1)

Bill Clause No. 124
Section No. 2
Topic: Definitions

Proposed Wording

2. (1) "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, **and any income trust, but does not include** banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

"shareholder" means a shareholder, member **or holder of any units** of any company to which this Act applies;

"bargaining agent" means any trade union that has entered into a collective agreement on behalf of the employees of a company;

"cash-flow statement", in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow;

"claim" means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the Bankruptcy and Insolvency Act;

"collective agreement", in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent;

"director", in respect of a company, includes any person, however designated, acting in any capacity that is similar to that of a director of a corporation and, in respect of an income trust, includes its trustee;

"income trust" means a trust (a) that has assets in Canada, and (b) the units of which are traded on a prescribed stock exchange;

"initial application" means the first application made under this Act in respect of a company;

"monitor", in respect of a company, means the person appointed under section 11.7 to monitor the business and financial affairs of the company;

"Superintendent of Bankruptcy" means the Superintendent of Bankruptcy appointed under subsection 5(1) of the Bankruptcy and Insolvency Act;

"prescribed" means prescribed by regulation;

(2) For the purpose of this Act, section 4 of the Bankruptcy and Insolvency Act applies for the purpose of determining whether a person is related to a company.

Rationale

"Company" is amended to include income trusts, a growing segment of the economy that would not otherwise be captured by insolvency law.

"Shareholder" is amended for technical reasons related to introduction of income trusts as part of the definition of "company".

"Prescribed" was not defined in the English version of the Act although it was defined in the French version.

The remaining definitions have been included to support other amendments to the Act.

Present Law

2. "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province and any incorporated company having assets or doing business in Canada, wherever incorporated, except banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

"shareholder" means a shareholder or member of any company to which this Act applies;

Senate Recommendation

Amendment to the definition of "company" follows Senate recommendation #38.

There were no recommendations relating to further definitions.

Bill Clause No. 125
Section No. 3(1)
Topic: Application of Act

Proposed Wording

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, **determined in accordance with section 20, is more than** $5,000,000 **or any other amount that is prescribed**.

Rationale

The reform includes technical amendments to correct cross-referencing and correct for grammatical errors.

The reform incorporates the ability to set the threshold claims amount for application of this Act by regulation. The changing marketplace may require an amendment to the threshold prior to the next reform of the CCAA (Companies' Creditors Arrangement Act).

Present Law

3. (1) This Act applies in respect of a debtor company or affiliated debtor companies where the total of claims, within the meaning of section 12, against the debtor company or affiliated debtor companies exceeds five million dollars.

Senate Recommendation

None.

CCAA: Treatment of tax, wages and pension claims

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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- **Bill Clause No.** 126 - CCAA (Companies' Creditors Arrangement Act) Section 6

Bill Clause No. 126

Section No. 6

Topic: Approval Restrictions

Proposed Wording

6. (2) Unless Her Majesty agrees otherwise, the court may sanction a compromise or an arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) If an order contains a provision authorized by section 11.09, no compromise or arrangement shall be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (2) that became due after the time of the application for an order under section 11.02.

(4) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the date of the filing of initial application in respect of the company, and

(ii) wages, salaries, commissions or compensation for services rendered after that date and before the court's sanction of the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph *(a)*.

(5) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment, immediately after the court sanction, of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*; and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph *(a)*.

(6) Despite subsection (5), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Rationale

Court sanction is required of any plan of arrangement or compromise that is developed by the debtor company and its creditors. Generally, the court will sanction a plan that has the approval of the majority of creditors unless it has a grievous, negative effect on one or a small group of creditors.

The intention of the reform is to ensure that the treatment of certain claims be similar in both the CCAA (Companies' Creditors Arrangement Act) and the BIA (Bankruptcy and Insolvency Act) to prevent forum shopping to defeat these interests, which are protected for public policy reasons. Concurrent reforms to the BIA (Bankruptcy and Insolvency Act) require that a court's ability to sanction a plan be limited to an extent to ensure that the treatment of certain creditor groups be the same in both the BIA (Bankruptcy and Insolvency Act) and CCAA (Companies' Creditors Arrangement Act).

Subsection (2) requires Crown approval for any plan of arrangement or compromise that would not require payment of all amounts owed to the Crown in respect of source deductions relating to income tax, Canada Pension Plan and Employment Insurance, including in favour of any province, that were outstanding as at the date of the initial application.

Subsection (3) requires Crown approval for any plan of arrangement or compromise that would not require payment of all amounts owed to the Crown in respect of source deductions relating to income tax, Canada Pension Plan and Employment Insurance, including in favour of any province, that came due after the date of the initial application.

The limitations created by subsection (2) and (3) currently exist in the BIA (Bankruptcy and Insolvency Act) proposal provisions but were not previously included in the CCAA (Companies' Creditors Arrangement Act). From a policy position, there is no reason why the amounts deducted from an employees' remuneration for income tax, Canada Pension Plan and Employment Insurance should be kept by the debtor company for its own use rather than remitted to the Canada Revenue Agency for the purpose intended.

Subsection (4) prohibits the court from sanctioning a plan of arrangement or compromise unless the plan requires the payment of all outstanding unpaid wage claims of employees and former employees, subject to monetary limits in the BIA (Bankruptcy and Insolvency Act).

A concurrent reform in the BIA (Bankruptcy and Insolvency Act) to enhance the protection of wage earners' in respect of unpaid wages is reflected in the CCAA (Companies' Creditors Arrangement Act) to ensure equal treatment of workers under both statutes. By prohibiting a court from sanctioning a plan unless the plan requires the payment of unpaid wages, the reform ensures equal treatment of wage earner's whether the employer becomes bankrupt, files a proposal under the BIA (Bankruptcy and Insolvency Act) or enters CCAA (Companies' Creditors Arrangement Act) proceedings.

Subsection (5) prohibits the court from sanctioning a plan of arrangement or compromise unless the plan requires the payment of specific pension obligations, enumerated in the subsection, outstanding at the date of the hearing to sanction the plan.

Subsection (6) provides that, notwithstanding subsection (5), the court may sanction a plan if the parties to the pension plan and the relevant pension regulator agree to alternate financing obligations.

Subsection (5) and (6) mirror the reforms in the BIA (Bankruptcy and Insolvency Act). Effectively, pension obligations will need to be accounted for before a court can sanction a plan.

Pension rights may form a significant portion of a wage earner's compensation from its employer, although it is deferred income. When the employer undertakes a restructuring under the CCAA (Companies' Creditors Arrangement Act), debts, including those owed to a pension fund, may be compromised. For wage earners, a diminution of pension benefits would have a negative impact on future income levels.

The intention of the reform is to provide a higher priority for unremitted pension contributions. The amounts subject to the provision are (1) contributions deducted from employees' salaries but not remitted to the pension fund, (2) contributions owed by an employer for the cost of benefits offered under the pension plan, excluding amounts payable to reduce an unfunded pension liability, and (3) contributions owed by an employer to a defined contribution plan. Obligations relating to unfunded pension liabilities, including special payments or solvency payments ordered to be paid by a regulator but not remitted to the pension fund, are not intended to be captured by the reform and will not be given a higher priority. If an unfunded pension liability exists and a claim is made, it would be treated as an unsecured debt.

Because court approval is required before a compromise or arrangement is finalized, prohibiting a court from approving it if it does not require the payment of unremitted pension contributions described above effectively grants a super-priority to the pension contribution amounts. The super-priority, however, is limited by the operation of subsection (6).

Subsection (6) provides flexibility to allow for a compromise of pension contribution obligations where the parties agree. It is expected that the provision will be used in limited circumstances where the parties agree to reduce pension benefits, which would reduce the employer's obligations. Requiring full payment of pre-filing contributions would not make sense in that circumstance.

The nature of pension regulation in Canada also affects aspects of the section - pensions may be regulated federally or provincially. The section must capture kinds of pensions described in the federal and provincial legislation. Prescribing pension plans that will be subject to this section provides greater flexibility to ensure that the appropriate pension plans are captured.

Present Law

None.

Senate Recommendation

For the reasons discussed in "Rationale", Senate recommendation #21 — "*The Bankruptcy and Insolvency Act* not be amended to alter the treatment of pension claims" — was not followed.

CCAA: Initial application

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 127
Section No. 10
Topic: Cash-flow Statements

Proposed Wording

10. (2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

Rationale

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When a debtor company applies for a court order granting a priority charge in respect of interim financing (also referred to as "DIP financing") the debtor company will normally provide the court with information regarding its cash-flow needs. The intention of the reform is to codify the existing practice regarding interim financing and the supporting information.

Subsection (2) creates an obligation on the debtor company to provide a cash-flow statement and supporting documentation. The reform mirrors requirements in the BIA (Bankruptcy and Insolvency Act) proposal provisions. The cash-flow statement will provide the court with the information necessary to properly assess the request for interim financing. The supporting documents will provide the court with assurance that the statement has been prepared properly, following standard accounting methods.

Subsection (3) provides the court with the authority to restrict the disclosure of the cash-flow statement. For businesses undergoing a restructuring, protecting the detailed information in a cash-flow statement may be vital to prevent it from providing an unfair advantage to competitors or from violating securities laws, if the debtor company is publicly traded.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 128
Section No. 11
Topic: General Power

Proposed Wording

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and* ***Restructuring*** *Act*, **if** an application is made under this Act in respect of a **debtor** company, the court, on the application of any person interested in the matter, may, subject to **the restrictions set out** in this Act, on notice to any other person or without notice as it may see fit, **make** any order **that it considers appropriate in the circumstances.**

Rationale

The intention of the reform is to codify existing practice.

Currently, the courts read subsection 11(1) to grant them the power to make any order it considers appropriate in order to facilitate a restructuring despite that section only referring to stay orders.

This provision will allow the court to make orders, other than stay orders, that may be necessary or appropriate in respect of the restructuring. The authority to order a stay has been included in section 11.02 of the reform.

Present Law

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Senate Recommendation

None.

Bill Clause No. 128
Section No. 11.01
Topic: Suppliers Rights

Proposed Wording

11.01 No order made under section 11 **or 11.02 has** the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

Rationale

The reform is a technical amendment to re-order provisions of this Act and correct cross-referencing.

Present Law

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

Senate Recommendation

None.

Bill Clause No. 128
Section No. 11.1
Topic: Regulatory Body Stay

Proposed Wording

11.1 (1) Subject to subsection (3), no order made under section 11.02 affects the rights of a regulatory body with respect to any investigation in respect of the company or any action, suit or proceeding taken or to be taken by it against the company, except when it is seeking to enforce any of its rights as a secured creditor or an unsecured creditor.

(2) If there is a dispute as to whether a regulatory body is seeking to enforce any of its rights as a secured creditor or an unsecured creditor, the court may, on application made by the company with notice given to the regulatory body, make an order declaring that the regulatory body is or would be so seeking to enforce its rights.

(3) Subsection (1) does not apply in respect of any or all actions, suits or proceedings taken or to be taken by a regulatory body if the court, on application made by the company with notice given to the regulatory body, makes an order declaring that a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply.

(4) The court shall not make the declaration referred to in subsection (3) if it is of the opinion that it is in the public interest that the regulatory body not be affected by the order made under section 11.02.

(5) In this section, "regulatory body" means any person or body who has powers, duties or functions relating to the enforcement or administration of any Act of Parliament or of the legislature of a province and includes any person or body prescribed to be a regulatory body for the purpose of this Act.

Rationale

The intention of the reform is to ensure that regulatory bodies, exercising powers for the benefit and well-being of all Canadians, should not be restricted by an insolvency situation from properly carrying out their duties.

Subsection (1) prevents an initial order from affecting regulatory bodies that are acting strictly as regulators. The regulatory body will be entitled to continue to investigate or prosecute a debtor company for failings under the relevant regulations. The order would, however, stay a regulatory body that is attempting to enforce a debt or monetary obligation owing to it, for example, in respect of a fine previously imposed.

Subsection (2) is intended to ensure that a debtor company does not frustrate the regulatory body by claiming that an action by the regulatory body is akin to debt collection. In a CCAA (Companies' Creditors Arrangement Act) proceeding, scheduling of court time is the responsibility of the monitor, who works closely with the debtor company. The monitor could delay scheduling a court hearing when a regulator seeks to challenge an action by the debtor company. To prevent potential, the subsection requires the debtor company to obtain a court order to stay a regulator in any particular circumstance.

Subsection (3) provides the court with the ability to stay regulators generally, regardless of their activity, where the court considers it necessary for the benefit of the restructuring process. The intention is to ensure the court has the flexibility it needs to deal with the particular circumstances of the restructuring. In addition, the court may use this provision to stay regulators whose effects on the management of the debtor company would be excessive in the situation.

Subsection (4) places limits on the application of subsection (3). For example, it would be inconceivable that a court would stay a regulator charged with public health and safety even if it meant the restructuring would fail. It will be on the particular circumstances of each case for the court to determine what would be in the public interest.

Subsection (5) defines what is to be considered a "regulatory body". Effectively, any body charged with enforcing or administering an Act of Parliament or the legislation of a provincial legislature would be such a body. In addition, there is the ability to prescribe by regulation other bodies that would obtain the benefits of the section. For example, stock exchanges and Market Regulatory Services Inc. will be prescribed bodies.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #41.

Bill Clause No. 128
Section No. 11.02
Topic: Initial Application Stays

Proposed Wording

11.02 (1) A court may, on an initial application in respect of a **debtor** company, make an order on **any** terms **that** it may impose, effective for **the** period **that** the court **considers** necessary, **which period may not be more than** 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the ***Bankruptcy and Insolvency Act*** **or the** ***Winding-up and Restructuring Act***;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a **debtor** company other than an initial application, make an order, on **any** terms **that** it may impose,

(a) staying, until otherwise ordered by the court, for **any** period **that** the court **considers** necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in **paragraph (1)*(a)***;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make **the** order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

Rationale

The reform in paragraphs (1), (2) and (3) is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical errors.

Paragraph (4) is added to ensure that court ordered stays are only granted pursuant to this section, including the limitations within this section.

Present Law

11. (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Senate Recommendation

None.

Bill Clause No. 128
Section No. 11.2
Topic: Interim Financing

Proposed Wording

11.2 (1) A court may, on application by a debtor company, make an order, on any conditions that the court considers appropriate, declaring that the property of the company is subject to a security or charge in favour of any person specified in the order who agrees to lend to the company an amount that is approved by the court as being required by the company, having regard to its cash-flow statement,

(a) for the period of 30 days following the initial application in respect of the company if the order is made on the initial application in respect of the company; or

(b) for any period specified in the order if the order is made on any application in respect of a company other than the initial application and notice has been given to the secured creditors likely to be affected by the security or charge.

(2) An order may be made under subsection (1) in respect of any period after the period of 30 days following the initial application in respect of the company only if the monitor has reported to the court under paragraph 23(1)(b) that the company's cash-flow statement is reasonable.

(3) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company.

(4) The court may specify in the order that the security or charge ranks in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(5) In deciding whether to make an order referred to in subsection (1), the court must consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company is to be governed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan will enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's assets; and

(f) whether any creditor will be materially prejudiced as a result of the company's continued operations.

Rationale

Interim financing provides funds to a business in financial distress to enable the business to continue to operate while it attempts to restructure its debts. The most important element is the obtaining of a priority charge by the interim lender in respect of the amount lent, thereby decreasing the lender's risk and increasing the likelihood that a willing lender can be found. The court, in determining whether to grant a priority charge, relies on factors developed through jurisprudence. The reform is generally a codification of the current practice, with additional safeguards to defend against possible abuse.

Subsection (1) provides a court with the authority to grant a charge against the property of a debtor in respect of interim financing, subject to certain limits. In the situation described in paragraph (a), the court may only approve interim financing to meet the cash flow needs of a business for a period of 30 days. In the situation described in paragraph (b), the court may approve interim financing to meet the needs of a business for a period determined by the court to be appropriate in the circumstances.

The provision in paragraph (a), which is not within the current practice, is a safeguard intended to prevent potential abuse. Creditors have complained that some debtors attend court on the first day armed with an agreement with its chosen financier that provides for interim financing far in excess of the company's short-term cash flow needs and with terms that may be overly generous to the lender. Because the debtor is usually the initiator of proposal proceedings, creditors may not have notice, or insufficient notice, of the hearing to properly prepare to defend their interests at that hearing. On the other hand, a business in severe financial distress may require immediate funding to continue operating. The allowance of limited interim financing at the first hearing is intended to balance the needs of the business with the rights of creditors.

Paragraph (b) is substantially a codification of the current practice. It requires that secured creditors be given notice of the application, allowing them to defend their interests as they determine appropriate. The court should be in the best position, after hearing from the debtor and any interested creditors, to determine the appropriate period for interim financing.

Subsection (2) is intended to ensure that the court has the information necessary to make a proper determination under this provision. The requirement for the monitor to bless the statement is intended to provide assurance to the court that the information is reliable.

Subsection (3) is the heart of the section. It provides the court with legislative authority to grant the interim lender a priority security charge above the secured interests of other creditors. It is necessary because lenders would be very reluctant to provide financing to a business in financial difficulty. The priority charge reduces the risk that the lender will suffer a loss. While the priority charge negatively affects existing creditors, it is widely accepted that interim financing enhances the ability of the business to restructure successfully, which generally results in better recovery for the creditors than a bankruptcy would.

Subsection (4) is intended to ensure that an interim lender that has taken the risk of providing financing early in the restructuring process does not have its security interest effectively shunted aside by a later lender without their consent. A later lender will have better information regarding the likelihood of a successful restructuring and can make the determination at that time whether it chooses to lend to the business. The ability of the first lender to consent to the granting of a higher priority is intended to provide greater flexibility in the process.

Subsection (5) provides the court with guidance regarding factors that should be considered prior to the granting of a priority charge under subsection (3). The described factors are largely a codification of the current jurisprudence. The intention is to provision is to ensure greater consistency, fairness and predictability in the process.

Present Law

None.

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Senate Recommendation

The proposed reform follows Senate recommendation #22.

Bill Clause No. 128
Section No. 11.03
Topic: Director Stays

Proposed Wording

11.03 (1) An order made under section **11.02** may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of **those** obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

(3) **If** all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

Rationale

The reform is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical errors.

Present Law

11.5 (1) An order made under section 11 may provide that no person may commence or continue any action against a director of the debtor company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company where directors are under any law liable in their capacity as directors for the payment of such obligations, until a compromise or arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

(3) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company shall be deemed to be a director for the purposes of this section.

Senate Recommendation

None.

CCAA: Initial application

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 128
Section No. 11.3
Topic: Assignments

Proposed Wording

11.3 (1) The court may, on the application of a debtor company, make an order assigning the rights and obligations of the company under any agreement to any person, to be specified by the court, who has agreed to the assignment.

(2) The applicant must give notice of the assignment in the prescribed manner to every party to the agreement.

(3) Subsection (1) does not apply in respect of rights and obligations

(a) under an eligible financial contract within the meaning of subsection 11.05(3);

(b) under a collective agreement; or

(c) that are not assignable by reason of their nature.

(4) In deciding whether to make an assignment, the court must consider, among other things,

(a) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(b) whether it would be appropriate to assign the rights and obligations to that person.

(5) The court may not make an order assigning an agreement unless it is satisfied that all financial defaults in relation to the agreement will be remedied.

Rationale

The intention of the reform is to protect and enhance the assets of the debtor company by allowing the debtor company to assign existing agreements to third parties for value.

Subsection (1) requires that court approval be obtained because there may be valid concerns that the party to whom the debtor company wishes to assign the agreement may not be appropriate. The court can act as a disinterested third party to make a determination of the appropriateness of the proposed assignee based on the facts of the particular case.

A court hearing will only be required in circumstances where a counter-party refuses to agree to an assignment or an assignment to a particular third party. Subsection (2) is intended to ensure that the counter-parties to the agreement have an opportunity to present their interests to the court.

Subsection (3) excludes certain agreements from the application of the section. Paragraphs (a) and (b) refer to agreements that have special treatment under the CCAA (Companies' Creditors Arrangement Act) and assignment would be contrary to that treatment. Paragraph (c) provides the court with the opportunity to extend the exclusion provision to include agreements that it considers non-assignable due to the agreements nature. The last paragraph is intended to provide flexibility to the court to review each agreement in light of the circumstances to determine whether or not it would be appropriate to allow the assignment.

Subsection (4) provides the courts with legislative guidance as to when an agreement may be assigned. The guidance is limited to enable the court to exercise its discretion to address individual fact situations.

Subsection (5) provides balance between the interests of the debtor and counter-parties to an agreement that is to be assigned. It would be unfair that the estate benefit financially by an assignment at the same time that a counter party is required to take a loss. If the agreement is in financial default, the counter-party would only have a claim against the debtor in bankruptcy.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #31.

Bill Clause No. 128
Section No. 11.04
Topic: Guarantors

Proposed Wording

11.04 No order made under section **11.02** has **affect on** any action, suit or proceeding against a person, other than **the** company in respect of **whom the order is made**, who is obligated under a letter of credit or guarantee in relation to the company.

Rationale

The reform is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical error.

The current section refers to an order made in respect of a company, which has made an application under this Act. Because of reforms to section 11 and 11.02, it was necessary to amend the language of the section to refer to "the company in respect of whom the order is made." The language changes do not affect the provision's effect.

Present Law

11.2 No order may be made under section 11 staying or restraining any action, suit or proceeding against a person, other than a debtor company in respect of which an application has been made under this Act, who is obligated under a letter of credit or guarantee in relation to the company.

Senate Recommendation

None.

Bill Clause No. 128
Section No. 11.4
Topic: Critical Supplier

Proposed Wording

11.4 (1) On application by a debtor company, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that those goods or services are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company.

Rationale

Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

Subsection (1) provides that a court may designate a supplier to the debtor company to be a critical supplier. The designation should not be lightly granted but should only be made where the supplier is of such a nature that the debtor company would not be able to continue to operate without a continuing business relationship.

Subsection (2) provides that a court may require a critical supplier to continue to supply goods and services to the debtor company. The court will have the authority to determine the appropriate terms and conditions of the business relationship, however, the court should look to the existing terms or, if necessary, the prevailing market terms.

Subsection (3) stipulates that the court must provide the critical supplier with a security charge for the value of the goods or services supplied as a critical supplier. The provision is to ensure that the critical supplier is paid for its goods or services.

Subsection (4) provides the court with the ability to determine the priority of the security charge. It is expected that the court will recognize the uniqueness of this situation and grant the critical supplier a high priority.

Present Law

None.

195

Senate Recommendation

None.

Bill Clause No. 128
Section No. 11.05
Topic: Eligible Financial Contracts

Proposed Wording

11.05 (1) No order may be made under **section 11.02** staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment, **or a forfeiture of the term**, under an eligible financial contract.

(2) For greater certainty, **if** an eligible financial contract entered into before an order is made under section **11.02** is terminated on or after the date of the order, the setting off of obligations between the company and the other parties to the eligible financial contract, in accordance with its provisions, is permitted and, if net termination values determined in accordance with the eligible financial contract are owed by the company to another party to the eligible financial contract, that other party **is** deemed to be a creditor of the company with a claim against the company in respect of the net termination values.

(3) **The following definitions apply** in this section.

"eligible financial contract" means

(a) a currency or interest rate swap agreement;

(b) a basis swap agreement;

(c) a spot, future, forward or other foreign exchange agreement;

(d) a cap, collar or floor transaction;

(e) a commodity swap;

(f) a forward rate agreement;

(g) a repurchase or reverse repurchase agreement;

(h) a spot, future, forward or other commodity contract;

(i) an agreement to buy, sell, borrow or lend securities, to clear or settle securities transactions or to act as a depository for securities;

(j) any derivative, combination or option in respect of, or agreement similar to, an agreement or contract referred to in paragraphs *(a)* to *(i)*;

(k) any master agreement in respect of any agreement or contract referred to in paragraphs *(a)* to *(j)*;

(l) any master agreement in respect of a master agreement referred to in paragraph *(k)*;

(m) a guarantee of the liabilities under an agreement or contract referred to in paragraphs *(a)* to *(l)*; or

(n) any agreement of a prescribed kind.

"net termination value" means the net amount obtained after setting off the mutual obligations between the parties to an eligible financial contract in accordance with its provisions.

Rationale

The reform is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical errors.

The reform included removing subsection 11.1(2) — the substance of the subsection is now found at section 11.06. The two matters in previously found in section 11.1 (eligible financial contracts and Canadian Payment Association) were not interconnected and it was determined appropriate to separate them into different sections.

The phrase "forfeiture of term" has been added at subsection (1) to clarify that the court does not have the authority to restrict the exercise of rights under eligible financial contracts.

Present Law

11.1 (1) In this section, "eligible financial contract" means

(a) a currency or interest rate swap agreement,

(b) a basis swap agreement,

(c) a spot, future, forward or other foreign exchange agreement,

(d) a cap, collar or floor transaction,

(e) a commodity swap,

(f) a forward rate agreement,

(g) a repurchase or reverse repurchase agreement,

(h) a spot, future, forward or other commodity contract,

(i) an agreement to buy, sell, borrow or lend securities, to clear or settle securities transactions or to act as a depository for securities,

(j) any derivative, combination or option in respect of, or agreement similar to, an agreement or contract referred to in paragraphs

(a) to *(i)*,

(k) any master agreement in respect of any agreement or contract referred to in paragraphs *(a)* to *(j)*,

(l) any master agreement in respect of a master agreement referred to in paragraph *(k)*,

(m) a guarantee of the liabilities under an agreement or contract referred to in paragraphs *(a)* to *(l)*, or

(n) any agreement of a kind prescribed;

"net termination value" means the net amount obtained after setting off the mutual obligations between the parties to an eligible financial contract in accordance with its provisions.

(3) For greater certainty, where an eligible financial contract entered into before an order is made under section 11 is terminated on or after the date of the order, the setting off of obligations between the company and the other parties to the eligible financial contract, in accordance with its provisions, is permitted, and if net termination values determined in accordance with the eligible financial contract are owed by the company to another party to the eligible financial contract, that other party shall be deemed to be a creditor of the company with a claim against the company in respect of the net termination values.

Senate Recommendation

None.

Bill Clause No. 128

Section No. 11.5

Topic: Removal of Directors

Proposed Wording

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

(2) The court may, by order, fill any vacancy created under subsection (1).

Rationale

The directors of a debtor company have a predominant role during the restructuring process. Unlike in a bankruptcy, the directors retain control of the debtor's assets (rather than having a receiver or trustee appointed) and also control the development of the proposal that will be put to the creditors. This is a strong position from which the directors may positively or negatively affect the restructuring process.

Under corporate law, directors have a fiduciary duty to act in the best interest of the corporation, which the courts have interpreted in the seminal *Peoples* case to mean to make a "better" corporation. What is meant by a "better" corporation means will vary in the individual circumstances. The remedies available to stakeholders, however, when a director fails to act in the correct manner can be both difficult and time consuming to obtain.

The Stelco CCAA (Companies' Creditors Arrangement Act) proceeding brought this issue to the forefront. In that situation, the board of directors appointed two shareholder activists to fill positions left vacant prior to the CCAA (Companies' Creditors Arrangement Act) filing. On application of Stelco pensioners, the bankruptcy judge ordered the appointees removed because of the perceived conflict of interest they engendered and the real risk that their appointment would poison the negotiations with other stakeholders. The Court of Appeal reversed the decision on the grounds that the CCAA (Companies' Creditors Arrangement Act) does not give the court the authority to remove directors — rather, the stakeholders were required to prove oppression under corporate law. The matter is now being appealed to the Supreme Court of Canada.

The difficulties in the Stelco case show that the current legislation is neither efficient nor flexible enough to deal with real factual problems in a timely manner. The reform is intended to provide shareholders, creditors and other stakeholders with the opportunity to quickly address problematic situations.

Subsection (2) provides the court with the authority to fill any vacancy created by a removal order. The subsection is intended to address the situation where there is only one or a small number of directors or the unlikely situation where the court determines that it is in the best interest of the debtor to remove the board en masse. In these limited situations, the court may be hesitant to grant the order only because it would leave the debtor without a quorum of directors. Providing the court with the authority to fix that situation without resorting to the time consuming process of holding a shareholder meeting to elect new directors will ensure that the restructuring can continue. In addition, the court will hear from the interested parties, including respecting persons who should be appointed to fill the vacancies.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #35.

Bill Clause No. 128
Section No. 11.06
Topic: Payments Association

Proposed Wording

11.06 Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.

Rationale

The reform is a technical amendment to re-order provisions of this Act and correct cross-referencing.

Present Law

11.1 (2) No order may be made under this Act staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.

Senate Recommendation

None.

Bill Clause No. 128
Section No. 11.07
Topic: Aircraft Objects

Proposed Wording

11.07 No order **may be** made under section **11.02 that has the effect of preventing** a creditor who holds security on aircraft objects **—** or a lessor of aircraft objects **—** under an agreement with a company from taking possession of the **aircraft objects**

(a) if, after the commencement of proceedings under this Act, the company defaults in protecting or maintaining the **aircraft objects** in accordance with the agreement;

(b) 60 days after the commencement of proceedings under this Act unless, during that period, the company

(i) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the company's financial condition,

(ii) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition, until proceedings under this Act end, and

(iii) agreed to perform all the obligations arising under the agreement after the proceedings under this Act end; or

(c) if, during the period that begins **60 days after the commencement of the proceedings under this Act** and ends on the day on which proceedings under this Act end, the company defaults in performing an obligation under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition.

Rationale

The existing provision is to be introduced into the CCAA (Companies' Creditors Arrangement Act) by the coming into force of the *Act to implement the Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (the Act). Due to commitments made under the Act, it became necessary to create an exception so that creditors with security on aircraft objects are not subject to the stay of proceedings under the CCAA (Companies' Creditors Arrangement Act) if the debtor fails to protect or maintain the object in accordance with the agreement. The Act also provides that 60 days following the filing of the notice of intention, the creditor can seize the object unless the debtor has remedied all defaults under the agreement. Finally, it releases the stay if after the 60-day period the debtor goes into default.

The reform is a technical amendment to re-order provisions of this Act, correct cross-referencing, correct grammatical errors and introduce the defined term "aircraft objects".

Present Law

11.31 No order made under section 11 prevents a creditor who holds security on aircraft objects — or a lessor of aircraft objects or a conditional seller of aircraft objects — under an agreement with a debtor company in respect of which an application is made under this Act from taking possession of the equipment

(a) if, after the commencement of proceedings under this Act, the company defaults in protecting or maintaining the equipment in accordance with the agreement;

(b) sixty days after the commencement of proceedings under this Act unless, during that period, the company

(i) remedied the default of every other obligation under the agreement, other than a default constituted by the commencement of proceedings under this Act or the breach of a provision in the agreement relating to the company's financial condition,

(ii) agreed to perform the obligations under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition, until proceedings under this Act end, and

(iii) agreed to perform all the obligations arising under the agreement after the proceedings under this Act end; or *(c)* if, during the period that begins on the expiry of the sixty-day period and ends on the day on which proceedings under this Act end, the company defaults in performing an obligation under the agreement, other than an obligation not to become insolvent or an obligation relating to the company's financial condition.

Senate Recommendation

None.

Bill Clause No. 128
Section No. 11.08
Topic: Government Function Stay

Proposed Wording

11.08 No order may be made under **section 11.02 that affects**

(a) the exercise **or performance** by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise **or performance** by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

Rationale

The reform is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical errors.

Present Law

11.11 No order may be made under this Act staying or restraining

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions of any power, duty or function assigned to them by the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*;

(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the *Canada Deposit Insurance Corporation Act*; or

(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the *Winding-up and Restructuring Act*.

Senate Recommendation

None.

CCAA: Initial application

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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Bill Clause No. 128
Section No. 11.09
Topic: Her Majesty Stay

Proposed Wording

11.09 (1) An order made under **section 11.02** may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for **the** period **that** the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) that may apply.

(2) **The portions of** an order **made** under **section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)*(a)* or *(b)*** cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) An order made under section **11.02**, **other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)*(a)* or *(b)***, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the Canada Pension Plan, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Rationale

The reform is a technical amendment to re-order provisions of this Act, correct cross-referencing and correct for grammatical errors.

The chapeau of subsections (2) and (3) have been amended to clarify that it is only the portion of the court order that creates a stay respecting Her Majesty rights that is affected by the operation of the subsections. The remainder of the court order is intended to continue in force.

Present Law

11.4 (1) An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the Canada Pension Plan or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (a)(i) to (v) may apply.

(2) An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act,*

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Senate Recommendation

None.

Bill Clause No. 128

Section No. 11.51

Topic: Director Indemnification

Proposed Wording

11.51 (1) The court may, on the application of a debtor company, make an order declaring that the property of the company is subject to a security or charge, in an amount that the court considers appropriate, in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that he or she may incur as a director or an officer of the company after the commencement of proceedings against the company under this Act.

(2) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company.

(3) The court shall not make the order if, in its opinion, the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or an officer if it is of the opinion that the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in the Province of Quebec, the director's gross or intentional fault.

Rationale

Directors of corporations are subject to legal liabilities created by statute and case law. While it is recognized that those who accept the responsibility of the position should do so after serious consideration of their abilities and the expectations, increasing personal liability for directors in more areas can reduce the pool of qualified candidates.

Directors and officers are confronted with significant, statutorily created personal liability, including for unpaid wages and taxes, when the business they are engaged by suffers financial difficulties. Some statutory liabilities provide for a due diligence defence but not all. Because of the risks in an insolvency situation that are out of the directors' control, many question the wisdom of acting for a company during a restructuring. In some instances, directors have resigned en masse rather than accept the liability — leaving the business without experienced direction or control when it needs it most.

The purpose of the reform is to provide directors and officers with greater protection against personal liability that may arise due to circumstances beyond their control in an insolvency proceeding. During a restructuring, companies often suffer restricted cash flow making it difficult for the directors and officers to ensure that all parties are paid. By providing directors with indemnification under specific circumstances, more directors should be willing to continue to act, which would increase the likelihood of a successful restructuring.

Subsection (1) provides certain limits to the indemnity. First, the amount of an indemnity is subject to court determination to ensure that other creditors are not unfairly prejudiced by a conservative approach taken by the debtor for the directors' protection. Allowing the company to determine the appropriate indemnity would result in a conflict of interest, as the directors would effectively have the ability to protect themselves. Second, the indemnity only applies in respect of obligations or liabilities incurred after the date of a filing. The restriction should force directors to act quickly to address the company's financial problems.

Subsection (2) provides the court with the ability to determine the priority of the security charge.

Subsection (3) limits the circumstances in which a court could grant an indemnity against the property of the debtor. Where directors' and officers' insurance is available, that option would almost always be the preferred choice, however, some D&O insurance policies either eliminate or restrict coverage after an insolvency filing. Therefore, there may be few choices but for the directors to seek the statutory indemnity.

Subsection (4) restricts the indemnity to circumstances where the directors and officers have acted with due regard to their duties. A finding of a court that an obligation or liability arose due to the director's or officer's gross negligence or wilful misconduct would negate the ability of that person to access the indemnity. The provision is open ended to allow any party interested to bring an application, or a court acting of its own accord, to challenge the standard of conduct of the director or officer.

Present Law

None.

Senate Recommendation

Senate recommendation #25 proposed a general due diligence defence against personal liability for directors. The creation of an indemnification process for directors and officers, coupled with the specified limitations, addressed the Senate concerns regarding directors' liability while simplifying the process.

Bill Clause No. 128
Section No. 11.52
Topic: Professional Costs

Proposed Wording

11.52 The court may make an order declaring that property of a debtor company is subject to a security or charge, in an amount that the court considers appropriate, in respect of

(a) the costs of the monitor, including the remuneration and expenses of any financial, legal or other experts engaged by the monitor in the course of the monitor's duties;

(b) the remuneration and expenses of any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) the costs of any interested party in relation to the remuneration and expenses of any financial, legal or other experts engaged by it, if the court is satisfied that the incurring of those costs is necessary for the effective participation of the interested party in the proceedings under this Act.

Rationale

The process of preparing a compromise or arrangement under the CCAA (Companies' Creditors Arrangement Act) can be a time consuming and expensive proposition for all of the parties involved. To obtain an agreement requires negotiations between the debtor, creditors and other stakeholders. To negotiate, the parties may require financial, legal and other expertise to assist them. The expense of engaging such professionals may be beyond the resources of many stakeholders, including unions or employee groups, pensioners and trade creditors. Stakeholders without the necessary resources may be unable to participate effectively, thereby reducing their ability to protect their interests.

The intention of the reform is to ensure effective participation of interested stakeholders — either directly, if they are large creditors, or indirectly as part of a creditors' group or stakeholders group. It is expected that the court will limit the application of this provision to situations where a group of small creditors may be jointly represented rather than allow each creditor to engage their own experts at the debtor's expense.

The reform provides the court with legislative authority to grant certain parties a priority charge over the assets of an entity that has commenced proceedings respecting a proposal. Paragraph (a) provides for the expenses of monitors. Paragraph (b) provides for the cost of the debtor company's own legal and financial professionals. Because the debtor is cash-restricted and may be unable to pay its ongoing obligations, professionals would be unlikely to act for the debtor without some guarantee of payment. These professionals regularly receive a priority charge in current practice. Paragraph (c) provides for third party's professional costs to be paid. Stakeholder groups have stated that small creditors tend not to be well represented during negotiations because the cost of engaging professionals is too high. The reform is intended to increase the ability of more creditors to act.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 129
Section No. 11.7
Topic: Monitors

Proposed Wording

11.7 (1) When an order **is made on the initial application in respect of** a **debtor** company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. **The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.**

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

***(a)* if the trustee is or, at any time during the two preceding years, was**

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

***(b)* if the trustee is**

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

Rationale

The monitor in a CCAA (Companies' Creditors Arrangement Act) proceeding acts as an officer of the court. It plays a vital role observing and reporting on the management and governance of the debtor company to the court. The party who acts as monitor must be professional, competent and reliable.

Subsection (1) requires that the monitor be a licensed trustee. This ensures that the person acting is a professional who has been trained and examined for their competence. Further, it ensures that the monitor is accountable for errors or omissions because licensed trustees are subject to discipline under the Office of the Superintendent of Bankruptcy.

Subsection (2) protects against conflicts of interests that may affect the performance of the monitor. Currently, the debtor company's auditor may act as monitor. This may create a perception of bias in the minds of creditors and stakeholders. The reform extends the prohibition against related parties to levels on par with best practice in corporate governance.

Subsection (3) provides creditors with an opportunity to seek the removal of a monitor. The practice is that the debtor company chooses its monitor. The creditors do not have an opportunity at the initial hearing to oppose the appointment of the monitor. The provision will allow a creditor to challenge a relationship that is inappropriate for any reason.

Present Law

11.7 (1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as "the monitor", to monitor the business and financial affairs of the company while the order remains in effect.

(2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.

Senate Recommendation

CCAA: Claims

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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- **Bill Clause No.** 130 - CCAA (Companies' Creditors Arrangement Act) Section 12
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 19
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 20
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 21
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 22

Bill Clause No. 130
Section No. 12
Topic: Claims Deadline

Proposed Wording

12. The court may make an order fixing a deadline for creditors to file their claims against a company for the purpose of voting at a creditors' meeting held under section 4 or 5.

Rationale

A technical amendment to clarify that the court has the authority to fix a deadline for creditors to file claims, after which the claim would be defeated by a successful vote in favour of a plan of arrangement or compromise.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 19
Topic: Claims

Proposed Wording

19. (1) Subject to subsection (2), in addition to deemed claims, the only claims that may be dealt with by a compromise or an arrangement in respect of a debtor company are

(a) claims that relate to debts and liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which the initial application was made in respect of the company, and

(ii) if the company had filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or an application under this Act was made by the company with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the day that is the date of the initial bankruptcy event within the meaning of subsection 2(1) of that Act; and

(b) claims that relate to debts and liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs *(a)*(i) and (ii).

(2) A compromise or an arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the relevant creditor has agreed to the compromise or arrangement:

(a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;

(b) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or

(ii) wrongful death resulting from an act referred to in subparagraph (i);

(c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or an administrator of the property of others;

(d) any debt or liability for obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from the purchase or sale of a share or unit of the company or from the rescission of any such purchase or sale; or

(e) any debt for interest owed in relation to an amount referred to in any of paragraphs *(a)* to *(d)*.

Rationale

The release of claims pursuant to a compromise or arrangement requires clarification. Certain stakeholders have argued that their claims were dealt with by a compromise without their knowledge or consent. Currently, the CCAA (Companies' Creditors Arrangement Act) does not expressly state what debts and liabilities of the debtor company may be dealt with pursuant to a proceeding.

Subsection (1) clarifies that the obligations to be dealt with during a proceeding under the CCAA (Companies' Creditors Arrangement Act) are debts and liabilities that existed before insolvency proceedings were commenced or debts and liabilities that have been created after that date relating to obligations entered into by the debtor company before that date.

Subsection (2) has been introduced to create specific debts and liabilities that may not be dealt with by a compromise or arrangement without the express consent of the claimholder. This provision mirrors a similar provision in the BIA (Bankruptcy and Insolvency Act), with specific amendments to reflect that the CCAA (Companies' Creditors Arrangement Act) deals only with entities and not individuals.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 20
Topic: Claim Amounts

Proposed Wording

20. (1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor **is to** be determined as follows:

(a) the amount of an unsecured claim **is** the amount

(i) in the case of a company in the course of being wound up under the Winding-up and Restructuring Act, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

(2) Despite subsection (1), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

(3) No person is entitled to vote on a claim acquired after the initial application in respect of the company, unless the entire claim is acquired.

Rationale

The reform in subsections (1) and (2) is a technical amendment to re-order provisions of this Act, correct for cross-referencing and correct for grammatical errors.

Subsection (3) is intended to address a potential abuse of the CCAA (Companies' Creditors Arrangement Act) voting process that is causing growing concern in Canada. Parties may swoop in after a CCAA (Companies' Creditors Arrangement Act) filing and purchase distressed debt, particularly unsecured claims, at a discount from the original holder. The third party then uses the votes it obtained by purchasing claims to push the restructuring in a direction advantageous to their position.

The issue that is causing concern, however, is the practice of purchasing portions of claims. A party may purchase a portion of claims from claimholders. This gives the third party a "claim" for each portion of claim that it has purchased. Under the CCAA (Companies' Creditors Arrangement Act) voting rules, to obtain approval, the compromise or arrangement requires support of a majority of claim holders within each class. Therefore, a party may be able to impose its will upon the proceedings by holding a large number of small claims that it purchased after the initial filing.

To be clear, the practice of purchasing distressed debt is not to be restricted — there are benefits to the risk adverse creditors who are able to recoup some money of the claim owed to them and benefits to the restructuring because vulture funds tend to bring great discipline to the proceedings. The reform will require any purchaser of a claim to purchase the entire claim. This should prevent "claim-splitting" and maintain integrity in the voting process.

Present Law

12. (2) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor shall be determined as follows:

a) the amount of an unsecured claim shall be the amount

(i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,

(ii) in the case of a company that has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or

(iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount shall be determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim shall be the amount, proof of which might be made in respect thereof under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company shall, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and in the case of any other company the amount shall be determined by the court on summary application by the company or the creditor.

(3) Notwithstanding subsection (2), the company may admit the amount of a claim for voting purposes under reserve of the right to contest liability on the claim for other purposes, and nothing in this Act, the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act* prevents a secured creditor from voting at a meeting of secured creditors or any class of them in respect of the total amount of a claim as admitted.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 21
Topic: Set-off

Proposed Wording

21. The law of set-off **or compensation** applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

Rationale

The reform is a technical amendment to re-order provisions of this Act and correct for legal terms.

Present Law

18.1 The law of set-off applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 22
Topic: Classes of Creditors

Proposed Wording

22. (1) Subject to subsection (3), a debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or an arrangement relating to a company and, if it does so, it must apply to the court for approval of the division before any meeting is held.

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs *(a)* to *(c)*, that are prescribed.

(3) Creditors having a claim against a debtor company arising from the rescission of a purchase or sale of a share or unit of the company — or a claim for damages arising from the purchase or sale of a share or unit of the company — must be in the same class of creditors in relation to those claims and may not, as members of that class, vote at a meeting to be held under section 4 in respect of a compromise or an arrangement relating to the company.

Rationale

Subsection (1) provides that the debtor company may divide its creditors into classes for the purpose of voting on a proposal provided the debtor company obtains court approval of the division. The current practice does not require court approval. From a fairness standpoint, creditors who object to their classification should have the opportunity to seek redress. By requiring court approval, the unhappy creditor will have that opportunity to approach a disinterested third party for that redress.

Subsection (2) sets out the factors that the debtor company must consider in dividing its creditors into classes. The provision mirrors a similar provision in the BIA (Bankruptcy and Insolvency Act) (excluding a factor that is relevant only due to the nature of proposal proceedings under the BIA (Bankruptcy and Insolvency Act)).

The intention of the reform in subsection (3) is to put shareholders with claims relating to their ownership of shares at the bottom of the priorities list. In a concurrent reform of section 136 of the BIA (Bankruptcy and Insolvency Act), shareholders with claims against the company for tort actions are explicitly placed at the bottom of the priorities list for recovery of their losses. In a CCAA (Companies' Creditors Arrangement Act) proceeding, unlike in bankruptcy that has a set distribution list, payment of claims is based on negotiations between the parties. Therefore, to reduce the power of shareholder claimants who might otherwise control the voting due to substantial claims, the reform removes the right of such creditors to vote on a compromise or arrangement. Effectively, the shareholder claimant should lose any voice in the negotiations.

Present Law

None.

Senate Recommendation

The reform proposed by subsection (3) follows Senate recommendation #40.

The Senate made no recommendations regarding subsections (1) and (2).

CCAA: Duties of the Monitor

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 23
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 24
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 25

- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 26
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 27
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 28
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 29
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 30
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 31

Bill Clause No. 131
Section No. 23
Topic: Monitor's Duties

Proposed Wording

23. (1) The monitor shall

(a) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the order is made,

(A) send a copy of the order to every known creditor who has a claim against the company of more than $1,000, and

(B) make a list showing the name and address of those creditors publicly available in the prescribed manner;

(b) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(c) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(d) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) without delay after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,

(ii) at least seven days before any meeting of creditors under section 4 or 5,

(iii) not later than 45 days, or any longer period that the court may specify, after the end of each of the company's fiscal quarters, and

(iv) at any other times that the court may order;

(e) advise the company's creditors of the filing of the report referred to in any of paragraphs *(b)* to *(d)*;

(f) file with the Superintendent of Bankruptcy a copy of the documents specified by the regulations and pay the prescribed filing fee;

(g) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(h) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) unless the court otherwise orders, make publicly available, in the prescribed manner, all documents filed with the court, and all court decisions, relating to proceedings held under this Act in respect the company and provide the company's creditors with information as to how they may access those documents and decisions; and

(k) carry out any other functions in relation to the company that the court may direct.

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

Rationale

The monitor has a significant role in a CCAA (Companies' Creditors Arrangement Act) proceeding as an officer of the court, overseer of the business and impartial observer of the restructuring. The current legislation does not set out the obligations of the monitor clearly; making it unclear exactly what is expected of the monitor during the restructuring.

Subsection (1) sets out the specific duties required of the monitor. In conjunction with other amendments to professionalize the role of the monitor, the list of duties should provide better context during a restructuring for the monitor, creditors and the debtor as to the role of the monitor.

Subsection (2) provides the monitor with a due diligence defence in respect of the monitor's review of reports prepared by the debtor company. A monitor must rely, to a certain extent, on the information provided by the debtor company, however, the monitor must also take positive steps to confirm that information for the benefit of the creditors and other stakeholders.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 24
Topic: Monitor's Rights

Proposed Wording

24. For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

Rationale

The reform supports the expanded duties of the monitor set out in section 23. As the monitor is required to take greater action to oversee the business and affairs of the debtor company, including reviewing the cash-flow statement and other financial statements to be filed with the court, the monitor requires the authority to access the information necessary to determine the accuracy of such documents.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 25
Topic: Monitor's Obligations

Proposed Wording

25. In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

Rationale

The monitor's role will be expanded by the reforms, to create a more effective and independent overseer of the debtor company's business and affairs. To balance the new duties and powers granted by sections 23 and 24 of the Bill, this provision sets guidelines for the behaviour of the monitor by requiring them to comply with the Code of Ethics applicable to trustees.

The provision mirrors the obligations that trustees face in proceedings under the BIA (Bankruptcy and Insolvency Act).

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 26
Topic: Superintendent's Duties — Public Records

Proposed Wording

26. (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, a public record of prescribed information relating to proceedings under this Act. On request, and on payment of the prescribed fee, the Superintendent of Bankruptcy must provide, or cause to be provided, any information contained in that public record.

(2) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers appropriate and for the prescribed period, any other records relating to the administration of this Act that he or she considers appropriate.

Rationale

Currently, the Office of the Superintendent of Bankruptcy (OSB) is charged with keeping records of BIA (Bankruptcy and Insolvency Act) proceedings, however, there is no corresponding power in the CCAA (Companies' Creditors Arrangement Act). The information obtained regarding BIA (Bankruptcy and Insolvency Act) proceedings is a tool for research by academics and the government. In addition, collection of the material has allowed the OSB (Office of the Superintendent of Bankruptcy) to assist creditors and interested members of the public to understand the events in specific files.

The provisions are similar to provisions in the BIA (Bankruptcy and Insolvency Act). Subsection (1) is related to a duty of the monitor to file prescribed documents with the OSB (Office of the Superintendent of Bankruptcy). The subsection requires the OSB (Office of the Superintendent of Bankruptcy) to maintain the records and to provide access on a cost recovery basis. Subsection (2) provides that the OSB (Office of the Superintendent of Bankruptcy) with the authority to collect and maintain records other than those prescribed. Creditors seeking information regarding a specific matter or academics researching topics in the area of the CCAA (Companies' Creditors Arrangement Act) may be interested in the material. In addition, the information obtained from the materials will assist the OSB (Office of the Superintendent of Bankruptcy), Industry Canada and other government departments in recognizing trends and policy development.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 27
Topic: Superintendent's Duties — Monitor

Proposed Wording

27. The Superintendent of Bankruptcy may apply to the court to review the appointment or conduct of a monitor and may intervene, as though he or she were a party, in any matter or proceeding in court relating to the appointment or conduct of a monitor.

Rationale

Concurrent with amendments giving the Superintendent oversight authority over monitors, this provision provides the Superintendent with the authority to apply to the court or intervene in court hearings relating to the appointment or conduct of a monitor. It is expected that the Superintendent will exercise the power in situations where the monitor has breached the duties imposed by this Act.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 28
Topic: Superintendent's Duties — Complaints

Proposed Wording

28. The Superintendent of Bankruptcy must receive and keep a record of all complaints regarding the conduct of monitors.

Rationale

Concurrent with amendments giving the Superintendent oversight authority over monitors, this provision charges the Superintendent with keeping a record of public complaints regarding monitors.

The provision mirrors a similar provision in the BIA (Bankruptcy and Insolvency Act).

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 29
Topic: Superintendent's Duties — Investigations

Proposed Wording

29. (1) The Superintendent of Bankruptcy may make, or cause to be made, any inquiry or investigation regarding the conduct of monitors that he or she considers appropriate.

(2) For the purpose of the inquiry or investigation, the Superintendent of Bankruptcy or any person whom he or she appoints for the purpose

(a) shall have access to and the right to examine and make copies of all books, records, data, including data in electronic form, documents and papers in the possession or under the control of a monitor under this Act; and

(b) may, with the leave of the court granted on an ex parte application, examine the books, records, data, including data in electronic form, documents and papers relating to any compromise or arrangement to which this Act applies that are in the possession or under the control of any other person designated in the order granting the leave, and for that purpose may under a warrant from the court enter and search any premises.

(3) The Superintendent of Bankruptcy may engage the services of persons having technical or specialized knowledge, and persons to provide administrative services, to assist the Superintendent of Bankruptcy in conducting an inquiry or investigation, and may establish the terms and conditions of their engagement. The remuneration and expenses of those persons, when certified by the Superintendent of Bankruptcy, are payable out of the appropriation for the office of the Superintendent.

Rationale

Currently, monitors are accountable only to the court based solely on the instructions given to them by the court. The intention of the reform is to ensure that persons appointed as monitors are reliable, credible professionals. Concurrent amendments require that monitors be licensed trustees. The Office of the Superintendent of Bankruptcy is responsible for licensing matters related to trustees.

Subsection (1) provides the Superintendent with the authority to investigate the conduct of monitors. This power mirrors the authority of the Superintendent to investigate the conduct of trustees under the BIA (Bankruptcy and Insolvency Act).

Subsection (2) provides the Superintendent with the powers necessary to effectively investigate the monitor's conduct. Paragraph (a) provides the Superintendent with the authority to review information within the monitor's control without requiring court approval. Paragraph (b) provides the Superintendent with the means to obtain information from third parties to ensure that a monitor does not defeat an investigation by giving up control or possession of relevant documents.

Subsection (3) provides the Superintendent with the authority to engage experts in connection with the investigation of a monitor. It would not be economically feasible for the OSB (Office of the Superintendent of Bankruptcy) to maintain a staff with the full range of legal, financial and technical expertise that may be required from time to time.

The provisions mirror similar provisions in the BIA (Bankruptcy and Insolvency Act).

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 30
Topic: Superintendent's Powers

Proposed Wording

30. (1) If, after making or causing to be made an inquiry or investigation into the conduct of a monitor, it appears to the Superintendent of Bankruptcy that the monitor has not fully complied with this Act and its regulations or that it is in the public interest to do so, the Superintendent of Bankruptcy may

(a) cancel or suspend the monitor's licence as a trustee under the *Bankruptcy and Insolvency Act*; or

(b) place any condition or limitation on the licence that he or she considers appropriate.

(2) Before deciding whether to exercise any of the powers referred to in subsection (1), the Superintendent of Bankruptcy shall send the monitor written notice of the powers that the Superintendent may exercise and the reasons why they may be exercised and afford the monitor a reasonable opportunity for a hearing.

(3) The Superintendent of Bankruptcy may, for the purpose of the hearing, issue a subpoena or other request or summons, requiring and commanding any person named in it

(a) to appear at the time and place mentioned in it;

(b) to testify to all matters within his or her knowledge relative to the subject-matter of the inquiry or investigation into the conduct of the monitor; and

(c) to bring and produce any books, records, data, including data in electronic form, documents or papers in the person's possession or under the control of the person relative to the subject-matter of the inquiry or investigation.

(4) A person may be summoned from any part of Canada by virtue of a subpoena, request or summons issued under subsection (3).

(5) Any person summoned under subsection (3) is entitled to receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

(6) At the hearing, the Superintendent of Bankruptcy

(a) has the power to administer oaths;

(b) is not bound by any legal or technical rules of evidence in conducting the hearing;

(c) shall deal with the matters set out in the notice of the hearing as informally and expeditiously as the circumstances and a consideration of fairness permit; and

(d) shall cause a summary of any oral evidence to be made in writing.

(7) The notice referred to in subsection (2) and, if applicable, the summary of oral evidence referred to in paragraph (6)(d), together with any documentary evidence that the Superintendent of Bankruptcy receives in evidence, form the record of the hearing, and that record and the hearing are public unless the Superintendent of Bankruptcy is satisfied that personal or other matters that may be disclosed are of such a nature that the desirability of avoiding public disclosure of those matters, in the interest of a third party or in the public interest, outweighs the desirability of the access by the public to information about those matters.

(8) The decision of the Superintendent of Bankruptcy after the hearing, together with the reasons for the decision, must be given in writing to the monitor not later than three months after the conclusion of the hearing, and is public.

(9) A decision of the Superintendent of Bankruptcy given under subsection (8) is deemed to be a decision of a federal board, commission or other tribunal that may be reviewed and set aside under the *Federal Courts Act*.

Rationale

The CCAA (Companies' Creditors Arrangement Act) provides only a modest outline for the process of corporate restructuring, leaving flexibility for creative responses to novel situations. The monitor is a key part of the process, but there is currently little oversight of the monitor's actions during the restructuring process to ensure that the monitor acts fairly and equitably.

Section 30 is modelled on sections 14.01 and 14.02 of the BIA (Bankruptcy and Insolvency Act). It provides that the Superintendent may take complaints about the conduct of the monitor, investigate such complaints and intervene in proceedings in respect of the conduct of the monitor or appointment of a monitor. Monitors will be required to be licensed trustees. Accordingly, the CCAA (Companies' Creditors Arrangement Act) will provide that the Superintendent shall have powers to affect the trustee licence of a monitor on the same grounds and with the same restrictions as the Superintendent has under the BIA (Bankruptcy and Insolvency Act) to affect the licence of a trustee.

This provision is aimed at enhancing transparency and providing all parties with clearer expectations.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 31
Topic: Delegation of Superintendent's Powers

Proposed Wording

31. (1) The Superintendent of Bankruptcy may, in writing, authorize any person to exercise or perform, subject to any terms and conditions that he or she may specify in the authorization, any of the powers, duties or functions of the Superintendent of Bankruptcy under sections 29 and 30.

(2) If the Superintendent of Bankruptcy delegates in accordance with subsection (1), the Superintendent or the delegate must give notice of the delegation in the prescribed manner to any monitor who may be affected by the delegation.

Rationale

Concurrent with amendments giving the Superintendent oversight authority over monitors, this provision provides that the Superintendent may delegate that oversight authority to another person.

This provision mirrors a similar provision in the BIA (Bankruptcy and Insolvency Act).

Present Law

None.

Senate Recommendation

None.

CCAA: Disclaimer of contracts

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 32

Bill Clause No. 131
Section No. 32
Topic: Disclaimer of Agreements

Proposed Wording

32. (1) Subject to subsection (3), a debtor company may disclaim or resiliate any agreement to which it is a party on the day of the filing of the initial application in respect of the company by giving 30 days notice to the other parties to the agreement in the prescribed manner.

(2) Subsection (1) does not apply in respect of

(a) an eligible financial contract within the meaning of subsection 11.05(3);

(b) a collective agreement;

(c) a financing agreement if the debtor is the borrower; and

(d) a lease of real property or an immovable if the debtor is the lessor.

(3) Within 15 days after being given notice of the disclaimer or resiliation, a party to the agreement may apply to the court for a declaration that subsection (1) does not apply in respect of the agreement, and the court, on notice to any parties that it may direct, shall, subject to subsection (4), make that declaration.

(4) No declaration under subsection (3) shall be made if the court is satisfied that a viable compromise or arrangement could not be made in respect of the company without the disclaimer or resiliation of the agreement and all other agreements that the company has disclaimed or resiliated under subsection (1).

(5) If the company has, in any agreement, granted the use of any intellectual property to a party to the agreement, the disclaimer or resiliation of the agreement does not affect the party's right to use the intellectual property so long as that party continues to perform its obligations in relation to the use of the intellectual property.

(6) If an agreement is disclaimed or resiliated by a company, every other party to the agreement is deemed to have a claim for damages as an unsecured creditor.

Rationale

When a debtor company enters the restructuring process under the CCAA (Companies' Creditors Arrangement Act), it is necessary for it to negotiate a reduction of its debts and obligations with its creditors. Among the obligations that the debtor company may seek to renegotiate are ongoing agreements.

The intention of the reform is to allow debtor companies to be freed from unwanted and burdensome agreements that make up part of the financial distress experienced by it. The agreements may be the result of poor negotiations, poor planning or unforeseen circumstances; however, the result is the weighing down of the debtor by unsound commitments. To successfully emerge from restructuring, the debtor company may need to rid itself of some agreements.

The debtor company will be entitled to unilaterally terminate agreements, subject to specific limitations. This ability to act unilaterally differs from normal process that requires negotiating, however, the provision is balanced by granted to the injured third parties a claim for damages resulting from the disclaimer.

Subsection (2) specifies certain agreements that may not be unilaterally disclaimed by the debtor company. Paragraphs (a) and (b) refer to agreements that are subject to special treatment under the CCAA (Companies' Creditors Arrangement Act). Paragraphs (c) and (d) refer to agreements that have been specifically excluded because the effect of disclaimer on co-parties to those agreements could be grievous. For example, without paragraph (d), an apartment building landlord making a proposal could be entitled to evict all of its residential tenants. While that may assist the restructuring of the landlord debtor, its societal effects would be heinous.

Subsection (3) provides the third party with the right to challenge a disclaimer by application to the court.

Subsection (4) provides the test to determine if a court should grant the declaration under subsection (3). The test requires the court to determine whether it is necessary for the contracts being disclaimed to actually be disclaimed for the purposes of a successful restructuring. It is expected that the courts will refuse blanket disclaimers and require the debtor to show, at least to a minimal standard of evidence, that the disclaimer is required for it to emerge from the proceedings with a viable business.

Subsection (5) is intended to address the issue of intellectual property licenses. If a debtor company is entitled to disclaim agreements in which the debtor is the licensor of intellectual property, the licensees may be grievously harmed. In the United States, a similar approach is taken — the licensor must allow the licensee to continue to use the intellectual property provided the licensee continues to meet it obligations relating to the use.

Subsection (6) provides parties to a disclaimed agreement with the right to a claim for damages arising from the disclaimer.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #30.

CCAA: Collective Agreements

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 33

Bill Clause No. 131
Section No. 33
Topic: Collective Agreements

Proposed Wording

33. (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

(2) A debtor company that is a party to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the company to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

(3) The court may issue the order only if it is satisfied that

(a) a viable compromise or arrangement could not be made in respect of the company, taking into account the terms of the collective agreement;

(b) the company has made good faith efforts to renegotiate the provisions of the collective agreement; and

(c) a failure to issue the order is likely to result in irreparable damage to the company.

(4) The vote of the creditors in respect of a compromise or an arrangement may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent has not expired.

(5) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the company, the bargaining agent that is a party to the agreement is deemed to have a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.

(6) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the company's business or financial affairs and that is relevant to the collective bargaining between the company and the bargaining agent. The court may make the order only after the company has been authorized to serve a notice to bargain under subsection (2).

(7) For the purpose of this section, the parties to a collective agreement are the debtor company and the bargaining agent that are bound by the collective agreement.

(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

Rationale

Collective agreements set out the framework for unionized employees. When the employer faces financial difficulties and enters restructuring proceedings, it is common for the employer to review its employee costs, as it may be a significant portion of its expenses. The difficulty lies, however, in maintaining a balance between the interests of the employer's restructuring and the employees.

The intention of the reform is to ensure that the balance is maintained by placing any negotiations into the context of labour law, rules that both the employer and union understand and with which they are comfortable. This should improve likelihood of success of any negotiations.

Subsection (1) is intended to clarify that the court does not have the authority to unilaterally impose an amended collective agreement upon the parties. The subsection clearly provides that the power should not be read into the CCAA (Companies' Creditors Arrangement Act).

Subsection (2) provides that a debtor may apply to the court for an order authorizing the debtor to serve a "notice to bargain" under the applicable labour laws (provincial or federal, as the case may be) to the union's bargaining agent. A "notice to bargain" is a document that, under labour law, initiates collective bargaining. A court order is required because labour law stipulates specific periods when a notice to bargain may be served.

Subsection (3) sets conditions that must be met before a court may grant the order referred to in subsection (2). Paragraph (a) provides a standard test — that the action must be measured against the likelihood that it will further the restructuring aims. The test requests the court to balance the possible harm done to one party against the likely advantage gained by all parties to determine if the action should be taken. Paragraph (b) provides a check on the activity of the debtor. It is an equitable test requiring the debtor to appear before the court with "clean hands" — that the debtor is acting in good faith. Paragraph (c) requires the debtor to satisfy the court that the order is required for a viable restructuring. Where paragraph (a) is limited to having the court balance the interests of different stakeholders, paragraph (c) requires the court to consider the position of the debtor itself. Collectively, the three conditions that must be met require the court to consider the needs of all parties in a restructuring before granting the order referred to in subsection (1).

Subsection (4) is intended to clarify that the bankruptcy court maintains control of the restructuring. Because collective bargaining falls under the rules of provincial or federal labour relations, each with its time frames and requirements, it may have been misconstrued that the restructuring could not continue until labour negotiations were completed under the relevant rules. It is vital, however, that a restructuring is not postponed while dealing with labour issues. The debtor may continue to negotiate with other parties and may prepare a proposal to bring to its creditors before the time periods set out in the relevant labour law expire. The subsection provides the court with the authority to order a creditor vote on a proposal at the court's discretion. In conjunction with subsection (6), however, if the labour negotiations are ongoing, the existing collective agreement must be respected.

Subsection (5) provides the bargaining agent with the right to claim against the debtor as damages any concessions granted during negotiations with the debtor, whether or not the negotiations were ordered under subsection (1). The claim would be as an unsecured creditor. Other parties to agreements with the debtor, which agreements are disclaimed under section 32, have a claim for damages.

Subsection (6) provides that a bargaining agent may apply to the court for an order compelling a person with information regarding the debtor's business and financial affairs to provide that information to the bargaining agent. Unions have stated that they often lack information necessary to effectively bargain on behalf of the employees. Business and financial information publicly available is often out-dated. The court has been granted authority to limit the information that must be provided or impose conditions on its release to ensure public market security. It is expected that courts will impose confidentiality of the information and strict trading prohibitions where the debtor is a publicly traded company.

Subsection (8) ensures that there is no ambiguity with respect to the status of a collective agreement during a restructuring. Any collective agreement that the parties do not agree to amend remains in force and many not be altered by the court.

Present Law

None.

Senate Recommendation

None.

CCAA: Ipso facto clauses

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 34
- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 35

Bill Clause No. 131

Section No. 34

Topic: Ipso Facto Clauses

Proposed Wording

34. (1) No person may terminate or amend any agreement, including a security agreement, with a debtor company, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with a debtor company by reason only that an order has been made under this Act in respect of the company.

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only that an order has been made under this Act in respect of the company or that the company has not paid rent in respect of any period before the filing of the initial application in respect of the company.

(3) No public utility may discontinue service to a debtor company by reason only that an order has been made under this Act in respect of the company or that the company has not paid for services rendered, or for goods provided, before the filing of the initial application in respect of the company.

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the date of the filing of initial application in respect of the company; or

(b) requiring the further advance of money or credit.

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(6) The court may, on application by a party to an agreement, declare that this section does not apply, or applies only to the extent declared by the court, if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Rationale

Contracting parties attempt to ensure that they deal with reputable and reliable co-parties. An extension of the principle may result in the inclusion of a clause stipulating that a future event that creates doubt as to the reliability of the co-party, may be a cause to terminate the agreement. The difficulty with such clauses is that they ignore the fact that the debtor company may be fulfilling the agreement's terms and may continue to do so.

The intention of the reform is to ensure that agreements in good standing be respected by all parties. Therefore, the debtor company, who is attempting to reorganize, will not be unreasonably evicted, denied basic and essential services or denied other benefits to which it would otherwise be entitled.

The co-party will not be forced, however, to provide free services or materials to the debtor company. Except as described in subsections (2) and (3), the debtor company is required to pay for all services or materials provided to them. In addition, the co-party is not required to provide credit but may demand immediate payment. As such, the relationship between the debtor company and the co-party remains balanced.

Subsection (1) prohibits the termination of an agreement with a debtor company solely because the company filed under the CCAA (Companies' Creditors Arrangement Act). The intention of the reform is to provide protection for the debtor company's interests. The co-party maintains the right to terminate an agreement with the debtor company for any other reason but the filing under the CCAA (Companies' Creditors Arrangement Act). The reform will enhance the assets of the debtor company while not harming the interests of the co-party to the agreement.

Subsection (2) stipulates that a landlord may not evict a debtor company only because an order was made under the CCAA (Companies' Creditors Arrangement Act) with respect to the debtor company or there is an amount for past rent outstanding prior to the filing. Permitting a landlord to evict a debtor company only because of a reorganization or past obligations would jeopardise the reorganization. Balance in the relationship is restored, however, by requiring the debtor company to pay rent on an on-going basis.

Subsection (3) stipulates that a public utility may not discontinue service only because the debtor company owes for services rendered or material provided prior to the CCAA (Companies' Creditors Arrangement Act) filing. The debtor company is required to make payments for services and materials provided after the date of filing or the public utility would be entitled to discontinue service. Because public utilities provide essential services, permitting it to terminate service because of a CCAA (Companies' Creditors Arrangement Act) filing or because an amount is outstanding would jeopardise the reorganization. Balance in the relationship is restored, however, by requiring the bankrupt to pay for on-going service.

Subsection (4) clarifies that the debtor company is still required to comply with the terms of the agreement and that the co-party is not required to extend credit to the debtor company. The provision extends the fairness principle to the co-party.

Subsection (5) clarifies that parties may not contract out of the constraints imposed by this provision. The intention of the subsection is to ensure that when a debtor company is in an unequal bargaining position — for example, with a telephone service provider or other large, quasi-monopolistic enterprise — the debtor company would not be effectively forced to sign an unfavourable contract or be denied an essential service.

Subsection (6) provides that a party may seek court approval to terminate an agreement with the debtor company where the party can satisfy the court that the party would otherwise suffer a serious financial loss. The intention is to reserve flexibility in the system.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 35
Topic: Debtor Obligations

Proposed Wording

35. (1) A debtor company shall provide to the monitor the assistance that is necessary to enable the monitor to adequately carry out the monitor's functions.

(2) A debtor company shall perform the duties set out in section 158 of the *Bankruptcy and Insolvency Act* that are appropriate and applicable in the circumstances.

Rationale

The reform mirrors provisions in the BIA (Bankruptcy and Insolvency Act). The intention of the reform is to create a positive obligation on the debtor company to assist the monitor in its work and not purposely and negatively affect the restructuring proceedings.

Present Law

None.

Senate Recommendation

None.

CCAA: Sales of Assets

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 36

Bill Clause No. 131
Section No. 36
Topic: Sale of Assets

Proposed Wording

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or dispose of any of its assets outside the ordinary course of its business unless authorized to do so by a court.

(2) A company that applies to the court for the authorization must give notice of the application to all secured creditors who are likely to be affected by the proposed sale or disposal of the assets to which the application relates.

(3) In deciding whether to grant the authorization, the court must consider, among other things,

(a) whether the process leading to the proposed sale or disposal of the assets to which the application relates was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposal of the assets;

(c) whether the monitor has filed with the court a report stating that in his or her opinion the sale or disposal of the assets would be more beneficial to the creditors than if the sale or disposal took place under the *Bankruptcy and Insolvency Act*;

(d) the extent to which the creditors were consulted in respect of the proposed sale or disposal of the assets;

(e) the effects of the proposed sale or disposal on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account the market value of the assets.

(4) In addition to taking the factors referred to in subsection (3) into account, if the proposed sale or disposal of the assets is to a person who is related to the company, the court may grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or dispose of the assets to persons who are not related to the company or who are neither directors or officers of the company nor individuals who control it; and

(b) the consideration to be received is superior to the consideration that would be received under all other offers actually received in respect of the assets.

(5) In granting an authorization for the sale or disposal of assets, the court may order that the assets may be sold or disposed of free and clear of any security, charge or other restriction, but if it so orders, it shall also order that the proceeds realized from the sale or disposal of the assets are subject to a security, charge or other restriction in favour of the creditors whose security, charges or other restrictions are affected by the order.

(6) For the purpose of this section, a person who is related to the debtor company includes a person who controls the company, a director or an officer of the company and a person who is related to a director or an officer of the company.

Rationale

When a debtor company is engaged in proceedings under the CCAA (Companies' Creditors Arrangement Act), it is granted a stay of other proceedings. Secured creditors are unable to act upon their security and other creditors are unable to seek redress from the courts. The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse.

Subsection (1) sets out the basic prohibition against a debtor company selling or disposing of its assets out of the ordinary course of business without court approval.

Subsection (2) requires that secured creditors be given notice of the application to allow the secured creditor the opportunity to oppose the order should they determine it necessary to protect their interests.

Subsection (3) sets out the factors the court must consider before granting the order to sell the property. It provides legislative guidance for the court and provides direction for the debtor company. The provision should improve consistency of judicial decisions.

Subsection (4) is intended to prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.

Subsection (5) provides that a court may order that the property be sold to the purchaser free and clear of charges, liens and restrictions of any kind. The provision will increase the value of the property thereby creating greater wealth for the estate while also increasing the likelihood that property will be returned to productive use quickly. The interests of the secured creditor is protected by the requirement that the consideration received be subject to the same charges, liens or restrictions as the original property.

For example, a lumber mill may be subject to a lien for municipal taxes in an amount in excess of the market value of the lumber mill. Because the lien is attached to the property, a purchaser for value would be subject to the lien. The property could not be sold because it has a negative value. If a court has the authority to remove the lien, the lumber mill could be sold at market value and be put into production by the purchaser. At the same time, the consideration received would be subject to the original lien. The reform should increase efficiency in the insolvency system.

Subsection (6) expands the definition of "related person" for the purposes of the section to address corporations.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #34, however, the reform does not provide that provincial Bulk Sales legislation be overridden because of concerns regarding the constitutional validity of such action.

CCAA: Crown Priorities

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 131
Section No. 37
Topic: Deemed Trusts

Proposed Wording

37. (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*, and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Rationale

The reform is a technical amendment to re-order the provisions of this Act.

Present Law

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the Income Tax Act, subsection 23(3) or (4) of the Canada Pension Plan or subsection 86(2) or (2.1) of the Employment Insurance Act (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 38
Topic: Crown Claims

Proposed Wording

38. (1) In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 39 called a "workers' compensation body", rank as unsecured claims.

(2) Subsection (1) does not apply

(a) in respect of claims that are secured by a security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

(i) pursuant to any law, or

(ii) pursuant to provisions of federal or provincial legislation if those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or a workers' compensation body; and

(b) to the extent provided in subsection 39(2), to claims that are secured by a security referred to in subsection 39(1), if the security is registered in accordance with subsection 39(1).

(3) Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the Canada Pension Plan or of the *Employment Insurance Act that* refers to subsection 224(1.2) of the Income Tax Act and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts if the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and, for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Rationale

The reform is a technical amendment to re-order the provisions of this Act.

Present Law

18.4 (1) In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

(2) Subsection (1) does not apply

(a) to claims that are secured by a security or privilege of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

(i) pursuant to any law, or

(ii) pursuant to provisions of federal or provincial legislation, where those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or a workers' compensation body; and

(b) to the extent provided in subsection 18.5(2), to claims that are secured by a security referred to in subsection 18.5(1), if the security is registered in accordance with subsection 18.5(1).

(3) Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the Employment Insurance Act, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph *(c)*, the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph *(c)*(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph *(c)*(ii), and in respect of any related interest, penalties or other amounts.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 39
Topic: Crown Securities

Proposed Wording

39. (1) In relation to a proceeding under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if the security is registered before the date of the filing of the initial application in respect of the company under any system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

(2) A security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to setting them up against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

Rationale

The reform is a technical amendment to re-order the provisions of this Act.

Present Law

18.5. (1) In relation to a proceeding under this Act in respect of a debtor company, a security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or a workers' compensation body is valid in relation to claims against the company only if the security is registered before the date of the filing of the initial application in respect of the company under any system of registration of securities that is available not only to Her Majesty in right of Canada or a province or a workers' compensation body, but also to any other creditor who holds a security, and that is open to the public for information or the making of searches.

(2) A security referred to in subsection (1) that is registered in accordance with that subsection

(a) is subordinate to securities in respect of which all steps necessary to setting them up against other creditors were taken before that registration; and

(b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 40
Topic: Binding Application

Proposed Wording

40. This Act is binding on Her Majesty in right of Canada or a province.

Rationale

The reform is a technical amendment to re-order the provisions of this Act.

Present Law

21. This Act is binding on Her Majesty in right of Canada or a province.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 41
Topic: Binding Application

Proposed Wording

41. Sections 65 and 66 of the *Winding-up and Restructuring Act* do not apply to any compromise or arrangement to which this Act applies.

Rationale

The reform is a technical amendment to re-order the provisions of this Act.

Present Law

19. Sections 65 and 66 of the *Winding-up and Restructuring Act* do not apply to any compromise or arrangement to which this Act applies.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 42
Topic: Application

Proposed Wording

42. The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Rationale

The reform is a technical amendment to re-order the provisions of this Act.

Present Law

20. The provisions of this Act may be applied together with the provisions of any Act of Parliament, or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Senate Recommendation

None.

Bill Clause No. 131
Section No. 43
Topic: Foreign Currency

Proposed Wording

43. If a compromise or an arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency is to be converted to Canadian currency as of the date of the **initial application** in respect of the company unless otherwise provided in the proposed compromise or arrangement.

Rationale

The reform is a technical amendment to correct for grammar and re-order the provisions of this Act.

Present Law

18.6. (8) Where a compromise or arrangement is proposed in respect of a debtor company, a claim for a debt that is payable in a currency other than Canadian currency shall be converted to Canadian currency as of the date of the first application made in respect of the company under section 10 unless otherwise provided in the proposed compromise or arrangement.

Senate Recommendation

None.

CCAA: International insolvencies / UNCITRAL

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 131
Section No. 44
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

Rationale

Section 44 is the first section dealing with cross-border insolvencies in Part IV of the *Companies' Creditors Arrangement Act*. It provides a summary statement of the basic policy objectives of Part IV. Although it may not be customary in Canada to set out purpose statements of policy in legislation, this section is useful in providing a general orientation and in assisting in the interpretation of this Part.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 45
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

45. (1) **The following definitions apply in this Part.**

"foreign court" means a judicial or other authority competent to control or supervise a foreign proceeding.

"foreign main proceeding" means a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests.

"foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding.

"foreign proceeding" means a judicial or an administrative proceeding, **including an interim proceeding, in a jurisdiction** outside Canada dealing with creditors' collective interests generally **under** any law relating to bankruptcy or insolvency **in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.**

"foreign representative" means a person **or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to**

***(a)* monitor the debtor company's business and financial affairs for the purpose of reorganization; or**

***(b)* act as a representative in respect of the foreign proceeding.**

(2) For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

Rationale

Subsection 45(1) adds a series of definitions in alphabetical order for terms that are specific to Part IV of the Bill relating to cross-border insolvencies. The definition of "foreign court" includes non-judicial authorities so that foreign proceedings receive the same treatment irrespective of whether they have been commenced and supervised by a judicial body or an administrative body. By specifying required characteristics of the "foreign proceeding" and "foreign representative, the definitions limit the scope of application of the Model Law. The definition of "debtor company" was excluded from this provision because it is it is not different from what is already provided for in section 2 of the current legislation. Subsection 45(2) creates a presumption - where the debtor has his place of residence or registered office is deemed to be the centre of the debtor's main interests.

Present Law

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18.6 (1) In this section,

"foreign proceeding" means a judicial or administrative proceeding commenced outside Canada

in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally;

"foreign representative" means a person, other than a debtor, holding office under the law of a

jurisdiction outside Canada who, irrespective of the person's designation, is assigned, under the laws of the jurisdiction outside Canada, functions in connection with a foreign proceeding that are similar to those performed by a trustee in bankruptcy, liquidator or other administrator appointed by the court.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 46
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

46. (1) A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

(2) Subject to subsection (3), the application must be accompanied by

(a) a certified copy of the instrument, however designated, that commenced the foreign proceeding or a certificate from the foreign court affirming the existence of the foreign proceeding;

(b) a certified copy of the instrument, however designated, authorizing the foreign representative to act in that capacity or a certificate from the foreign court affirming the foreign representative's authority to act in that capacity; and

(c) a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative.

(3) The court may, without further proof, accept the documents referred to in paragraphs (2)*(a)* and *(b)* as evidence that the proceeding to which they relate is a foreign proceeding and that the applicant is a foreign representative in respect of the foreign proceeding.

(4) In the absence of the documents referred to in paragraphs (2)*(a)* and *(b)*, the court may accept any other evidence of the existence of the foreign proceeding and of the foreign representative's authority that it considers appropriate.

(5) The court may require a translation of any document accompanying the application.

Rationale

Subsection 46(1) allows the foreign representative to apply to the court for recognition of a foreign proceeding in Canada. Subsection 46(2) describes the procedural requirements for an application, by a foreign representative, for recognition of a foreign proceeding in Canada. It provides a simple, expeditious structure to be used by a foreign representative to obtain recognition. Paragraph c) requires that an application for recognition be accompanied by a statement identifying all know foreign proceedings in respect of the debtor. This information is needed by the court for any decision granting relief in favour of the foreign proceeding. In order to ensure that the relief is consistent with any other insolvency proceeding concerning the same debtor, the courts needs to know of all foreign proceedings that may be under way in a third State.

Subsection 46(3) provides that documents submitted in support of the application for recognition need not be authenticated in any special way. The court is entitled to presume that they are authentic unless there is evidence to the contrary. This approach provides the court flexibility and avoids legalization procedures, which may be cumbersome and time-consuming.

In order not to prevent recognition because of non-compliance with a mere technicality, subsection 46(4) allows evidence other than that specified in paragraphs a) and b) to be taken into account. However, this provision does not does not compromise the court's authority to insist on the presentation of evidence acceptable to it.

Subsection 46(5) entitles, but does not compel, the court to require a translation of some or all documents accompanying the application for recognition. This discretion is compatible with the procedures of the court under the current legislation.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 47
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

47. (1) If the court is satisfied that the application for the recognition of a foreign proceeding relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court shall make an order recognizing the foreign proceeding.

(2) The court shall specify in the order whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding.

Rationale

Section 47 provides that if the application for recognition meets the requirements set out in section 46, recognition will be granted by the court as a matter of course. It also draws a basic distinction between foreign proceedings categorized as "main" proceedings and those that are not, depending on the jurisdictional basis of the foreign proceeding.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 48
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

48. (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

(3) Subsection (1) does not apply if any proceedings under this Act have been commenced in respect of the debtor company at the time the order recognizing the foreign proceeding is made.

(4) Nothing in subsection (1) precludes the debtor company from commencing or continuing proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

Rationale

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Subsection 48(1) requires the court to make a stay order on the making of an order recognizing a foreign main proceeding. The stay of proceedings is necessary to allow steps to be taken to organize an orderly and equitable cross-border insolvency proceeding.

Subsection 48(2) ensures that the stay order made under subsection (1) is consistent with any other order that may be made by the court under this Act.

Subsection 48(3) ensures that existing proceedings commenced under Canadian insolvency laws are not subject to a stay when an order recognizing a foreign main proceeding, with regards to the same debtor, is made by the court. This ensures that Canadian proceedings are only subject to Canadian insolvency rules.

Subsection 48(4) merely clarifies that the stay order, pursuant to subsection 48(1) does not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and from participating in that proceeding.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 49
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

49. (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

(3) The making of an order under paragraph (1)(a) does not preclude the commencement or the continuation of proceedings under this Act, the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act* in respect of the debtor company.

Rationale

Subsection 49(1) provides the court with discretionary powers to grant post-recognition relief. Orders listed in this subsection are typical in CCAA (Companies' Creditors Arrangement Act) insolvency proceedings. However, the list is not exhaustive. The court is not restricted unnecessarily in its ability to grant any type of relief that is available under Canadian law and needed in the circumstances of the case.

Subsection 49(2) provides that any order made under subsection 49(1) must be consistent with any prior court orders, made in existing proceedings, commenced under Canadian insolvency law. This ensures that all court orders in respect of a debtor are consistent.

Subsection 49(3) merely clarifies that court orders made, pursuant to subsection 49(1), do not prevent anyone, including the foreign representative or foreign creditors, from requesting the commencement of a local insolvency proceeding and from participating in that proceeding.

Present Law

18.6 (2) The court may, in respect of a debtor company, make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of proceedings under this Act with any foreign proceeding.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 50
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

50. An order under this Part may be made on any terms and conditions that the court considers appropriate in the circumstances.

Rationale

Section 50 is the same as the current subsection 18.6 (3) of the *Companies' Creditors Arrangement Act*. It provides the court with much discretion to impose whatever conditions it deems appropriate upon any order with respect to cross-border proceedings. This discretion is in line with basic principles of Canadian insolvency laws.

Present Law

18.6 (3) An order of the court under this section may be made on such terms and conditions as the court considers appropriate in the circumstances.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

CCAA: International insolvencies / UNCITRAL

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 131
Section No. 51
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

51. If an order is made recognizing a foreign proceeding, the foreign representative may commence and continue proceedings under this Act in respect of a debtor company as if the foreign representative were a creditor of the debtor company, or the debtor company, as the case may be.

Rationale

Section 51 gives the foreign representative the same standing to initiate or continue insolvency proceedings under the CCAA (Companies' Creditors Arrangement Act) as Canadian debtors and creditors once a foreign proceeding is recognized by the court in Canada.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 52
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

52. (1) If an order recognizing a foreign proceeding is made, the court shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

(2) If any proceedings under this Act have been commenced in respect of a debtor company and an order recognizing a foreign proceeding is made in respect of the debtor company, every person who exercises powers or performs duties and functions under the proceedings under this Act shall cooperate, to the maximum extent possible, with the foreign representative and the foreign court involved in the foreign proceeding.

Rationale

The purpose of section 52 is to enable courts and insolvency administrators from two or more countries to be efficient and achieve optimal results. In cross-border insolvencies, cooperation is often the only realistic way, for example, to prevent the dissipation of assets, to maximize the value of assets or to find the best solutions for the reorganization of businesses.

Section 52 not only authorizes cross-border cooperation, it mandates it. This is useful in eliminating any uncertainties that may exist with regards to the court or administrator's discretion to operate outside areas of express statutory authorization in order to cooperate with the foreign representative or foreign court in cross-border cases.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined

that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 53
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

53. If an order recognizing a foreign proceeding is made, the foreign representative who applied for the order shall

(a) without delay, inform the court of

(i) any substantial change in the status of the recognized foreign proceeding,

(ii) any substantial change in the status of the foreign representative's authority to act in that capacity, and

(iii) any other foreign proceeding in respect of the same debtor company that becomes known to the foreign representative; and

(b) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information.

Rationale

Paragraph 53(a) ensures that the court is informed of any important change regarding the foreign proceeding. It is possible that, after recognition, changes occur in the foreign proceeding that would have affected the decision on recognition or the relief granted on the basis of recognition. For example, the foreign proceeding may be terminated or transformed from a liquidation proceeding into a reorganization proceeding or the terms of the appointment of the foreign representative may be modified or terminated.

Paragraph 53(b) is modelled on clause 131 of the Bill, subparagraph 23(1)(a)(i) of the CCAA (Companies' Creditors Arrangement Act). It provides a specific mechanism to ensure that all parties who may be affected by any substantial changes to the recognized foreign proceeding or in respect of the foreign representative receive adequate notice of these changes, allowing them to better protect their interests.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131

Section No. 54

Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

54. If any proceedings under this Act in respect of a debtor company are commenced at any time after an order recognizing the foreign proceeding is made, the court shall review any order made under section 49 and, if it determines that the order is inconsistent with any orders made in the proceedings under this Act, the court shall amend or revoke the order.

Rationale

Section 54 gives the court guidance to deal with cases where the same debtor is subject to a foreign proceeding followed by a local proceeding. The most important principle in this section is that the commencement of a local proceeding does not terminate the recognition of a foreign proceeding. This principle allows Canadian courts to provide relief in favour of the foreign proceeding in all circumstances. However, section 54 maintains a pre-eminence of the local proceeding over the foreign proceeding (i.e., any relief that has already been granted to the foreign proceeding must be reviewed to ensure consistency with the local proceeding). It is worth noting that, contrary to the parallel provision in the BIA (Bankruptcy and Insolvency Act) (section 277), stay orders made on the making of an order recognizing a foreign main proceeding remain in force until the reorganization is complete. Hence, they cannot be terminated. This is compatible with the CCAA (Companies' Creditors Arrangement Act) process.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131

Section No. 55

Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

55. (1) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of a debtor company, an order recognizing a foreign main proceeding is made in respect of the debtor company, the court shall review any order made under section 49 in respect of the foreign non-main proceeding and, if it determines that the order is inconsistent with any orders made under that section in respect of the foreign main proceedings, the court shall amend or revoke the order.

(2) If, at any time after an order is made in respect of a foreign non-main proceeding in respect of the debtor company, an order recognizing another foreign non-main proceeding is made in respect of the debtor company, the court shall, for the purpose of facilitating the coordination of the foreign non-main proceedings, review any order

made under section 49 in respect of the first recognized proceeding and amend or revoke the order if it considers it appropriate.

Rationale

Section 55 deals with cases where the debtor is subject to insolvency proceedings in more than one foreign State and foreign representatives of more than one foreign proceeding seek recognition or relief in Canada.

The objective of section 55 is similar to that of section 54 in that the key issue when there are concurrent proceedings is to promote cooperation, coordination and consistency of relief granted to different proceedings. Such consistency is achieved by appropriately tailoring relief to be granted or by modifying or terminating relief already granted.

The only priority in this section is given to the foreign main proceeding. That priority is reflected in the requirement that any relief in favour of a foreign non-main proceeding must be consistent with the foreign main proceeding (subsection 55(1)).

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 56
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

56. The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside Canada.

Rationale

The purpose of section 56 is to allow Canadian insolvency administrators, appointed in Canadian insolvency proceedings, to act abroad as foreign representatives of those proceedings. The lack of such authorization has proven, in some cross-border cases, to be an obstacle to effective international cooperation. This section is aimed at avoiding just that.

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to

ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 57
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

57. An application **by a foreign representative for any order under this Part** does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this **Part** conditional on the compliance by the foreign representative with any other order of the court.

Rationale

Section 57 is the same as the current section 18.6(7) of the CCAA (Companies' Creditors Arrangement Act). Language was simply added to reflect the fact that the new Part IV on cross-border insolvencies has introduced the concept of court "orders" recognizing foreign insolvency proceedings. These "orders" give foreign insolvency proceedings standing in Canada.

Present Law

18.6 (7) An application to the court by a foreign representative under this section does not submit the foreign representative to the jurisdiction of the court for any other purpose except with regard to the costs of the proceedings, but the court may make any order under this section conditional on the compliance by the foreign representative with any other order of the court.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 58
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

58. A foreign representative is not prevented from making an application to the court under this Part by reason only that proceedings by way of appeal or review have been taken in a foreign proceeding, and the court may, on an application if such proceedings have been taken, grant relief as if the proceedings had not been taken.

Rationale

Section 58 is the same as the current section 273 of the BIA (Bankruptcy and Insolvency Act). It is also applicable in the CCAA (Companies' Creditors Arrangement Act).

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 59
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

59. For the purposes of this Part, if an insolvency or a reorganization or a similar order has been made in respect of a debtor company in a foreign proceeding, a certified copy of the order is, in the absence of evidence to the contrary, proof that the debtor company is insolvent and proof of the appointment of the foreign representative made by the order.

Rationale

Section 59 is the same as the current subsection 268(1) of the BIA (Bankruptcy and Insolvency Act). It is also applicable in the CCAA (Companies' Creditors Arrangement Act).

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 60
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

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60. (1) In making a compromise or an arrangement of a debtor company, the following shall be taken into account in the distribution of dividends to the company's creditors in Canada as if they were a part of that distribution:

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the company; and

(b) the value of any property of the company that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if it were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim.

Rationale

Section 60 is the same as the current section 274 of the BIA (Bankruptcy and Insolvency Act). It was only reorganized and adapted to reflect the changes made to the preferences and transfers at undervalue provisions in clauses 71-76 of the Bill. This provision is also applicable in the CCAA (Companies' Creditors Arrangement Act).

Present Law

None.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 61
Topic: UNCITRAL (United Nations Commission on International Trade Law) Model Law

Proposed Wording

61. (1) Nothing in this **Part** prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives **that** are not inconsistent with the provisions of this Act.

(2) Nothing in this **Part** requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

Rationale

Section 61 is the same as current subsections 18.6(4) and (5) of the CCAA (Companies' Creditors Arrangement Act).

Present Law

18.6 (4) Nothing in this section prevents the court, on the application of a foreign representative or any other interested person, from applying such legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives as are not inconsistent with the provisions of this Act.

18.6 (5) Nothing in this section requires the court to make any order that is not in compliance with the laws of Canada or to enforce any order made by a foreign court.

Senate Recommendation

The Senate recommendation with regards to the UNCITRAL (United Nations Commission on International Trade Law) Model Law on Cross-Border Insolvencies was fairly general. The proposed amendment follows the Senate recommendation to adopt the Model Law. Consideration was given to adding a reciprocity clause and provisions to ensure the creation of Canadian creditors' committees, as recommended by the Senate. However, it was determined that these would not be consistent with furtherance of international harmony in insolvency laws that the Senate Committee endorsed and would not be consistent with Canadian support for the Model Law, which it helped to develop.

Bill Clause No. 131
Section No. 62
Topic: Regulation Making Power

Proposed Wording

62. The Minister may make regulations for carrying out the purposes and provisions of this Act, including regulations

(a) specifying documents for the purpose of paragraph 23(1)*(f)*; and

(b) prescribing anything that by this Act is to be prescribed.

Rationale

The reform reflects one of the current standards for regulation making. The Minister of Industry, responsible for the CCAA (Companies' Creditors Arrangement Act), will have the specialized knowledge necessary to create regulations for the better operation of the Act. In addition, to ensure that the Act remains flexible and efficient, the Minister may be able to address compelling issues quickly.

Present Law

18. (1) The Governor in Council may make, alter or revoke, and may delegate to the judges of the courts exercising jurisdiction under this Act the power to make, alter or revoke, general rules for carrying into effect the objects of this Act.

(2) The rules referred to in subsection (1) shall not extend the jurisdiction of the court.

(3) All general rules as are from time to time made by the Governor in Council shall be laid before Parliament within three weeks after they are made, or, if Parliament is not then sitting, within three weeks after the beginning of the next session.

(4) All rules referred to in subsection (1) shall be judicially noticed and shall have effect as if enacted by this Act.

Senate Recommendation

None.

CCAA: Review of the Act

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

- **Bill Clause No.** 131 - CCAA (Companies' Creditors Arrangement Act) Section 63

Bill Clause No. 131
Section No. 63
Topic: Review Clause

Proposed Wording

63. (1) Within five years after the coming into force of this section, the Minister shall cause to be laid before both Houses of Parliament a report on the provisions and operation of this Act, including any recommendations for amendments to those provisions.

(2) The report stands referred to the committee of the Senate, the House of Commons or both Houses of Parliament that is designated or established for that purpose, which shall

(a) as soon as possible after the laying of the report, review the report; and

(b) report to the Senate, the House of Commons or both Houses of Parliament, as the case may be, within one year after the laying of the report of the Minister, or any further time authorized by the Senate, the House of Commons or both Houses of Parliament.

Rationale

The Canadian insolvency regime must meet the needs of the economy, whose needs rarely stand still but continue to evolve due to competition, external pressures and the changing marketplace. By providing for a review every five years, Industry Canada will be able to address issues that have developed and adjust previous amendments to ensure that they are accomplishing what was intended when they were made.

Present Law

22. (1) This Act shall, on the expiration of five years after the coming into force of this section, stand referred to such committee of the Senate, of the House of Commons or of both Houses of Parliament as may be designated or established to review the administration and operation of this Act.

(2) The committee shall, within one year after beginning the review or within such further time as the Senate, the House of Commons or both Houses of Parliament, as the case may be, may authorize, submit a report on the review to that House or both Houses, including a statement of any changes to this Act that the committee would recommend.

Senate Recommendation

The reform follows Senate recommendation #45.

CCAA: Transitional Provisions

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 132
Section No. --
Topic: Transitional Provision

Proposed Wording

132. The *Wage Earner Protection Program Act*, as enacted by section 1, applies

(a) in respect of wages owing to an individual by an employer who becomes bankrupt after the coming into force of that section; and

(b) in respect of wages owing to an individual by an employer any of whose property comes under the possession or control of a receiver within the meaning of subsection 243(2) of the *Bankruptcy and Insolvency Act* after the coming into force of that section.

Rationale

The *Wage Earner Protection Program Act* is intended to apply only with respect to new bankruptcies or receiverships. A bankruptcy file, or a receivership, may last years and it would cause undue hardship to the parties involved to apply new rules to files after they have already been initiated.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 133
Section No. --
Topic: Transitional Provision

Proposed Wording

133. The amendments to the *Bankruptcy and Insolvency Act*, as enacted by any of sections 2 to 123, other than section 6, apply in respect of a person

(a) who becomes bankrupt after the coming into force of that section;

(b) who files a notice of intention after the coming into force of that section;

(c) who files a proposal after the coming into force of that section without having filed a notice of intention;

(d) in respect of whom a proposal is made after the coming into force of that section without the person having filed a notice of intention;

(e) any of whose property comes under the possession or control of an interim receiver who is appointed as such after the coming into force of that section; and

(f) any of whose property comes under the possession or control of a receiver within the meaning of subsection 243(2) of the *Bankruptcy and Insolvency Act* after the coming into force of that section.

Rationale

The amendments to the BIA (Bankruptcy and Insolvency Act) are intended to apply only with respect to new bankruptcies or proposals. A bankruptcy file, or a proposal, may last years and it would cause undue hardship to the parties involved to apply new rules to files after they have already been initiated.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 134
Section No. --
Topic: Transitional Provision

Proposed Wording

134. The amendments to the *Companies ' Creditors Arrangement Act*, as enacted by sections 124 to 131, apply in respect of a debtor company in respect of whom proceedings are commenced under that Act after the coming into force of those sections.

Rationale

The amendments to the CCAA (Companies' Creditors Arrangement Act) are intended to apply only with respect to new filings. CCAA (Companies' Creditors Arrangement Act) matters may last years and it would cause undue hardship to the parties involved to apply new rules to files after they have already been initiated.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 135
Section No. --
Topic: Transitional Provision — Superintendent of Bankruptcy

Proposed Wording

135. The person who holds office as Superintendent of Bankruptcy immediately before the day on which subsection 5(1) of the *Bankruptcy and Insolvency Act*, as enacted by subsection 6(1), comes into force continues to hold office for the remainder of the person's term as though the person had been appointed under that subsection 5(1).

Rationale

The provision relating to the appointment of the Superintendent of Bankruptcy is intended to apply only with respect to a new appointment.

Present Law

None.

Senate Recommendation

None.

Bill C-55: Consequential Amendments to Other Acts and coordinating Amendments

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Bill Clause No. 136
Section No. Canada Labour Code Section 67
Topic: Consequential Amendment

Proposed Wording

136. Section 67 of the *Canada Labour Code* is amended by adding the following after subsection (6):

(7) Despite subsection (2), if a notice to bargain referred to in subsection 65.12(1) of the *Bankruptcy and Insolvency Act* has been served, the parties may agree to revise the term of the collective agreement without approval of the Board.

(8) Despite subsection (2), if a notice to bargain referred to in subsection 33(2) of the Companies' *Creditors Arrangement Act* has been served, the parties may agree to revise the term of the collective agreement without approval of the Board.

Rationale

The amendment intended to clarify that the notice to bargain, issued under either the BIA (Bankruptcy and Insolvency Act) or CCAA (Companies' Creditors Arrangement Act) should entitle the parties to a collective agreement to amend the collective agreement by consensus. This provides the support needed to ensure that the collective bargaining can occur in an insolvency situation.

Present Law

None.

Senate Recommendation

None.

Bill Clause No. 137
Section No. Canada Pension Plan Section 23(2)(b)
Topic: Consequential Amendment

Proposed Wording

137. Paragraph 23(2)(b) of the *Canada Pension Plan* is replaced by the following:

23. (2)(b) subsection 224(1.2) of the Income Tax Act shall apply to employer's contributions, employee's contributions, and related interest, penalties or other amounts, subject to subsections 69(1), 69.1(1) and **69.2(1)** of the *Bankruptcy and Insolvency Act* and section **11.09** of the *Companies' Creditors Arrangement Act*.

Rationale

The consequential amendment is a technical reform to correct for cross-referencing.

Present Law

23. (2)(b) subsection 224(1.2) of the *Income Tax Act* shall apply to employer's contributions, employee's contributions, and related interest, penalties or other amounts, subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.4 of the *Companies' Creditors Arrangement Act*.

Senate Recommendation

None.

Bill Clause No. 138
Section No. Employment Insurance Act Section 99(b)
Topic: Consequential Amendment

Proposed Wording

138. Paragraph 99. (b) of the *Employment Insurance Act* is replaced by the following:

99. (b) subsection 224(1.2) of the *Income Tax Act* shall apply to employer's premiums, employee's premiums, and related interest, penalties or other amounts, subject to subsections 69(1), 69.1(1) and **69.2(1)** of the Bankruptcy and Insolvency Act and section **11.09** of the *Companies' Creditors Arrangement Act*.

Rationale

The consequential amendment is a technical reform to correct for cross-referencing.

Present Law

99. (b) subsection 224(1.2) of the *Income Tax Act* shall apply to employer's premiums, employee's premiums, and related interest, penalties or other amounts, subject to subsections 69(1) and 69.1(1) of the *Bankruptcy and Insolvency Act* and section 11.4 of the *Companies' Creditors Arrangement Act*.

Senate Recommendation

None.

Bill Clause No. 139
Section No. Income Tax Act Section 224
Topic: Consequential Amendment

Proposed Wording

139. The portion of subsection 224(1.2) of the *Income Tax Act* before paragraph (a) is replaced by the following:

224. (1.2) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act*, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1), 69.1(1) and **69.2(1)** of the *Bankruptcy and Insolvency Act* and section **11.09** of the *Companies' Creditors Arrangement Act*, if the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

Rationale

The consequential amendment is a technical reform to correct for cross-referencing.

Present Law

224. (1.2) Notwithstanding any other provision of this Act, the Bankruptcy and Insolvency Act, any other enactment of Canada, any enactment of a province or any law, but subject to subsections 69(1) and 69.1(1) of the Bankruptcy and Insolvency Act and section 11.4 of the Companies' Creditors Arrangement Act, where the Minister has knowledge or suspects that a particular person is, or will become within one year, liable to make a payment

Senate Recommendation

None.

Bill Clause No. 140
Section No. *Department of Human Resources and Skills Development Act*
Topic: Coordinating Amendment

Proposed Wording

140. (1) Subsections (2) and (3) apply if Bill C-23, introduced in the 1st session of the 38th Parliament and entitled the *Department of Human Resources and Skills Development Act* (in this section, the "other Act"), receives royal assent.

(2) On the later of the day on which the other Act comes into force and the day on which this Act receives royal assent, section 27 of the *Wage Earner Protection Program Act*, as enacted by section 1, is replaced by the following:

27. Despite subsection 139(5) of the *Employment Insurance Act*, personal information relating to an applicant that is collected or obtained by the Canada Employment Insurance Commission must, if requested by the Minister, be made available to the Minister to determine the applicant's eligibility to receive a payment under this Act.

(3) On the later of the day on which the other Act comes into force and the day on which this Act receives royal assent, section 28 of the *Wage Earner Protection Program Act*, as enacted by section 1, is repealed.

Rationale

The coordinating amendment is intended to ensure that the *Wage Earner Protection Program Act* does not conflict with the *Department of Human Resources and Skills Development Act*.

Present Law

None.

Senate Recommendation

None.

Bill C-55: Coming into force

Clause by Clause Briefing Book

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

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- **Bill Clause No.** 141

Bill Clause No. 141
Section No. --
Topic: Coming into force

Proposed Wording

141. (1) Sections 1, 67 and 88 come into force on a day to be fixed by order of the Governor in Council.

(2) Sections 2 to 66, 68 to 87, 89 to 123 and 136 to 139 come into force on a day or days to be fixed by order of the Governor in Council.

(3) Sections 124 to 131 come into force on a day to be fixed by order of the Governor in Council.

Rationale

The section determines the timing for the coming into force of the provisions of the Bill. The provisions, as set forth, are related to each other and should come into force at the same time.

Clauses 1, 67 and 88 are related to wage earner protection issues. Clause 1 implements the *Wage Earner Protection Program Act*. Clause 67 implements a super-priority for unpaid wages. Clause 88 amends the priority list to account for the improved priority for wage earners.

Clauses 2 to 66, 68 to 87, 89 to 123 and 136 to 139 are related to the broad, balanced reform of the BIA (Bankruptcy and Insolvency Act), excluding wage earner protection issues.

Clauses 124 to 131 deal with the broad, balanced reform of the CCAA (Companies' Creditors Arrangement Act).

Present Law

None.

Senate Recommendation

None.

Previous

Date modified:
2016-12-29

TAB 5

HCO-159 Conditions.

Halsbury's Laws of Canada - Contracts (2021 Reissue), 2021 Reissue

Angela Swan, Jakub Adamski (Main Title Contributors)

HCO-159

Halsbury's Laws of Canada - Contracts (2021 Reissue) (Swan, Adamski) > X. Conditions > 1. General Considerations

X. Conditions

1. General Considerations

Conditions.

Conditions[1] allow parties to control the risks that making a contract might create; they permit a buyer, for example, to commit itself to buying something from the seller but only if some event, like the obtaining of a necessary permission, occurs. Both buyer and seller will be unable to back out of the deal but neither may be liable to the othe for non-performance unless the event occurs. This limitation on their liability to each other may make the transaction far more attractive than it would have been if their obligations had been unconditional. From this point of view, conditions operate to give each party an excuse for its non-performance. Without any conditions, a party must perform these obligations regardless of any external circumstances that may evolve or the behaviour[2] of the other party. The term “condition” is sometimes used to refer to an important term[3] of a contract (as distinguished from a “warranty” or a “representation”) whose breach can allow another party to refuse to perform its contractual obligations. However, the term “condition” is better understood not as an *a priori* characterization of a contractual term but rather as a contractual effect, *i.e.*, an event or operative fact on which the performance of one or both of the parties depends.[4] Thus, the occurrence of a condition operates to provide one or both parties with an excuse for not performing their obligations under the contract.

Classification. Conditions are classified on two bases. First, they are categorized on the basis of whether or not they appear in the parties' agreement. Thus, a condition is "express" when it is explicitly stated in the agreement or "implied" when it is imposed by the courts. Second, conditions are distinguished on the basis of whether their occurrence is a prerequisite for the parties' performance of their respective obligations or whether they give the parties a reason to abandon their performance. The former is labelled a "condition precedent", whereas the latter is known as a "condition subsequent". The "events of default" that are found in many commercial agreements that create a long-term relation are conditions subsequent; they give a party an excuse not to perform any further obligations under the contract.

Footnote(s)

1 The word "condition" has several meanings. In one sense (the primary one in this section), a condition refers to an event (which may or may not occur) on which the performance of the obligations of one or both of the parties to a contract depends: *Restatement (Second) of Contracts* (St. Paul, MN: American Law Institute Publishers, 1981) at § 224 provides that a condition is "an event, not certain to occur, which must occur, unless occurrence is excused, before performance under a contract becomes due". The provincial and territorial sale of goods statutes use the terms "absolute" and "conditional".

See: (AB) *Sale of Goods Act*, R.S.A. 2000, c. S-2, s. 3(3)

(BC) *Sale of Goods Act*, R.S.B.C. 1996, c. 410, s. 6(3)

(MB) *Sale of Goods Act*, C.C.S.M. c. S10, s. 3(2)

(NB) *Sale of Goods Act*, S.N.B. 2016, c. 110, s. 5

(NL) *Sale of Goods Act*, R.S.N.L. 1990, c. S-6, s. 3(3)

(NS) *Sale of Goods Act*, R.S.N.S. 1989, c. 408, s. 4(2)

(ON) *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 2(2)

(PE) *Sale of Goods Act*, R.S.P.E.I. 1988, c. S-1, s. 3(2)

(SK) *Sale of Goods Act*, R.S.S. 1978, c. S-1, s. 3(3)

(NT) *Sale of Goods Act*, R.S.N.W.T. 1988, c. S-2, s. 5

(NU) *Sale of Goods Act*, R.S.N.W.T. (Nu.) 1988, c. S-2, s. 5

(YT) *Sale of Goods Act*, R.S.Y. 2002, c. 198, s. 2(2).

An "absolute" contract is one in which the parties' obligations arise when the contract is made and do not depend on the happening of an event; a conditional contract is one in which the parties' obligations depend on the occurrence of a condition.

2 In many instances, it is far more sensible to excuse a party from performance or further performance than to allow the party a claim for damages for breach. It makes much more sense, *e.g.*, for a seller to avoid having to make deliveries to an insolvent buyer than to make the deliveries, become an unsecured creditor of the buyer, and entertain little (or no) hope of being paid anything but a fraction of the outstanding amount.

3 The various sale of goods statutes use the word "condition" in this sense: Section 12(2) of the (ON) *Sale of Goods Act*, R.S.O. 1990, c. S.1 provides:

> Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated or a warranty the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated depends in each case on the construction of the contract, and a stipulation may be a condition, though called a warranty in the contract.

Whether an event operates as an excuse depends on the impact of the event on the parties' expectations under the contract, as well as on the construction of the contract.

See also: (AB) *Sale of Goods Act*, R.S.A. 2000, c. S-2, ss. 14-17

(BC) *Sale of Goods Act*, R.S.B.C. 1996, c. 410, ss. 16-19

(MB) *Sale of Goods Act*, C.C.S.M. c. S10, ss. 14-17

(NB) *Sale of Goods Act*, S.N.B. 2016, c. 110, ss. 18-21

(NL) *Sale of Goods Act*, R.S.N.L. 1990, c. S-6, ss. 14-17

(NS) *Sale of Goods Act*, R.S.N.S. 1989, c. 408, ss. 15-18

(ON) *Sale of Goods Act*, R.S.O. 1990, c. S.1, ss. 13-16

(PE) *Sale of Goods Act*, R.S.P.E.I. 1988, c. S-1, ss. 14-17

(SK) *Sale of Goods Act*, R.S.S. 1978, c. S-1, ss. 14-17

(NT) *Sale of Goods Act*, R.S.N.W.T. 1988, c. S-2, ss. 16-19

(NU) *Sale of Goods Act*, R.S.N.W.T. (Nu.) 1988, c. S-2, ss. 16-19

(YT) *Sale of Goods Act*, R.S.Y. 2002, c. 198, ss. 13-16.

4 If it is clear that, because of political or other developments, the event will never occur, the contract will have no effect: see, *e.g.*, *City Front Developments Inc. v. Toronto Catholic District School Board* (2007), 281 D.L.R. (4th) 557, [2007] O.J. No. 901 (Ont. S.C.J.), affd 2008 ONCA 641,300 D.L.R. (4th) 574, [2008] O.J. No. 3652 (Ont. C.A.).

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF HUDSON'S BAY COMPANY ULC COMPAGNIE DE LA BAIE D'HUSON SRI et al

Court File No.: CV-25-00738613-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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