Court of Appeal File No.: COA-24-OM-0248
Court File No. CV-23-00696017-00CL

COURT OF APPEAL FOR ONTARIO

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 LOYALTYONE, CO.

APPLICANT

RESPONDING BOOK OF AUTHORITIES OF BREAD FINANCIAL HOLDINGS, INC. (MOTION FOR LEAVE TO APPEAL)

October 4, 2024

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TAB 1

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Date:	2020-05-08
File number:	38594
Other citations:	444 DLR (4th) 373 — 317 ACWS (3d) 532 — 78 CBR (6th) 1 — [2020] CarswellQue 3772
Citation:	**9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10 (CanLII), [2020] 1 SCR 521, <https://canlii.ca/t/j7c04>, retrieved on 2024-09-17**

SUPREME COURT OF CANADA

Citation: 9354-9186 Québec inc. *v.* Callidus Capital Corp., 2020 SCC 10, [2020] 1 S.C.R. 521	**Appeals Heard and Judgment Rendered:** January 23, 2020 **Reasons for Judgment:** May 8, 2020 **Docket:** 38594

Between:

9354-9186 Québec inc. and 9354-9178 Québec inc.

Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP,

Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier

Respondents

- and -

Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited),

Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and

Canadian Association of Insolvency and Restructuring Professionals

Interveners

And Between:

IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)

Appellants

and

Callidus Capital Corporation, International Game Technology, Deloitte LLP,

Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier

Respondents

- and -

Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc.,

Insolvency Institute of Canada and

Canadian Association of Insolvency and Restructuring Professionals

Interveners

Coram: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

Joint Reasons for Judgment: Wagner C.J. and Moldaver J. (Abella, Karakatsanis, Côté, Rowe and Kasirer JJ. concurring)

(paras. 1 to 117)

9354-9186 Québec inc. and

9354-9178 Québec inc. Appellants

v.

Callidus Capital Corporation,

International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier Respondents

and

Ernst & Young Inc.,

IMF Bentham Limited (now known as Omni Bridgeway Limited),

Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and
Canadian Association of Insolvency and Restructuring Professionals Interveners

- and -

IMF Bentham Limited (now known as Omni Bridgeway Limited) and
Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited)
Appellants

v.

Callidus Capital Corporation,

International Game Technology,
Deloitte LLP, Luc Carignan,
François Vigneault, Philippe Millette,
Francis Proulx and François Pelletier Respondents

and

Ernst & Young Inc.,

9354-9186 Québec inc.,

9354-9178 Québec inc.,

Insolvency Institute of Canada and
Canadian Association of Insolvency

and Restructuring Professionals Interveners

Indexed as: 9354-9186 Québec inc. *v.* Callidus Capital Corp.

2020 SCC 10

File No.: 38594.

Hearing and judgment: January 23, 2020.

Reasons delivered: May 8, 2020.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Rowe and Kasirer JJ.

on appeal from the court of appeal for quebec

Bankruptcy and insolvency —— Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act —— Appellate review of decisions of supervising judge —— Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose —— Whether supervising judge can approve third party litigation funding as interim financing —— Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

The debtor companies filed a petition for the issuance of an initial order under the Companies' Creditors Arrangement Act ("CCAA") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around

the same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with

due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* —— that is, acting for an improper purpose —— s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive. Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote, which is expressly provided for in s. 11.2 of the *CCAA*.

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Jean-Philippe Groleau, Christian Lachance, Gabriel Lavery Lepage and Hannah Toledano, for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.

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Sylvain Rigaud, Arad Mojtahedi and Saam Pousht-Mashhad, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for judgment of the Court were delivered by

The Chief Justice and Moldaver J.—

I. Overview

[1] These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

[2] Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

[3] For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

[4] In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants, 9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

[5] In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

[6] Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus — close to half of which Bluberi asserts is comprised of interest and fees.

A. Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets

[7] On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

[8] Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

[9] Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1][1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

[10] The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

[11] Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. The Initial Competing Plans of Arrangement

[12] On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

[13] However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

1. Bluberi does not appear to have filed this claim yet (see 2018 QCCS 1040, at para. 10 (CanLII)).

[14] The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

[15] On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. Creditors' Vote on Callidus's First Plan

[16] On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors — that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

[17] Callidus did not vote on the First Plan — despite the Monitor explicitly stating that Callidus could have "vote[d] . . . the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. Bluberi's Interim Financing Application and Callidus's New Plan

[18] On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

[19] The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

[20] Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

[21] On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

[22] The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. Quebec Superior Court, 2018 QCCS 1040 (Michaud J.)

[23] The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

[24] With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48 (CanLII)). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan — which was almost identical to the New Plan — had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.

2. Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.

It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

[25] The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

[26] Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

[27] With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

[28] The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

[29] After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150, at para. 41, and *Hayes v. The City of Saint John*, 2016 NBQB 125, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332, at para. 23).

[30] Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

[31] Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. Quebec Court of Appeal, 2019 QCCA 171 (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))

[32] The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 (CanLII)). In particular, the court identified two errors of relevance to these appeals.

[33] First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

[34] Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

[35] In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

[36] Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

[37] These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. Preliminary Considerations

[38] Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

[39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

[40] Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (J. P. Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2016* (2017), 9, at pp. 9-10; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2nd ed. 2013), at pp. 4-5 and 14; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

[41] Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state — that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

[42] That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress . . . and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ("*Essar*"), at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

[43] Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 1998 CanLII 14907 (ON SC), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

[44] *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

[45] However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

[46] Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

[47] One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

3. We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

[48] The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 2005 CanLII 8671 (ON CA), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

[49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith — powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

(See also *BIA*, s. 4.2; *Budget Implementation Act, 2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

[51] The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). A party's failure to participate in *CCAA* proceedings in a diligent and timely fashion can undermine these procedures and, more generally, the effective functioning of the *CCAA* regime (see, e.g., *North American Tungsten Corp. v.*

Global Tungsten and Powders Corp., 2015 BCCA 390, 377 B.C.A.C. 6, at paras. 21-23; *Re BA Energy Inc.*, 2010 ABQB 507, 70 C.B.R. (5th) 24; *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 1563, 72 C.B.R. (5th) 276, at para. 11; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701, at paras. 51-52, in which the courts seized on a party's failure to act diligently).

[52] We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

[53] A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

> [54] This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:
>
> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[55] With the foregoing in mind, we turn to the issues on appeal.

B. Callidus Should Not Be Permitted to Vote on Its New Plan

[56] A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote.

We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

[57] Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at §149). If the requisite "double majority" in each class of creditors — again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims — vote in favour of the plan, the supervising judge may sanction the plan (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 529; Houlden, Morawetz and Sarra at §45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

[58] Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

[59] Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can

sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

[60] We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

[61] While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at §33, *Red Cross*; *Re 1078385 Ontario Inc.* (2004), 2004 CanLII 55041 (ON CA), 206 O.A.C. 17). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

[62] Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

[63] Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis* (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

[64] Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not

share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "... courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

[66] Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

General power of court

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.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

[69] Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor

is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

[70] Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

[71] The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

[72] While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

[73] First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

[74] Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* — that is, any purpose collateral to the purpose of insolvency legislation — is entirely

harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute. [Emphasis added.]

("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30)

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

[77] In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

[78] The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all — despite the Monitor explicitly inviting it do so.[4][4] The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors'

approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan — which was identical to the First Plan, save for a modest increase of $250,000 — none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

[79] Indeed, as the Monitor observes, "[o]nce a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

[80] We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding — which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

[81] As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its First Plan had failed

4. It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

(see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

[82] In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

[83] Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. Bluberi's LFA Should Be Approved as Interim Financing

[84] In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

[85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as "debtor-in-possession" financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 1999 CanLII 14840 (ON SC), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

[86] Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

Interim financing

11.2 **(1)** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

[87] The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5][5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

[88] The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived — Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp.

5. A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

228-29 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-104).

[90] Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

Factors to be considered

(4) In deciding whether to make an order, the court is to 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's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would 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 property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

(*CCAA*, s. 11.2(4))

[91] Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

[92] As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

[93] Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Bayens*).

[94] Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6][6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* (1884), 7 O.R. 644 (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* (2002), 2002 CanLII 45046 (ON CA), 218 D.L.R. (4th) 193 (Ont. C.A.), at para. 26).

[95] Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, at para. 52, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739 (Div. Ct.); see also *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context — and indeed, the parameters of their legality generally — is still evolving, and no party before this Court has invited us to evaluate it.

6. The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. Banque nationale du Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

[96] That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

[97] We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

[98] The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

[99] A key argument raised by the creditors in *Crystallex* — and one that Callidus and the Creditors' Group have put before us now — was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

[100] There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all — it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100¢ on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).

(Houlden, Morawetz and Sarra, at §33)

[101] The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away . . . their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

(*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

[102] Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

[103] We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine

that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

[104] None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

[105] In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

[106] While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

- the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);

- the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));

- the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));

- the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

- the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (para. 91 (emphasis added); s. 11.2(4)(f)); and

- the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

[107] In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been — to some extent, it does prioritize Bentham's recovery over theirs — we nonetheless defer to the supervising judge's exercise of discretion.

[108] To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

[109] First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

[110] Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

[111] We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[112] This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> . . .
>
> . . . While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

[113] We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising

judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

[114] We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

[115] Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

[116] Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

[117] For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

TAB 2

Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à), 2012 QCCS 6796 (CanLII)

Date: 2012-11-20

File number: 500-11-042345-120

Citation: **Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à), 2012 QCCS 6796 (CanLII), <https://canlii.ca/t/fvrrx>, retrieved on 2024-09-18**

Aveos Fleet Performance Inc./Aveos Fleet performance aéronautique inc. (Arrangement relatif à) 2012 QCCS 6796

SUPERIOR COURT

Commercial Division

CANADA

PROVINCE OF QUÉBEC

DISTRICT OF MONTRÉAL

N°: 500-11-042345-120

DATE : November 20, 2012

_____

PRESIDING : THE HONOURABLE MARK SCHRAGER, J.S.C.

_____

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

AVEOS FLEET PERFORMANCE INC. /

AVEOS FLEET PERFORMANCE AÉRONAUTIQUE INC.

Insolvent Debtor/Petitioner

and

AERO TECHNICAL US, INC.

Insolvent Debtor

and

FTI CONSULTING CANADA INC.

Monitor

and

NORTHGATEARINSO CANADA INC.

Petitioner

and

JS 1319

CREDIT SUISSE AG CAYMAN ISLANDS BRANCH

Secured creditor

JUDGMENT

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INTRODUCTION

[1] Aveos Fleet Performance Inc. ("Aveos") is subject to an order under the *Companies' Creditors Arrangement Act* ("C.C.A.A.')[1][7] It has sold or seeks to sell all of its assets and is not operating its business. Can it invoke Section 32 C.C.A.A. to cancel an executory contract? This is the principal issue before this Court.

FACTS

[2] Aveos and its related entity, Aero Technical US, Inc. (collectively, the "debtors") applied for and this Court issued an initial order under the C.C.A.A. on March 19, 2012. A stay was issued until April 5, 2012, at that time and has subsequently been extended. F.T.I. Consulting Canada Inc. was named monitor. The record of the Court and particularly the orders and reasons of the undersigned indicate that in the hours following the initial order, the entire board of directors (but one) of Aveos resigned. Most of the remaining employees (i.e. those who had not been laid off prior to the C.C.A.A. filing) were laid off immediately following the initial order and the day-to-day operations of Aveos were shut down.

[3] The remaining director signed the affidavit in support of a Motion Seeking the Appointment of a Chief Restructuring Officer ("C.R.O."), in virtue of which Mr. Jonathan Solursh of the firm R.e.I. Consulting Group, an independent consultant, was named C.R.O. and has acted in such capacity since then. The remaining director resigned following such appointment.

[4] Much time and effort were spent in the month following the filing with the emergency situations of a company not having sufficient cash to operate in the normal course, being in possession of property claimed by third parties and having 2800 former or present employees owed millions of dollars in the aggregate. Nevertheless, the C.R.O. quickly concluded with the support of the Monitor that Aveos had to be sold.

[5] On April 29, 2012, this Court issued an order approving the "Divestiture Process" put forward by the C.R.O. in virtue of which Aveos was offered for sale. The C.R.O. determined that Aveos' three (3) divisions (i.e. engines, components and air frames) should be marketed with a view to separate sales as it was unlikely that anyone would purchase all three (3) divisions. The C.R.O. believed that the value could be maximized by seeking to split Aveos into three (3) enterprises although there was no impediment to any one person acquiring all three (3) divisions. It was certainly hoped that all three (3) divisions would be sold on a going concern basis and would recommence operations and this in the interest of all stakeholders.

[6] As the Court record indicates, at no time did any party bring a motion to end the stay period with a view to petitioning Aveos into bankruptcy.

[7] The C.R.O. and Monitor have reported on an ongoing basis and also gave evidence in the present matter before the undersigned. The Divestiture Process has given rise to over 10 transactions. Unfortunately, only one sale (for the components division) has been made on a

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7. R.S.C. 1985, c. C-25

going concern basis where approximately 200 jobs should be conserved. However, and significantly, although the process of seeking bids has ended, the C.R.O. and the Monitor testified before the undersigned that a "latecomer" has appeared, and is performing a due diligence investigation with a view to making an offer to acquire the engine maintenance division of Aveos. The engine maintenance equipment remains in the hands of a liquidator but the scheduled auction has now been postponed. The interested party is in the same type of business, so that the tax losses of Aveos may have value as part of the transaction and this could potentially lead to the filing of a plan of arrangement with some benefit for unsecured creditors. Though the engine maintenance contract with Air Canada was sold as part of the Divestiture Process, it represented approximately 55 % of the engine maintenance business. Accordingly, there is a potential value in the business enterprise beyond the liquidation value of the tangible assets.

[8] Against this status update of the C.C.A.A. file is the dispute between Aveos and the present Petitioner, Northgatearinso Canada Inc. ("N.G.A.").

[9] Aveos was created as a result of the C.C.A.A. restructuring of Air Canada. It was the former maintenance department of Air Canada. Initially, it depended on Air Canada's support for payroll and human resources. As part of the process of separating Aveos from Air Canada, Aveos sought to outsource its human resources and payroll departments. To this end, a process to select a service provider was put in place. The goal of Aveos was to have a completely outsourced human resources and payroll system that would include computer access for employees through a portal where they could access their files and view their status (e.g. benefit accruals) and even input information (e.g. change beneficiaries in insurance plans). The service would include a call center to handle employee questions.

[10] The establishment of the system had many challenges and complicating factors, such as the fact that some Aveos' personnel were Air Canada's employees that had been seconded to Aveos.

[11] Originally, an operating system completely independent from Air Canada and its services providers was targeted for autumn 2010. This date was extended due to extraneous considerations to July 14, 2011, which was fortunate given all of the developmental problems experienced as will be addressed below.

[12] The "Global Master Services Agreement" ("G.M.S.A.") with N.G.A. was signed between Aveos and N.G.A. in January 2011. By the time of the C.C.A.A. filing in March 2012 not all outstanding operational issues had been resolved. The relationship was fraught with frustration on both sides. Aveos felt that N.G.A. took too long to install systems and was unable to provide certain services altogether. Costs ran over those stipulated in the G.M.S.A. for services not covered under the agreement. All of this caused Aveos to lose confidence in N.G.A.

[13] N.G.A. was frustrated by the ongoing changes in Aveos management personnel charged with the implementation of the system, so that from N.G.A.'s point of view, once it finally "educated" one member of the Aveos team he she was replaced so that Aveos throughout did not fully understand what the system was designed to do, and by extension, what the system could not do.

[14] Aveos felt that N.G.A. as the expert should tell it not merely what was needed, but what was missing in the system to address Aveos' needs. Instead, the Aveos' personnel in charge learned piecemeal that features that they wanted or needed were not available or at least not included in the contract price. This situation was severe enough to cause Aveos to engage the services of Deloitte at the beginning of 2012 as a consultant to help Aveos resolve the continuing issues arising during implementation of the services to be provided by N.G.A. under the G.M.S.A.

[15] N.G.A. felt not only did Aveos fail to understand the system, but it provided incomplete or incorrect data to N.G.A. for input and thus further complicated matters.

[16] The problems with N.G.A. were such that Aveos has sought cancellation of the G.M.S.A. not only under Section 32 C.C.A.A. but also Aveos seeks resiliation for cause pursuant to the law of contracts generally based on N.G.A.'s alleged faulty execution of its obligations.

[17] The level of frustration existing between N.G.A. and Aveos continued after the C.C.A.A. filing. The lay-offs and the shut down of day-to-day operations required services not contemplated by the G.M.S.A. Obtaining such services in a timely manner from N.G.A. was the subject of ongoing extensive and tense negotiations over a period of approximately one month. Aveos was now represented by the C.R.O. and his staff with the support of the Monitor.

[18] Before the undersigned, the representative of the Monitor diplomatically described the situation between N.G.A. and Aveos prior to the C.C.A.A. filing as a "failed business relationship". Unfortunately, the situation did not improve during the post-filing period.

[19] Upon learning of the initial filing under the C.C.A.A., N.G.A. communicated with Aveos. The thrust of N.G.A.'s written and verbal communications were either a refusal to continue services under the existing contract and seeking assurance of payment going forward (according to Aveos) or a request as to what would be required given the change of operations and personnel as described above (according to N.G.A). There followed a series of exchanges including numerous conference calls which gave rise, in succession, to three Memoranda of Understanding dated March 26, April 10 and April 13, 2012 which outlined the services to be provided by N.G.A. to Aveos and the pricing in respect thereof.

[20] Aveos had payroll needs because 120 employees had been recalled. Also payroll periods which fell on both sides of the C.C.A.A. filing date required special attention. Certain "claw-back" amounts previously set off against amounts due to employees had to be paid post-filing. Records of employment had to be issued in order for employees to be able to claim benefits from the government unemployment insurance program.

[21] Other ongoing services under the G.M.S.A. were obviously not required as Aveos' operations were not continuing as had been the case prior to the C.C.A.A. filing.

[22] From N.G.A.'s point of view, the demands being made by Aveos were exorbitant mainly because the time delays were extremely aggressive. Many of the services requested were not what the system was designed to do. For example, records of employment resulting from mass layoffs were not designed into the system, nor were reversing deductions from past pay periods and ledgering these reversals in the former pay period already closed for purposes of data entry. The system had to be (re-)designed to accommodate these needs.

[23] From the C.R.O's point of view, N.G.A.'s performance failures experienced by Aveos pre-filing now continued into the post-filing period. N.G.A.'s difficulty to meet tight time deadlines imposed by the C.C.A.A. circumstances and the exorbitant pricing made it such that Aveos, through the C.R.O., sought and engaged an alternate payroll service provider as of May 1, 2012. The price for a one-year contract albeit encompassing far less extensive services than those under the G.M.S.A., is one-half of N.G.A.'s monthly fee. Indeed, the representative of the C.R.O. testified that the exorbitant pricing under the three (3) Memoranda of Agreement was only accepted because there was no alternative at that time. As such, $240,000.00 was paid by Aveos to N.G.A. for the 4-week period between the end of March and the end of April 2012.

[24] In one instance, where the payroll included the reversal of amounts previously set off, N.G.A. could not produce the work product at all or at least on time such that the C.R.O. organized staff to produce 800 pay cheques manually. Moreover, the data in question was entered into the database by N.G.A. in the current as opposed to the old, pre-filing period in consideration of which the payments were being made. This caused Services Canada to question whether the employees were indeed eligible for Unemployment Insurance ("UIC") benefits. Apparently, much energy was expended in order to correct this situation and the results were additional delays for employees to receive their UIC benefits.

[25] Effective May 1, 2012, Aveos gave notice to N.G.A. that it was cancelling the G.M.S.A. and the three (3) Memoranda of Agreement for faulty performances both pre and post-filing. Alternatively, Aveos took the position that it was cancelling and repudiating the agreements pursuant to its rights to do so under Section 32 C.C.A.A. N.G.A. claims $501,381.00 which is the indemnity provided by the G.M.S.A. where cancellation is for "convenience", i.e. without cause. N.G.A. also claims the sum of $91,377.00 for unpaid services rendered under the three (3) Memoranda of Agreement.

[26] Crédit Suisse, the secured creditor, has taken the position that whatever sums might be due to N.G.A., they fall within the definition of "claim" in Sections 2 and 19 C.C.A.A. and are not post-filing claims as postulated by N.G.A. Thus, any payment would be subordinate to the rights of Crédit Suisse.

ISSUES

[27] Is Section 32 C.C.A.A. available to Aveos as a means to resiliate or cancel the G.M.S.A.?

[28] Aside from Section 32 C.C.A.A., does Aveos have the right to resiliate the G.M.S.A. because of the alleged faulty execution by N.G.A. of its obligations there under?

[29] Does N.G.A. have the right to claim the cancellation indemnity of $501,381.00 foreseen by the G.M.S.A.? If so, is the amount due immediately by Aveos as a claim arising after the C.C.A.A. filing, and as such not subject to the stay of proceedings? In the alternative, is the amount due but subject to be treated as a (pre-filing) ordinary or unsecured claim to be dealt with under an arrangement, if any, or a bankruptcy?

[30] Is the sum of $91,377.00 due immediately for services rendered by N.G.A. to Aveos after the C.C.A.A. filing?

POSITION OF N.G.A.

[31] N.G.A. contends that Section 32 C.C.A.A. does not apply in the circumstances where Aveos ceased to carry on business, is being liquidated and as such will not propose an arrangement to its creditors. N.G.A. argues that Section 32(1)(b) C.C.A.A. does not apply to such a scenario. The purpose of Section 32 C.C.A.A. is to allow a debtor company to rid itself of contractual obligations which are an impediment to an arrangement. Where no arrangement will be filed, Section 32 C.C.A.A. should not apply according to N.G.A.

[32] Moreover, since the G.M.S.A. contains a provision allowing for cancellation without cause, such recourse must be used before reverting to a statutory mechanism to seek cancellation of the contract. In other words, according to N.G.A., Aveos must pay the stipulated cancellation penalty of $501,381.00 to achieve cancellation in such manner rather than having recourse to Section 32 C.C.A.A.

[33] The resiliation of the G.M.S.A. for faulty execution is not available to Aveos because on the facts of the case, N.G.A. is not at fault having fulfilled its contractual obligations at all relevant times.

[34] The $501,381.00 cancellation penalty is not a claim provable within the meaning of the C.C.A.A., but rather is a post-filing claim. This claim arises from the unilateral cancellation of the G.M.S.A. by Aveos after the C.C.A.A. filing. N.G.A. continued to render services after the filing albeit in a modified manner, at Aveos' request and in order to respond to Aveos' needs in the situation as it unfolded after the C.C.A.A. filing. On or about May 1, 2012, approximately five (5) weeks after the C.C.A.A. filing, Aveos cancelled the G.M.S.A. and as such the obligation of Aveos to pay the penalty of $501,381.00.00 arose after the filing. Consequently, it is not a provable claim, but rather an amount arising and payable after the C.C.A.A. filing.

[35] Similarly, the $91,377.00 representing charges for services rendered after the filing, and at the request of and as agreed with Aveos, are currently due. This is not a claim provable to be dealt with under an arrangement, according to N.G.A. As such, it should be paid by Aveos immediately, as were the other amounts for services rendered after the C.C.A.A. filing, the whole as pleaded by N.G.A.

DISCUSSION

[36] Section 32 C.C.A.A. provides a mechanism for a debtor company to "disclaim or resiliate" agreements to which it is a party at the time of the initial C.C.A.A. filing. This disclaimer is achieved by notice given by the debtor to the co-contracting party.

[37] The debtor company's notice to disclaim may be contested by the other party to the contract as N.G.A. has done in the present case. It then falls upon the Court to make (or not) an order of disclaimer :

[38] Section 32(4) C.C.A.A. provides as follows :

> "Factors to be considered
>
> In deciding whether to make the order, the court is to consider, among other things,
>
> a) whether the monitor approved the proposed disclaimer or resiliation;
>
> b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement."

[39] On the face of the drafting of Section 32(4) C.C.A.A., the matters listed are not an exhaustive enumeration of the matters that this Court may consider in deciding whether to approve the cancellation of a contract where the notice is contested.

[40] Section 37(4)(c) C.C.A.A. is not in issue in these proceedings because N.G.A. did not allege nor prove any financial hardship arising from the G.M.S.A. There is the obvious lack of revenue stream when the contract is cancelled (approximately $80,000.00 per month), but it was not contended that the loss of this, *per se* constituted, in this particular case, the "financial hardship" to which subparagraph (c) refers.

[41] Section 32(4)(b) C.C.A.A. addresses the issue of whether the cancellation of the contract would "enhance the prospects of a viable" arrangement being made.

[42] The Monitor filed a report and its representative, Ms. Toni Vanderlaan, testified before the undersigned.

> [43] The Monitor confirmed that it had approved the proposed cancellation of the G.M.S.A. as foreseen by Section 32(4)(a) C.C.A.A. In so doing, the Monitor considered the cost of continuing the G.M.S.A., which as indicated above represents approximately $80,000.00 per month prior to the C.C.A.A. filing. The alternate provider engaged by Aveos after May 1 (Ceridian), was considerably cheaper at $40,000.00 per year albeit that the scope of the service under the G.M.S.A. provided by N.G.A. was much broader than those provided by Ceridian. In any event, the Monitor determined that the G.M.S.A. was far too expensive given the cash position of Aveos and its payroll and human resources needs in any scenario post C.C.A.A. filing.

[44] In addition to cost, the Monitor concluded that cancelling the G.M.S.A. would enhance the prospect of filing an arrangement. The Monitor underlined that not merely was the G.M.S.A. expensive, but it was undesirable. As stated above, Ms. Vanderlaan summarized the relations between N.G.A. and Aveos at the time of the C.C.A.A. filing as a "failed business relationship". It is clear to the Court that the systems provided by N.G.A. either did not do what they were supposed to do or if they did do what they were supposed to do, then there was a breakdown in communication between N.G.A. as service provider and Aveos as consumer as to what the requirements of Aveos were.

[45] The representative of N.G.A., Mr. Latulippe, referred on a number of occasions to the fact that the representatives of Aveos responsible for the negotiation and implementation of the G.M.S.A. with N.G.A. did not properly understand what the system was designed to do. This may have been so, but it became evident during the hearing before the undersigned that N.G.A. was lacking in its ability both before and after the C.C.A.A. filing to understand its client's needs and to address them adequately or where that was not possible to explain such inability in a timely and comprehensible fashion. It was therefore not conceivable that Aveos could use the G.M.S.A. going forward because of all of the problems associated with it.

[46] Moreover, the system described in the G.M.S.A. was designed for a company with approximately 3,000 employees. After the C.C.A.A. filing, Aveos only had a fraction of that number on a descending basis. Since the Divestiture Process was based on the premise that no one acquirerer would seek to purchase all three (3) divisions of Aveos, then any possible purchasers would not want the contract based purely on the number of employees. Aside from such consideration, the system did not work very well and the likelihood was that any acquirerer would be an operator in the industry and already have its own payroll and human resources systems in place. The sale or assignment of the G.M.S.A. as part of a sale of assets was not an

alternative in the view of the Monitor even absent all the problems experienced by Aveos with the system. Thus, in any possible scenario, the G.M.S.A. was of no use to Aveos and could not enhance, in any scenario, the making of an arrangement.

> [47] However, and as stated above, N.G.A. contends that cancellation under Section 32 C.C.A.A. is not available because Section 32(4)(b) C.C.A.A. does not apply. According to N.G.A., there is no discussion to be had about the prospect of an arrangement since early on in the C.C.A.A. process, Aveos shut down its normal operations and went into liquidation mode. Thus, no plan of arrangement will be made, so that an essential element for the application of Section 32 C.C.A.A. is not met according to N.G.A.

> [48] The text of Section 32(4)(b) C.C.A.A. does not impose as a condition for resiliation that there be a plan of arrangement or even the certainty that there will be a plan of arrangement filed. Rather 32(4)(b) C.C.A.A. requires that the cancellation of the G.M.S.A. enhance the prospects of a viable arrangement. It is clear from the Monitor's analysis referred to above that the cancellation would rid Aveos of an expensive contract for a system which never functioned in a completely satisfactory manner, and that under the best of circumstances was inappropriate for a company with less than 2,800 employees, and where the relationship with the service provider (both pre and post C.C.A.A. filing) had failed. Viewed in this way, the disclaimer could only enhance the possibility of an arrangement.

> [49] It is accepted by the case law that the disclaimer need not be essential but merely advantageous to a plan [2][8]. There need not be any certainty that there will be a plan of arrangement but just that cancellation of the contract in question would be beneficial to the making of a plan.

[50] Section 32 C.C.A.A. applies even where there is a sales process in place as is the situation with Aveos [3][9]. Prior to Section 36 C.C.A.A. coming into force in 2009, it was broadly accepted that liquidating while under C.C.A.A. protection was not contrary to the Act.[4][10] Now, Section 36 C.C.A.A. explicitly provides for sales out of the ordinary course of business, with Court approval.

[51] A sales process, particularly when assets are offered on a going concern basis together with intangible property (e.g. customer contracts) can lead to a result where one or several operating business entities similar to those operated by the debtor pre C.C.A.A. filing, continues after the C.C.A.A. process is completed. The ability to file an arrangement can largely be a function of the sales proceeds received and the amounts available to different stakeholders, particularly secured creditors. The point is that the existence of a sales process or "liquidation" does not *per se* mean that an arrangement is not a possibility. The fact that Aveos ceased operations was a function of cash (or the lack thereof), but the sales process was specifically designed to enhance the possibility of going-concern sales. Indeed, the timetable was short, specifically so as to limit the deterioration of critical mass of such things as customer base and labour pool. Despite the fact that only one division (components) of Aveos was sold on a going concern basis through the process, the C.R.O. testified at the hearing that a new prospective purchaser had come forward to possibly purchase the engine maintenance center together with tax losses arising from Aveos' operations. This could result in a plan of arrangement being filed with benefit for unsecured creditors.

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8. *Timminco Limited (Re)*, 2012 ONSC 4471 at par. 52 to 57; *Boutique Jacob inc. (Arrangement relatif à)*, 2011 QCCS 276 at par. 38 to 41 and 46; *Homburg Invest inc. (Re)*, 2011 QCCS 6376 at par. 103-106; *9145-7978 Québec inc. (arrangement relatif à*), 2007 QCCA 768 at par. 26 to 29.
9. *Timminco Limited* (Re), op.cit, at par. 52-27
10. *Sproule vs. Nortel Networks Corporation 2009 ONCA 833; First Leaside Wealth Management Inc. (Re),* 2012 ONSC 1299; *PCAS Patient Care Automation Services Inc. (Re),* 2012 ONSC 3367; *Brainhunter Inc. (Re),* (2009) 62 C.B.R. (5) 41 (ONSC); *Anvil Range Mining Corp. (Re)*, (2002) 34 C.B.R. (4) (ONCA)

[52] Accordingly, in the view of this Court, the shutdown of Aveos' normal operations and the implementation of a sales process does not in itself, eliminate the application of Section 32 C.C.A.A. as argued by N.G.A.

[53] As indicated above, the undersigned has considered the evidence of the C.R.O. with respect to the late bidder. C.C.A.A. issues generally must be decided in "real time" if for no other reason so as to achieve the broad remedial purpose of the legislation[5][11] of providing a means for financially-strapped enterprises to correct problems and continue in business. This is all the more so in a process such as the Aveos Divestiture Process where the parties' business judgment dictates that the debtor be offered for sale but the parties do not know ahead of time what the outcome of such process will be. The situation evolves constantly and rapidly. The Court's decisions along the way cannot be frozen in time lest those decisions be unrealistic and unhelpful to the process. In any event, even if the undersigned only considered the facts as they were at the date of the notice to disclaim the G.M.S.A. as urged by N.G.A., the undersigned would still be of the opinion that Section 32 C.C.A.A. is available to Aveos for the reasons given above pertaining to the interpretation of Section 32 C.C.A.A.

[54] N.G.A. also submitted that since the G.M.S.A. contains a mechanism to cancel where cancellation for cause under the common law of contracts is not available, then Section 32 C.C.A.A. cannot apply. The argument put forward by N.G.A. is based on the decision in the matter of Hart Stores [6][12] where Mongeon, J.S.C. held that Section 32 C.C.A.A. did not apply to the cancellation or termination of verbal contracts of employment having no fixed term.

[55] The reasoning in that case was that the mechanism in Section 32 C.C.A.A. was inappropriate to cancel a verbal contract of indeterminate term where the law (Article 2091 of the Civil Code of Québec) provided a mechanism for unilateral cancellation. In this Court's opinion that reasoning does not apply to a written service agreement of determinate term such as the G.M.S.A.

[56] Moreover taken to its logical conclusion, the argument is not really of any help to N.G.A. for the following reason. If Aveos could not rely on Section 32 C.C.A.A. and was obliged to rely on the cancellation for convenience clause in the G.M.S.A., the penalty of $501,381.00 would nonetheless constitute a provable claim payable under an eventual plan of arrangement or bankruptcy.

[57] "Claim" is defined in Section 2 of the C.C.A.A. by reference to the *Bankruptcy and Insolvency Act* ("B.I.A.") [7][13]. Section 19 C.C.A.A. introduced in the 2007 amendments which came into force in 2009, includes in claims that can be dealt with under a plan of arrangement the following:

> "19.(1)(*b*) claims that relate to debts or 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)."

This is precisely the situation with the cancellation indemnity claimed by N.G.A. in this case. Though Aveos may have triggered the cancellation penalty after the C.C.A.A. filing, the obligation stems from a contract to which it was bound pre-C.C.A.A. filing.

11. *Century Services Inc. vs. Canada (Attorney General),* 2010 SCC 60 (CanLII), [2010] 3 S.C.R. 379
12. Re *Hart Stores Inc.*, 2012 QCCS 1094
13. R.S.C. *c.* B.-3

[58] The claim for the cancellation penalty would also be a claim provable in a bankruptcy (see Section 2 and Section 121 of the *B.I.A.* which are substantially similar to Section 19 C.C.A.A.).

[59] Accordingly, in any and all scenarios, the $501,381.00 claimed by N.G.A. for the cancellation indemnity would be a claim provable and would not have the status of a "post-filing claim" payable immediately, i.e. prior to the claims of other creditors.

[60] The Courts have said on numerous occasions that pre-filing creditors cannot under the guise of making a post-filing claim, obtain a preference over other creditors. [8][14] This applies even to employees for severance claims arising from termination of employment after the C.C.A.A. filing [9][15]. The equitable treatment of creditors' demands that claims for contractual damages arising from the termination of contracts after filing under the C.C.A.A. be treated on a par with other provable claims [10][16].

[61] Consequently, N.G.A.'s argument based on the cancellation of the G.M.S.A. without cause after the C.C.A.A. filing date is not helpful to N.G.A., since even if correct, the argument would give rise to a claim provable only.

[62] Moreover, the parties cannot write out part of the C.C.A.A. from contracts. [11][17] This is against public policy. Parties to a contract cannot exclude in advance the application of the C.C.A.A. It would be offensive to the wording of Section 32 and the C.C.A.A. in general if Section 32 C.C.A.A. could not achieve its purpose as a result of the drafting of the contract which the debtor sought to cancel. This would defeat the rehabilitative purpose of the C.C.A.A. and thus would be contrary to the public policy of the C.C.A.A.

[63] Consequently, Section 32 C.C.A.A. is available to Aveos in order to cancel the G.M.S.A. The appropriate order will issue.

[64] Because of the manner in which the Court has answered the first issue set forth hereinabove (i.e. the application of Section 32 C.C.A.A.) it is not necessary to analyse whether Aveos could cancel the G.M.S.A. for cause because of alleged faulty execution by N.G.A. in virtue of the law of contracts generally.

[65] Regarding the $501,381.00 cancellation indemnity, the following should be added. Section 32(7) C.C.A.A. provides that any loss suffered in relation to the disclaimer is a provable claim. The Court renders no judgment on whether the amount of any such claim is $501,381.00 or any other amount in the circumstances. That will have to be determined at a later date, if necessary.

[66] The final issue requiring determination is the matter of N.G.A.'s claim for $91,377.00 for system maintenance. This amount represents the fee of $10,153.00 per week stipulated in the memorandum of understanding of April 13th. Such an amount was paid for the period up to the end of April 2012. The $91,377.00 represents $10,153.00 per week for the 9-week period commencing April 30, 2012, i.e. the expiry of the term of the last memorandum of understanding.

[67] N.G.A. needed the data maintained in the system to complete the records of employment ("R.O.E.") for each of the employees. It had contracted to make "best efforts" to complete those R.O.E.s by April 28, 2012. Mr. Latulippe, N.G.A.'s representative, testified that N.G.A. completed all of the R.O.Es by April 28, except for 50 which were problematic and could not be completed

14. *Pine Valley Mining Corporation (Re),* 2008 BCSC 368 (CanLII), 2008 B.C.S.C. 368 para. 37-42; *Canwest Global Communications Corp. (Re),* 2010 ONSC 1746 (CanLII), 2010 O.N.S.C. 1746, para. 29-31, 33-35
15. *Canwest Global Communications Corp. (Re),* op.cit.
16. *Timminco Limited (Re*), op.cit., para. 44
17. Section 8 C.C.A.A.

until the end of June. Accordingly, N.G.A. required the data to be maintained until that time. He conceded that there was no explicit agreement in place after April 30, 2012 for Aveos to pay such weekly system maintenance fee.

[68] Even though N.G.A. only contracted to make best efforts to complete the R.O.E.s before April 28, if N.G.A. needed to maintain the data in the system after April 28, it was not justified, without Aveos' consent, to charge the $10,153.00 per week to maintain the data in the system. The "best efforts" clause may have attenuated N.G.A.'S obligation to complete by April 28 but did not impose an obligation on Aveos after that date without its consent. It had been agreed after the C.C.A.A. filing that the services to be provided by N.G.A. and paid for by Aveos were set forth in the memoranda of understanding. There was no obligation to pay for system maintenance after April 28.

[69] The Court adds that the fact that the cancellation of the G.M.S.A. takes effect according to Section 32(5) C.C.A.A. on the 30 day following Aveos' notice of May 7, 2012 does not entitle N.G.A. to charge for services under the M.G.S.A. not provided nor for services not agreed to under the memoranda of understanding. Accordingly, the claim for $91,377.00 will be denied.

FOR ALL OF THE FOREGOING REASONS, THE COURT :

[70] **DISMISSES** Northgatearinso Canada Inc.'s "Amended Motion to Strike *De Bene Esse* Notice by Debtor Company to Disclaim or Resiliate an Agreement and for Payment of Post-filing Obligations", dated July 9, 2012;

[71] **DECLARES** and **ORDERS** resiliated as of June 6, 2012 the following agreement, namely: "Global Master Services Agreement" between Aveos Fleet Performance Inc. and Northgatearinso Canada Inc. dated June 30, 2010 as amended from time to time including, *inter alia*, by subsequent Memoranda of Agreement".

[72] THE WHOLE with costs against Northgatearinso Canada Inc.

Montreal, November 20, 2012

MARK SCHRAGER, J.S.C.

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Monitor

Dates of Hearings: September 28, October 18, 19 and 30, 2012

TAB 3

DEL Equipment Inc. (Re), 2020 ONCA 555 (CanLII)

Date: 2020-09-08

File number: M51568

Citation: DEL Equipment Inc. (Re), 2020 ONCA 555 (CanLII), <https://canlii.ca/t/j9jxg>, retrieved on 2024-09-25

COURT OF APPEAL FOR ONTARIO

CITATION: DEL Equipment Inc. (Re), 2020 ONCA 555

DATE: 20200908

DOCKET: M51568

Lauwers, Brown and Nordheimer JJ.A.

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 DEL Equipment Inc.

Applicant (Respondent/Responding Party)

Rahul Shastri and David Winer, for the moving party Gin-Cor Industries Inc.

Jason Wadden, Christopher Armstrong and Andrew Harmes, for the responding party DEL Equipment Inc.

Heard: in writing

Motion for leave to appeal from the order of Justice Glenn A. Hainey of the Superior Court of Justice, dated May 7, 2020.

REASONS FOR DECISION

OVERVIEW

[1] Gin-Cor Industries Inc. ("GCI") seeks leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), from the order of Hainey J. dated May 7, 2020, which required GCI to pay DEL Equipment Inc. ("DEL") the amount of $874,107.08 (the "Funds") then being held in trust pursuant to an earlier court order.

[2] We refuse GCI leave to appeal. In accordance with the practice of this court on motions for leave to appeal under the *CCAA*, these brief reasons explain our refusal.

THE DISPUTE

[3] DEL manufactures special truck bodies and equipment. GCI also manufactures and customizes trucks. In June 2017, DEL and GCI entered into a management agreement under which GCI assumed management control of DEL and ultimately could earn a 100% equity interest in DEL if certain milestones were reached. However, the parties terminated the agreement on July 18, 2019, at which time GCI ceased to manage DEL's business.

[4] In 2018, DEL received two purchase orders from Mack Defense LLC ("Mack Defense") for certain trucks. In May and June 2019, DEL delivered the trucks. In June 2019, DEL issued invoices totaling $874,107.08 to Mack Defense, which made two payments totaling that amount in late August and early September2019.

[5] However, Mack Defense mistakenly sent the payments to GCI, instead of to DEL. It appears the mistake originated when Mack Defense sought to confirm payment instructions for the trucks back in April 2019, when GCI was managing DEL. A GCI representative answered Mack Defense's inquiry and mistakenly provided instructions to direct payment to GCI's account. Although a DEL representative later provided Mack Defense with the proper payment instructions, Mack Defense ended up mistakenly paying the DEL invoiced amounts to GCI.

[6] In mid-September 2019, DEL followed up with Mack Defense and learned about the mistaken payments. DEL asked GCI to transfer the $874,107.08 to it. Although GCI acknowledged that the payments by Mack Defense were intended to satisfy DEL's invoices, GCI refused to transfer the Funds. GCI took the position that it was entitled to retain the Funds as a set-off against other obligations of DEL to GCI, including those that arose under the management agreement.

[7] Mack Defense viewed the matter as a dispute between DEL and GCI.

[8] On October 22, 2019, DEL was granted protection under the *CCAA*. As of that date, DEL owed GCI and related companies approximately $1.5 million.

[9] The motion judge then granted a preservation order requiring that GCI transfer the Funds to its lawyers pending further order of the court.

[10] Subsequently, DEL and GCI brought competing motions asserting entitlement to the Funds. The motion judge ordered the Funds be paid to DEL and that, pending payment of the Funds to DEL, the Funds are subject to a constructive trust in favour of DEL. GCI now seeks leave to appeal that order.

[11] By order dated June 24, 2020, Thorburn J.A. directed that this motion for leave to appeal be expedited and, if leave was not granted, the Funds be paid out to DEL within two business days of the order refusing leave to appeal.

ANALYSIS

The governing test

[12] This court will only sparingly grant leave to appeal in the context of a *CCAA* proceeding. Leave will be granted only where there are "serious and arguable grounds that are of real and significant interest to the parties", determined by considering whether: (i) the proposed appeal is *prima facie* meritorious or frivolous; (ii) the issue on the proposed appeal is of significance to the practice; (iii) the issue on the proposed appeal is of significance to the proceeding; and (iv) the proposed appeal will unduly hinder the progress of the proceeding: *Stelco Inc., (Re)* (2005), 2005 CanLII 8671 (ON CA), 75 O.R. (3d) 5 (C.A.), at para. 24.

Whether the proposed appeal is *prima facie* meritorious or frivolous

[13] The motion judge concluded that: (i) GCI unjustly enriched itself by retaining the Funds and refusing to pay them to DEL or return them to Mack; and (ii) GCI's retention of the Funds constitutes an improper preference over DEL's other creditors. In dealing with the issue of whether a juristic reason existed for GCI's receipt and retention of the Funds, the motion judge stated:

I have also concluded that there is no juristic reason for GCI's enrichment of receiving and retaining the Funds because,

(a) the Funds were never intended for GCI;

(b) GCI cannot rely on set off as a juristic reason for its enrichment because the Supreme Court of Canada made this clear at para. 114 of its decision in *Kerr v. Baranow,* 2011 SCC 10, [2011] 1 S.C.R. 269;

(c) GCI has acknowledged that it received the Funds by mistake which is not a juristic reason for its enrichment;

(d) GCI is not an "innocent" recipient of the Funds because its own employees were at least, in part, the cause of the mistaken payment; and

(e) GCI's retention of the Funds constitutes an improper preference over DEL's other creditors.

[14] GCI's primary submission is that the motion judge erred in holding that GCI could not rely on set-off as a juristic reason to defend a claim of unjust enrichment. GCI contends that set-off can constitute a juristic reason in a commercial law context and *CCAA* s. 21 creates a statutory right of set-off available in *CCAA* proceedings.

[15] We are not persuaded that the proposed appeal is *prima facie* meritorious. In our view, GCI has not raised any arguments that provide good reason to doubt the motion judge's decision.

[16] In particular, we are not persuaded GCI's submission on juristic reason is *prima facie* meritorious. *Kerr* remains the leading authority on the elements of a claim for unjust enrichment. On the issue of juristic reason, *Kerr* drew upon the two-step juristic reason analysis described in the Supreme Court of Canada's earlier decision in *Garland v. Consumers Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629. As the motion judge correctly noted, that two-step analysis is summarized at para. 114 of *Kerr*, where the Supreme Court stated, in part:

The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations. [Emphasis added.]

[17] While the fact that the parties have conferred benefits on each other may be considered at the juristic reasons stage, it can only be considered for the limited purpose of providing evidence of the parties' reasonable expectations that could support the existence of a juristic reason outside the settled categories: *Kerr*, at para. 115.

[18] The motion judge's reasons reveal that he applied *Kerr*'s two-step juristic reason analysis to the specific facts of this case. There was no evidence that GCI's receipt of a benefit of $874,107.08 from Mack Defense was pursuant to a legal obligation. On the contrary, GCI mistakenly received the Funds from Mack Defense, which should have sent the Funds to DEL to satisfy the invoices for DEL's delivery of trucks to Mack Defense. *CCAA* s. 21[1][18] recognizes that a creditor may raise the common law defence of set-off when sued by a company under *CCAA* protection. However, this does not alter the fact that, in this case, the Funds were mistakenly paid to and received by GCI.

[19] Further, the fact that DEL was indebted to GCI at the time of Mack Defense's mistaken payments was not, in the circumstances, evidence of any reasonable expectation by DEL and GCI that a juristic reason existed for GCI to retain the mistakenly paid Funds. Indeed, the evidence was to the contrary. As soon as DEL discovered that Mack Defense had mistakenly paid the Funds to GCI, DEL demanded that GCI transfer the Funds to it.

The remaining factors: the significance of the issue to the proceeding; significance to the practice; and the impact on the progress of the *CCAA* proceeding

[20] While the issue of the entitlement to the Funds is of significance to the parties to the proceeding, we are not persuaded that the proposed appeal raises any issues of significance to the practice. The proposed appeal turns on applying well-established principles of law to the unique facts of this case, which include the existence of a management agreement in effect between DEL and GCI at the time Mack Defense sought instructions for the payment of the Funds.

[21] The final factor to consider is whether the proposed appeal will unduly hinder the progress of the proceeding. We regard this factor as neutral. On the one hand, DEL submits that the only remaining task in the *CCAA* proceeding is to distribute funds to unsecured creditors, which cannot occur until the amount available to unsecured creditors is determined. That, in turn, would depend

18. *CCAA* s. 21 states: "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."

> upon the outcome of the proposed appeal. On the other hand, GCI argues that there is no evidence in the record of any prejudice to the *CCAA* proceeding in the event leave were to be granted. As well, GCI submits that the appeal could be expedited, as was the hearing of this motion for leave to appeal.

Conclusion

> [22] Leave to appeal is only sparingly granted in *CCAA* proceedings. In our view, the proposed appeal is neither *prima facie* meritorious nor does it raise issues of significance to the practice. Therefore, we are not persuaded that GCI's motion merits granting leave to appeal.

DISPOSITION

[23] For the reasons set out above, the motion is dismissed.

"P. Lauwers J.A."

"David Brown J.A."

"I.V.B. Nordheimer J.A."

TAB 4

Edgewater Casino Inc. (Re), 2009 BCCA 40 (CanLII)

Date:	2009-02-06
File number:	CA035922; CA035924
Other citations:	308 DLR (4th) 339 — 265 BCAC 274 — 51 CBR (5th) 1
Citation:	**Edgewater Casino Inc. (Re), 2009 BCCA 40 (CanLII), <https://canlii.ca/t/22d67>, retrieved on 2024-09-17**
Most recent unfavourable mention:	Port Capital Development (EV) Inc. (Re), 2022 BCSC 1655 (CanLII)

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Edgewater Casino Inc. (Re),***

2009 BCCA 40

Date: 20090206

Docket: CA035922; CA035924

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as amended

In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c 57, as amended

In the Matter of Edgewater Casino Inc. and
Edgewater Management Inc.

Between:

Canadian Metropolitan Properties Corp.

Appellant

(Applicant)

And

Libin Holdings Ltd., Gary Jackson Holdings Ltd.
and Phoebe Holdings Ltd.

Respondents

(Respondents)

Before: The Honourable Madam Justice Levine

The Honourable Mr. Justice Tysoe

The Honourable Madam Justice D. Smith

J.J.L. Hunter, Q.C. and J.A. Henshall	Counsel for the Appellant
J.R. Sandrelli and A. Folino	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia January 7, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2009

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Madam Justice Levine

The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] This application raises the question of the nature and application of the test to be utilized when leave is sought to appeal from an order made in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] On August 29, 2008, the chambers judge refused Canadian Metropolitan Properties Corp. (the "Landlord") leave to appeal from two orders pronounced on March 5, 2008 and December 18, 2008, by the judge supervising the *CCAA* proceedings (the "*CCAA* judge") concerning Edgewater Casino Inc. and Edgewater Management Inc. ("Edgewater"). The Landlord applies under section 9(6) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to vary or discharge the order of the chambers judge so that it is given leave to appeal from the two orders. The respondents, being the original shareholders of Edgewater, oppose the application.

Background

[3] The Landlord and Edgewater entered into a lease agreement dated for reference November 8, 2004 (the "Lease") under which the Landlord leased part of the Plaza of Nations site in downtown Vancouver for the operation of a casino by Edgewater. Edgewater took possession of the leased property on May 4, 2004 and, prior to commencing operation of the casino on February 5, 2005, spent approximately $15 million renovating the main building covered by the Lease. These renovations indirectly led to two disputes between the parties. The first dispute related to the extent, if any, to which Edgewater was responsible to reimburse the Landlord for increases in property taxes attributable to improvements made by Edgewater. A related issue was whether Edgewater was responsible to pay a portion of the consulting fees incurred by the Landlord in appealing property tax assessments. The second dispute related to Edgewater's responsibility to pay for the cost of utilities supplied to the leased property prior to the commencement of the operation of the casino while Edgewater was in possession and renovating the building.

[4] Edgewater commenced the *CCAA* proceedings on May 2, 2006, and the *CCAA* judge supervised the proceedings. Edgewater proposed a plan of arrangement by which sufficient funds would be paid into a law firm's trust account in an amount to fully pay all claims of creditors accepted by Edgewater and the asserted amounts of creditor claims disputed by Edgewater. I gather that the plan of arrangement was predicated on a sale of the shares in Edgewater by the respondents to a new owner and that it was agreed that the respondents would be the benefactors of any monies recovered from the Landlord and any monies left in trust following the resolution of the property tax and utilities disputes.

[5] On August 11, 2006, the *CCAA* judge pronounced a "Claims Processing Order" establishing a process for claims to be made by Edgewater's creditors and to be either accepted by Edgewater or adjudicated upon in a summary manner in the *CCAA* proceedings. On August 29, 2006, the *CCAA* judge pronounced a "Closing Order" pursuant to which the plan of arrangement was implemented and sufficient funds were paid into trust to satisfy the accepted and disputed claims of Edgewater's creditors.

[6] The Landlord filed a proof of claim asserting that Edgewater was indebted to it in the amount by which the property taxes for the leased property had increased since 2004. Edgewater disallowed the proof of claim. Edgewater subsequently claimed a right of setoff against the Landlord in respect of the utilities that it alleged had been improperly charged by the Landlord and had been paid by mistake.

[7] By a case management order dated March 29, 2007, the *CCAA* judge directed that, among other things, the property tax and utilities disputes were to be determined summarily, with the parties exchanging pleadings and having representatives cross-examined on affidavits or examined for discovery. Hearings took place before the *CCAA* judge in August and September, 2007.

[8] In his reasons for judgment dealing with the property tax dispute, indexed as 2008 BCSC 280, the *CCAA* judge held that: (i) clause 3.05 of the Lease, which dealt with Edgewater's responsibility for increases in the property taxes, was sufficiently clear to be enforceable; (ii) the Landlord had not made negligent misrepresentations to Edgewater on matters relevant to the property tax increase; (iii) Edgewater was only responsible for increases in the assessment of the "Lands" (defined as the lands and improvement thereon) solely attributable to the improvements made by it, with the result that Edgewater was only obliged to pay the Landlord the increased taxes based on the increase in the assessed value of the buildings; and (iv) Edgewater was not liable, either in contract, *quantum meruit* or unjust enrichment, to reimburse the Landlord for any consulting fees incurred by it in appealing the property tax assessments in question.

[9] In his reasons for judgment dealing with the utilities dispute, indexed as 2007 BCSC 1829, the *CCAA* judge held that: (i) clause 4.01 of the Lease, which was clear on its face, restricted the amount of rent and additional rent during the period preceding the commencement of operation of the casino to the sum specified in the clause, and Edgewater was not responsible to pay for any additional sum in respect of utilities; (ii) the Landlord did not meet the test in order to have the Lease rectified in respect of the payment for utilities during the period of possession preceding the commencement of operation of the casino; and (iii) Edgewater was entitled to the return of the payments for utilities during the period of possession preceding the commencement of the casino made by it as a result of a mistake.

Decision of the Chambers Judge

[10] In dismissing the applications for leave to appeal the two orders, the chambers judge commented that the *CCAA* judge had held the language of clauses 3.05 and 4.01 of the Lease to be clear and unambiguous. Relying on *Re Pacific National Lease Holding Corp.* (1992), 1992 CanLII 427 (BC CA), 72 B.C.L.R. (2d) 368, 15 C.B.R. (3d) 265 (C.A. Chambers), and *Re Pine Valley Mining Corporation*, 2008 BCCA 263, 43 C.B.R. (5th) 203 (Chambers), the chambers judge stated that leave to appeal in proceedings under the *CCAA* is granted sparingly. He commented that there were none of the time pressures that often attend *CCAA* proceedings.

[11] The chambers judge noted that the *CCAA* judge had applied settled principles of contractual interpretation and expressed the view that there were very limited prospects of success on appeal. He observed that the issues had been decided in the context of summary proceedings under the *CCAA* and stated that the decision of the chambers judge was entitled to substantial deference.

Discussion

[12] The parties are agreed that the test to be applied by a reviewing court on an application to review an order of a chambers judge is to determine whether the judge was wrong in law or principle or misconceived the facts: see *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, 3 C.P.C. (5th) 225.

[13] The parties made their submissions on the basis that there is a special test or standard for the granting of leave to appeal from an order made in *CCAA* proceedings. The genesis of this perception is the following passage from the decision of Mr. Justice Macfarlane in *Pacific National Lease*:

[30] Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.

[31] A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

[32] Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

Numerous subsequent decisions have referred to these comments. These decisions include *Re Westar Mining Ltd.* (1993), 1993 CanLII 1419 (BC CA), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202 (C.A.) at para. 57; *Re Woodward's Ltd.* (1993), 1993 CanLII 305 (BC CA), 105 D.L.R. (4th) 517, 22 C.B.R. (3d) 25 (B.C.C.A. Chambers) at para. 34; *Re Repap British Columbia Inc.* (1998), 1998 CanLII 5902 (BC CA), 9 C.B.R. (4th) 82 (B.C.C.A. Chambers) at para. 8; *Luscar Ltd. v. Smoky River Coal Ltd.,* 1999 ABCA 179, 175 D.L.R. (4th) 703 at para. 62; *Re Blue Range Resource Corp.*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Chambers) at para. 3; *Re Canadian Airlines Corp.*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Chambers) at

para. 42; *Re Skeena Cellulose Inc.*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 at para. 52; *Re Fantom Technologies Inc.* (2003), 2003 CanLII 34291 (ON CA), 41 C.B.R. (4th) 55 (Ont. C.A. Chambers) at para. 17; and *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, [2005] 8 W.W.R. 224 at para. 20.

[14] The Landlord accepts the general proposition that leave to appeal from *CCAA* orders should be granted sparingly, but says that there should be an exception where, as here, the time constraints present in typical *CCAA* situations do not exist. In this regard, the Landlord relies on the views expressed by Chief Justice McEachern in *Westar Mining*. After quoting the above passage from *Pacific National Lease*, McEachern C.J.B.C. said the following:

[58] I respectfully agree with what Macfarlane J.A. has said, but in this case the situation of the Company has stabilized as its principal assets have been sold. The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities, and the proper distribution of the trust fund which was established with the approval of the Court primarily for the protection of the Directors.

Although McEachern C.J.B.C. was speaking in dissent when making these comments, an appeal to the Supreme Court of Canada was allowed, 1993 CanLII 97 (SCC), [1993] 2 S.C.R. 448, and the Court agreed generally with his dissenting reasons.

[15] The respondents submit that there should be the same test for leave to appeal from all orders made in *CCAA* proceedings. The respondents maintain that the test has been consistently applied throughout Canada and that a different test in some circumstances would lead to the result that there would be many more leave applications to appeal orders made in *CCAA* proceedings and appellate courts would be required to analyze the underlying *CCAA* proceeding in every leave application.

[16] The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA* proceedings should be limited: see *Re Algoma Steel Inc.* (2001), 2001 CanLII 5433 (ON CA), 147 O.A.C. 291, 25 C.B.R. (4th) 194 at para. 8.

[17] However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. In British Columbia, the test involves a consideration of the following factors:

(a) whether the point on appeal is of significance to the practice;
(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.

The authority most frequently cited in British Columbia in this regard is *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A. Chambers).

[18] This is not to suggest that I disagree with the above comments of Macfarlane J.A. in *Pacific National Lease*. To the contrary, I agree with his comments, but I do not believe that he established a special test for *CCAA* orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in *CCAA* proceedings and a recognition of the special position of the supervising judge in *CCAA* proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical *CCAA* orders being given sparingly.

[19] The third of the above factors involves a consideration of the merits of the appeal. In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.

> [20] First, one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

[21] The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing – some refer to *CCAA* proceedings as "real-time" litigation.

[22] The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.

[23] Similar views were expressed by Mr. Justice O'Brien in *Re Calpine Canada Energy Ltd.*, 2007 ABCA 266, 35 C.B.R. (5th) 27 (Chambers):

[13] This Court has repeatedly stated, for example in *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.), at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:

(1) Whether the point on appeal is of significance to the practice;

(2) Whether the point raised is of significance to the action itself;

(3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) Whether the appeal will unduly hinder the progress of the action.

[14] In assessing these factors, consideration should also be given to the applicable standard of review: *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]). Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 61.

Other decisions on leave applications where the usual factors were expressly considered include *Re Blue Range Resource Corp*., *Re Canadian Airlines Corporation* and *Re Fantom Technologies Inc*., each of which quoted the above comments of Macfarlane J.A. in *Pacific National Lease*.

[24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing *CCAA* proceeding. However, not all of the above considerations will be applicable to some orders made in *CCAA* proceedings. Thus, in *Westar Mining*, McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease*, believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the *CCAA* proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena Forest Products* at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

[25] The chambers judge did give consideration to the usual factors in the present case, but none of the considerations I have mentioned were applicable to the two orders. The *CCAA* judge was deciding questions of law in each case and was not exercising his discretion. The knowledge gained by the *CCAA* judge during the reorganization process was not relevant to his decisions, which involved events that occurred prior to the commencement of the *CCAA* proceeding. The plan of arrangement made by Edgewater has been implemented, and appeals from the two orders will not delay or otherwise jeopardize the reorganization process. There is no prospect that the outcome of the appeals will affect the continuing viability of Edgewater; indeed, although the disputes involve Edgewater in name, the parties with a monetary interest in the disputes are the Landlord and the respondents, who are the former shareholders of Edgewater. In the circumstances, there was no reason to give substantial deference to the *CCAA* judge.

[26] I am not saying that the considerations I have mentioned will never apply to a determination of claims pursuant to a claims process in a *CCAA* proceeding. For example, a plan of arrangement may only be successful if the total amount of claims against the debtor company is less than a specified sum. An appeal from an order quantifying a claim of a creditor would delay the *CCAA* proceeding and could jeopardize the company's reorganization.

[27] I have no doubt that there will be other circumstances in which the claims process will have an impact on the reorganization process. Even if the claims process will not jeopardize the reorganization process, some of the other considerations I have mentioned may apply to the determination of the claims. For example, the outcome of an appeal may affect the amounts received by other creditors and may delay the full implementation of the plan of arrangement. The fact that section 12 of the *CCAA* mandates the determination of claims to be by way of a summary application to the court illustrates that Parliament recognized that the claims process will often be sensitive to time constraints.

[28] There is one other point about the order relating to the utilities dispute that differentiates it from the typical *CCAA* order. The dispute did not involve a claim against Edgewater but, rather, it was a claim by Edgewater to have the Landlord refund utilities payments made by it. Such a claim would normally be pursued in a normal lawsuit and, if it was determined on a summary application (i.e., a Rule 18A application), there would have be an appeal as of right, and leave would not have been required. It was only because the claim was raised as a setoff to the Landlord's property tax claim that it came to be determined in the *CCAA* proceeding.

[29] I now turn to a consideration of the usual factors in relation to the order dealing with the property tax dispute:

1. As stated by the chambers judge, the point in issue is of no significance to the practice.
2. As conceded by the respondents on the application before the chambers judge, the point in issue is of significance to the action itself (in the sense that it finally determines the Landlord's claim).

3. The order did not involve an exercise of discretion by the *CCAA* judge. The chambers judge was mistaken in his belief that the *CCAA* judge held that clause 3.05 was clear and unambiguous; the first issue considered by the *CCAA* judge was whether the clause was sufficiently clear as to make it enforceable. In my opinion, the appeal is not frivolous.
4. The appeal will not unduly hinder the progress of the action because Edgewater's plan of arrangement has been implemented and the *CCAA* proceeding has come to a conclusion.

On a consideration of all of the factors, it is my view that leave to appeal the order dealing with the property tax dispute should be given.

[30] A consideration of the usual factors in relation to the order dealing with the utilities dispute leads to the same observations with one exception. As conceded by the Landlord on this application, the prospects of success of an appeal do not appear to be as high as the prospects in an appeal from the other order. However, I am not persuaded that the appeal has so little merit that it amounts to a frivolous appeal. If the dispute had not become intertwined with the property tax dispute as a result of Edgewater's claim of a right of setoff, the dispute would not have been determined in the *CCAA* proceeding, and the Landlord would have had an appeal as of right. In all the circumstances, it is my view that leave to appeal from the order dealing with the utilities dispute should also be given.

Conclusion

[31] I would discharge the order made by the chambers judge dismissing the leave application, and I would grant the Landlord leave to appeal from both of the orders.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice D. Smith"

TAB 5

Essar Steel Algoma Inc. (Re), 2017 ONCA 478 (CanLII)

Date: 2017-06-08

File number: M47815/M47846

Other citation: 49 CBR (6th) 259

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COURT OF APPEAL FOR ONTARIO

CITATION: Essar Steel Algoma Inc. (Re), 2017 ONCA 478

DATE: 20170608

DOCKET: M47815/M47846

Cronk, Blair and van Rensburg JJ.A.

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 ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

Peter H. Griffin, Matthew B. Lerner, Kim Nusbaum and Robert Trenker, for the Moving Parties, GIP Primus LP and Brightwood Loan Services LLC

Patricia D.S. Jackson, Andrew Gray, Jeremy Opolsky and Alexandra Shelley, for the Moving Party, Port of Algoma Inc.

Ashley Taylor, Eliot Kolers and Sanja Sopic, for the Applicants/Respondents

Clifton P. Prophet, Nicholas Kluge and Delna Contractor, for the Monitor Ernst & Young Inc.

Heard: June 2, 2017 (In Writing)

Motions for leave to appeal from the order of Justice Frank Newbould of the Superior Court of Justice, dated April 28, 2017.

Reasons for Decision

Background

[1] GIP Primus LP and Brightwood Loan Services LLC (collectively "GIP") and Port of Algoma Inc. ("Portco") apply for leave to appeal the order of Newbould J. dated April 28, 2017. The order was made in the context of insolvency proceedings under the CCAA[1][19] involving Essar Steel Algoma Inc. ("Algoma") and related companies. Newbould J. is the supervising CCAA judge in those proceedings.

[2] Algoma and its predecessors are no strangers to restructuring proceedings. The first CCAA proceedings were commenced in 1991. A second CCAA restructuring took place in 2001. By 2014 Algoma was in further need of a cash injection and an attempt was made to address the problem through a solvent restructuring under the *Canada Business Corporations Act*.[2][20] This resulted in a complex transaction in the course of which GIP advanced $150 million which was then paid to Algoma as the major portion of the purchase price in what is referred to by the parties as the "Port Transaction". That overall transaction involved four basic components:

(i) the sale by Algoma to Portco of the port facilities at Sault Ste. Marie, Ontario;

(ii) a lease of the port lands to Portco for a period of 50 years;

(iii) a Cargo Handling Agreement, whereby Algoma was to pay Portco US$36 million annually, in monthly instalments, for use of the port and cargo-handling facilities; and

(iv) a Shared Services Agreement that required Portco to pay Algoma US$11 million annually, in monthly instalments, in exchange for Algoma providing operation and maintenance services at the port.

[3] At the end of the day, Algoma received a total purchase price of US$171.5 million. Of that amount, US$150 million was advanced by GIP to Portco which, in turn, used it to pay Algoma. Portco paid a small further amount itself and the balance of the purchase price was paid by way of a US$19.8 million promissory note from Portco to Algoma (the "Note"). Portco's obligation under the Note was subsequently assumed by Essar Global Fund Ltd. ("EGFL"), the indirect parent company of both Portco and Algoma. The structure of the Cargo Handling Agreement and the Shared Services Agreement was designed to provide Portco with a net stream of payments that would enable it to service the GIP loan.

19. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

20. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

[4] Unfortunately, the restructuring was unsuccessful. Algoma filed for protection under the CCAA in November, 2015. DIP lenders provided financing during the proceedings.

[5] Under the Initial CCAA Order, Algoma was required to pay post-filing expenses as set out in a cash-flow budget approved by the DIP lenders, and for a period of time after the filing Algoma continued to make regular payments under the Cargo Handling Agreement. These payments stopped in May, 2016, however, when the DIP lenders refused to approve cash-flow budgets providing for those payments so long as the $19.8 million Note remained outstanding.

[6] This triggered proceedings that have ultimately led to these motions for leave to appeal.

The First Motion

[7] In June, 2016, Portco brought a motion – supported by GIP – for an order requiring Algoma to resume payments under the Cargo Handling Agreement, relying on the provisions of s. 11.01(a) of the CCAA as the basis for the order. Section 11.01(a) permits a company under CCAA protection to make payment for post-filing goods and services provided to it. Portco argued it was providing post-filing services under the Cargo Handling Agreement.

[8] There was also an issue raised by the Monitor and the DIP lenders as to whether there was a right, on the part of Algoma, to set off payments due under the Cargo Handling Agreement against the amount outstanding on the Note.

[9] The CCAA Judge dismissed the motion. He held that s. 11.01(a) was not applicable because, in fact, it was Algoma and its employees, and not Portco, who were providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. He concluded that it was premature to deal with the set-off issue. In dismissing the motion, he said that the dismissal was "without prejudice to it being brought back on after the set-off issue [had been] determined".

[10] No steps were taken to seek leave to appeal from this decision.

The Second Motion

[11] Not to be deterred, however, Portco – again supported by GIP – brought a second motion in October, 2016, seeking the same relief. Again Portco and GIP relied on s. 11.01(a). But this time, they presented a different argument. The Cargo Handling Agreement was in reality a licensing agreement, they submitted, and Algoma was not entitled to enter onto the premises without paying under the license.

[12] The CCAA Judge dismissed the motion again. First, he held that the issue of s. 11.01(a)'s applicability had been decided on the previous motion – from which no leave to appeal had been sought – and could not be re-litigated under the guise of a different argument which could have been raised on the First Motion. In holding that the s. 11.01(a) issue had already been finally decided against Portco, and with respect to the "without prejudice" aspect of the first order, he was very clear:[3][21]

21. 2016 ONSC 6459, at para. 9.

I must say that when I stated that the first Portco motion was dismissed without prejudice to it being brought back on after the set-off issue was determined, it was not intended to enable Portco to raise anew those issues that had been decided against it. It was intended to permit Portco to come back if it succeeded on the set-off point or the issues raised by the Monitor. Portco however continues to raise issues already decided against it.

[13] Secondly, and in any event, the CCAA Judge rejected the licensing argument. He further concluded that even if Portco were free to raise the s. 11.01(a) issue – which it was not free to do – he would not have ordered payment of amounts due under the Cargo Handling Agreement at that stage in the face of related oppression remedy proceedings involving the Port Transaction that were pending before him as well.

[14] No steps were taken to seek leave to appeal from this second order.

The Oppression Proceedings

[15] In September, 2016, the CCAA Judge had authorized the Monitor to commence oppression remedy proceedings on behalf of Algoma with regard to the Port Transaction. EGFL (the obligor under the Note) asserted a counterclaim in those proceedings, arguing that the amounts owing to Portco under the Cargo Handling Agreement could be set off against the $19.8 million Note and that that amount had then been exceeded, with the result that payments should resume under the Cargo Handling Agreement.

[16] The oppression remedy proceedings were heard by Newbould J. as well, in early 2017. On March 6, 2017, he released his reasons. He found the Port Transaction was oppressive and unfairly disregarded the interests of Algoma's trade creditors, employees, pensioners and retirees, but did not set aside the transaction. Instead, he ordered that the transaction documents be amended in various ways, the particulars of which are not important to the leave to appeal issues. He declined to deal with the set-off issue in those proceedings, however, concluding instead that "the appropriate place to make this claim is in the CCAA proceedings."

The Third Motion

[17] Very quickly – in April, 2017 – the s. 11.01(a) issue was brought back again, this time by way of a GIF motion, supported by Portco. In an April 28 endorsement, Newbould J. once again dismissed the motion. This time he said:[4][22]

This is the third time that this argument has been advanced. It was unsuccessfully argued by Portco on two previous motions requesting orders that the payments under the Cargo Handling Agreement resume. On the first occasion, it was argued that Portco was providing services to Algoma on the Port facilities and that section 11.01(a) required immediate payment. I held that Portco was not providing the services but rather Algoma personnel who were doing all of the work. On the second occasion Portco

22. 2017 ONSC 2585, at paras. 10-12.

added the argument that Portco was licensing the Port facilities to Algoma and that the payments under the Cargo Handling Agreement were for that purpose and therefore had to be made. I held that it was not open to Portco to make that new argument but that in any event I did not accept it...

Portco adds another argument why the access of Algoma to the Port facilities is a licence. Again, that should have been argued in the first go-around on the point. It says that under the Cargo Handling Agreement, Algoma can enter the property only if it makes payment under that agreement. I do not agree. What the Cargo Handling Agreement provides in section 3.3 is that notwithstanding that Algoma's access to the Port is non-exclusive, Algoma shall have priority access so long as it makes its payments due under the Cargo Handling Agreement. That in no way can be construed to be a licence. That section recognizes Algoma's right to access to the Port facilities as provided for in the Lease.

In short, even if it were permissible for Portco or GIP to again raise section 11.01(a), which it is not, I cannot find that there was a licence relationship between Algoma and Portco regarding the Port assets.

[18] It is this order that is the subject of these motions for leave to appeal.

Analysis

[19] Leave to appeal is to be granted sparingly in CCAA proceedings. This is because of the "real time" dynamic of CCAA matters and the "generally discretionary character underlying many of the orders made by supervising judges in such proceedings" and the deference to be accorded to those decisions. In considering whether to grant leave, the court will consider whether:

(i) the proposed appeal is *prima facie* meritorious or frivolous;

(ii) the point on the proposed appeal is of significance to the practice;

(iii) the point on the proposed appeal is of significance to the proceeding; and

(iv) whether the proposed appeal will unduly hinder the progress of the action.

See *Re Stelco Inc.*, 2005 CanLII 42247 (ON CA), [2005] O.J. No. 4883 (C.A.), at paras. 15-20; *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

[20] In our view, the leave motions fail on the first two of these factors.

The Merits

[21] GIP and Portco propose identical questions to be determined on the appeal if leave is granted:

(i) Did the motion judge err in concluding that [GIP and Portco were] precluded from arguing that Algoma is required by section 11.01(a) of the CCAA to make payments under the Cargo Handling Agreement?

(ii) Did the motion judge err in his interpretation of section 11.01(a) of the CCAA?

[22] The application and interpretation of s. 11.01(a) of the CCAA are precisely the issues that were addressed by the motion judge in the First Motion, and in the Second Motion (in addition to whether those issues were *res judicata*), and in the Third Motion (which led to the order from which leave to appeal is now sought). In spite of the moving parties' attempts on the Second and Third Motions to wrap their arguments in different packaging, the issues remained the same: the interpretation of s. 11.01(a) and its application in the particular circumstances of this CCAA proceeding.

[23] Those issues have now been determined adversely against the moving parties three times. No steps were taken to obtain leave to appeal from the motion judge's orders on the First Motion or the Second Motion. We are not persuaded there is *prima facie* merit in the attempt now to seek leave to appeal from a third unsuccessful attempt to invoke s. 11.01(a) of the CCAA.

[24] The moving parties argue that the landscape has changed since Newbould J.'s determination of the oppression remedy proceedings.[5][23] They submit that, in declining to deal with the set-off issue in those proceedings and determining that "the appropriate place to make [that] claim is in the CCAA proceedings", he opened the door for a re-consideration of the s. 11.01(a) issue. The record does not support that submission.

[25] Newbould J. dealt with the set-off counterclaim in one paragraph at the end of his reasons in the oppression remedy proceedings. He said:[6][24]

Portco has made a counterclaim for a declaration that the $19.8 million note has been paid in full as a result of set-off and for payments beyond that amount said to be owing under the Cargo Handling Agreement. When and how the set-off occurred is not in the record and whether that could be affected by the stay of proceedings in the CCAA has not been argued. Nor are the amounts said to be owing set out with any precision. In my view the appropriate place to make this claim is in the CCAA proceedings and I do not intend to deal with it in this counterclaim.

[26] We see nothing in this disposition to suggest that Newbould J. had somehow signalled that he was re-opening – even if he were entitled to do so – the s. 11.01(a) issues, which he had clearly determined against the moving parties' interests on the First and Second Motions. Nor is there any

23. An appeal from that order is scheduled to be heard in this Court in August of this year.

24. 2017 ONSC 1366, at para. 147.

indication in his reasons provided on the Third Motion – which was heard after his decision in the oppression remedy proceedings had been released – that he intended that to be the case. Indeed, as stated in the passage of his reasons on the Third Motion set out above, quite the opposite was the case.

[27] The same parties have now joined issue on the same legal questions (the interpretation and application of s. 11.01(a) in the circumstances of the CCAA proceedings) three times. The CCAA Judge, presiding in a court of competent jurisdiction, had finally determined those legal questions twice before the Third Motion was launched, and there were no attempts to appeal. All the relevant factors for the application of issue estoppel are present and the decisions are binding on the moving parties, absent a successful appeal: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para. 25; *Diamond v. Western Realty Co.*, 1924 CanLII 2 (SCC), [1924] S.C.R. 308, at para. 35. They deprive the proposed appeal of the merit required for leave to appeal to be granted.

[28] The moving parties raise an additional argument, however. They submit that, even if the elements of issue estoppel have been established, the court retains a residual discretion to decline to apply the doctrine, and that the CCAA Judge failed to take that factor into consideration.

[29] We disagree. In concluding that payments to Portco under the Cargo Handling Agreement should not resume, the CCAA Judge considered and weighed the interests of all stakeholders involved in the CCAA proceeding – including the fact that to allow the payments to resume would be to permit a breach of the DIP financing then in place, thereby jeopardizing that financing – and concluded that it would not be appropriate in the circumstances to lift the CCAA stay in respect of those payments. In doing so, he was exercising the same discretion that would apply to the estoppel issue. We see no error that would justify granting leave to appeal in the exercise of that discretion.

Significance to the Practice

[30] We accept that the s. 11.01(a) issues have considerable significance for this particular CCAA proceeding, but we are not persuaded that they have significance for the practice in the circumstances of this proceeding.

[31] Whether s. 11.01(a) is available to benefit the moving parties, thereby giving them an advantage over other stakeholders in terms of the servicing of the GIP loan, depends upon the interpretation and application of the particular agreements that underlie the Port Transaction and upon how they are being carried out in practice. Thus, the proposed appeals arise out of the unique and inter-related agreements that formed the Port Transaction. We see little of assistance to the general practice of insolvency law that would arise in the proposed appeals.

Undue Hindrance of the Proceedings

> [32] We do not think that granting leave to appeal would unduly hinder the progress of the CCAA proceedings, given that the appeals could be heard together with the pending appeal in the oppression remedy proceedings in August. However, in view of the foregoing conclusions, this does not assist the moving parties in the circumstances.

Disposition

[33] For the reasons set out above, the motions for leave to appeal are dismissed.

[34] The Monitor and Algoma are each entitled to their costs of the leave motions, fixed in the amount of $3,000, as against the moving parties, jointly and severally.

"E.A. Cronk J.A."

"R.A. Blair J.A."

"K. van Rensburg J.A."

TAB 6

Laurentian University of Sudbury (Re), 2021 ONCA 199 (CanLII)

Date:	2021-03-31
File number:	M52287
Other citation:	87 CBR (6th) 243
Citation:	**Laurentian University of Sudbury (Re), 2021 ONCA 199 (CanLII), <https://canlii.ca/t/jf220>, retrieved on 2024-08-27**

COURT OF APPEAL FOR ONTARIO

CITATION: Laurentian University of Sudbury (Re), 2021 ONCA 199

DATE: 20210331

DOCKET: M52287

Hoy, Pepall and Zarnett JJ.A.

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 Laurentian University of Sudbury

Murray Gold and James Harnum, for the moving party the Ontario Confederation of University Faculty Associations

Susan Philpott and Charles Sinclair, for the moving party the Laurentian University Faculty Association

Miriam Martin, for the moving party the Canadian Union of Public Employees

D.J. Miller, Scott McGrath and Derek Harland, for the responding party Laurentian University of Sudbury

Ashley Taylor, Elizabeth Pillon and Zev Smith, for the responding party Ernst & Young Inc., acting as the Monitor

Heard: in writing

Motion for leave to appeal from the order of Chief Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated February 26, 2021.

REASONS FOR DECISION

[1] Laurentian University of Sudbury ("Laurentian") is a publicly funded, bilingual and tricultural post-secondary institution, serving domestic and international undergraduate and graduate students. Due to recurring operational deficits, it has encountered a liquidity crisis and is insolvent.

[2] Laurentian sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C.36 ("CCAA"), to permit it to restructure, financially and operationally, in order to emerge as a sustainable university for the benefit of all stakeholders. Among the stated reasons for Laurentian's CCAA application was what it described as unsustainable "academic costs", which Laurentian attributes in part to the terms of its collective agreement with its faculty members.

[3] Two unions representing Laurentian employees - the Laurentian University Faculty Association ("LUFA") and the Canadian Union of Public Employees ("CUPE") - and the Ontario Confederation of University Faculty Associations ("OCUFA"), an umbrella organization representing faculty associations, seek leave to appeal the decision of the CCAA judge, dated February 26, 2021, which continues a sealing order over two documents that Laurentian filed on its application for CCAA protection.

[4] Having reviewed the written submissions of the parties and the sealed documents, we refuse leave for the reasons that follow.

Background

[5] On February 1, 2021, the CCAA judge made an order (the "Initial Order"), granting Laurentian initial relief under the CCAA.

[6] Four days later, on February 5, 2021, the CCAA judge made an order appointing Dunphy J. as mediator to conduct a confidential mediation among Laurentian's key stakeholders. The mediation is intended to address various issues concerning Laurentian's restructuring, including a new collective agreement with LUFA, which represents 612 Laurentian faculty, accounting for 60% of the university's payroll. LUFA supported the appointment of the mediator.

[7] The Initial Order contained a sealing provision. At the comeback hearing, there was opposition to it. The CCAA judge continued the sealing provision in the Amended and Restated Order, dated February 11, 2021, on an interim basis, pending a supplementary endorsement.

[8] The sealing provision, which was identical in both orders, covers two exhibits (Exhibits "EEE" and "FFF") to the affidavit by Dr. Robert Haché, which was filed in support of Laurentian's request for the Initial Order. Dr. Haché is the President, Vice-Chancellor and CEO of Laurentian.

[9] The sealing provision states that the Exhibits "are herby sealed pending further order of the Court, and shall not form part of the public record". Both the Initial Order and the Amended and Restated Order provide that any interested party may apply on seven days' notice to vary or amend the order.

[10] The sealed Exhibits consist of two letters. Exhibit "EEE" is a letter from the Ministry of Colleges and Universities ("Ministry") to Laurentian, dated January 21, 2021. Exhibit "FFF" is a letter from Laurentian to the Ministry, dated January 25, 2021. Laurentian has described the letters as containing "information with respect to [Laurentian] and certain of its stakeholders, including various rights or positions that stakeholders or [Laurentian] may take either inside or outside of these CCAA proceedings, the disclosure of which could jeopardize [Laurentian's] efforts to restructure."

[11] None of the moving parties sought to cross-examine Dr. Haché on his affidavit or the communications between Laurentian and the Ministry.

[12] The CCAA judge released his supplementary endorsement on February 26, 2021, continuing the sealing provision. The effect of the sealing provision is that both the broader public and the parties to the CCAA proceeding are prevented from accessing the Exhibits.

[13] The CCAA judge held that the sealing provision was authorized under s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and by the application of the principles in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. According to *Sierra Club*, at para. 53, a confidentiality or sealing order should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[14] The CCAA judge summarized the evidence in Dr. Haché's affidavit and noted that he had reviewed the Exhibits in detail. He indicated that the evidence, as contained in Dr. Haché's affidavit, outlines that there has been continuous communication between Laurentian and the Ministry with respect to Laurentian's financial crisis, and that the government is well aware that a real-time solution must be found if Laurentian is to survive. He noted that "the role, if any, that the Ministry will play is at this moment uncertain."

[15] Considering the first branch of the *Sierra Club* test, he concluded that disclosure of the Exhibits, "at this time, could be detrimental to any potential restructuring of [Laurentian]" (emphasis added). Accordingly, "the risk in disclosing the Exhibits is real and substantial and poses a serious risk to the future viability of [Laurentian]." He also noted that "it is speculative to conclude that the Exhibits contain information that is not helpful to [Laurentian's] position."

[16] He found that the commercial interest was that of the entire Laurentian community, including the faculty, students, employees, third-party suppliers and the City of Greater Sudbury and the surrounding area; that it is of paramount importance to these groups that all efforts to restructure Laurentian be explored; and that it is necessary to maintain the confidentiality of the Exhibits in order to do so. He reiterated that "[t]he disclosure of the Exhibits, at this time, could undermine the restructuring efforts being undertaken by [Laurentian]" (emphasis added).

[17] He was not satisfied that there were any reasonable alternatives to a sealing order over the Exhibits. Stakeholders were involved in the mediation and the negotiations could or could shortly be at a sensitive stage. It would not be appropriate to implement any alternative to a confidentiality order. To do so could negatively impact the mediation efforts.

[18] Turning to the second branch of the *Sierra Club* test, the CCAA judge was also satisfied, based on the evidence, that the salutary effects of the sealing provision outweighed its deleterious effects, including the public interest in accessing the Exhibits.

Leave Test

[19] Section 13 of the CCAA provides that any person dissatisfied with an order or a decision made under the CCAA may appeal from the order or decision with leave. Leave to appeal in CCAA proceedings is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. This cautious approach is a function of several factors.

> [20] First, a high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings, who are "steeped in the intricacies of the *CCAA* proceedings they oversee". Appellate intervention is justified only where the "supervising judge erred in principle or exercised their discretion unreasonably": *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, 78 C.B.R. (6th) 1, at paras. 53 to 54.

> [21] Second, CCAA proceedings are dynamic. It is often "inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests": *Edgewater Casino Inc. (Re)*, 2009 BCCA 40, 51 C.B.R. (5th) 1, at para 20.

[22] Third, CCAA restructurings can be time sensitive. The existence of, and delay involved in, an appeal can be counterproductive to a successful restructuring.

> [23] In addressing whether leave should be granted, the court will consider four factors, specifically whether:
>
> (a) the proposed appeal is *prima facie* meritorious or frivolous;
>
> (b) the points on the proposed appeal are of significance to the practice;
>
> (c) the points on the proposed appeal are of significance to the action; and
>
> (d) whether the proposed appeal will unduly hinder the progress of the action.
>
> See: *Nortel Networks Corp. (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

Leave is Not Warranted

[24] As we will explain, we refuse to grant leave because the proposed appeal is not *prima facie* meritorious, granting leave would unduly hinder the progress of the action, and the proposed appeal is not of significance to the action. This is not an appropriate case for this court to explore issues of significance to the practice relating to the granting of sealing orders in the CCAA context.

Leave Not *Prima Facie* Meritorious

[25] The moving parties raise three questions for determination on their proposed appeal, which we paraphrase as follows:

1. Did the CCAA judge err in focussing solely on Laurentian's assertion of an important commercial interest without balancing the various competing interests applicable to a sealing order?

2. Did the CCAA judge err in granting the sealing provision without a sufficient evidentiary foundation?

3. Did the CCAA judge err in concluding that the sealing provision was justified as a result of speculative concerns about the impact that disclosure of the Exhibits that were sealed would have on the CCAA restructuring process?

[26] A significant plank of the moving parties' argument is that the sealing provision denies access to the sealed documents to parties to the CCAA process on the ostensible ground that the documents might have an impact on the positions those parties choose to take vis-à-vis the restructuring. They argue that the importance of the documents to the formulation of their positions is the exact reason why they should have access to the documents, not a justification for denying access to them.

[27] We note that one of the moving parties, OCUFA, is not a creditor of Laurentian and is apparently not participating in the court-ordered mediation, the aim of which is a consensual restructuring. It is not clear in what sense OCUFA is a party to the CCAA proceeding or is in any different position than any other member of the public who may be interested in the court-filed materials. Yet the moving parties do not differentiate, in their proposed appeal questions or in the relief they propose to seek, between the

entitlements of OCUFA to obtain the documents and those of the other moving parties. In other words, although reference is made to the denial of access to "litigants", the underlying theory of the moving parties actually starts and stops with the proposition that there should be no sealing order at all.

[28] We are not persuaded that the proposed appeal, challenging what is a discretionary order, is *prima facie* meritorious.

[29] The CCAA judge set out the *Sierra Club* test in his reasons. Contrary to the submissions of the moving parties, he was well aware that *Sierra Club* required him to balance the deleterious effects of the sealing order.

[30] In earlier reasons, the CCAA judge noted that if the restructuring is to be successful, it will have to be largely completed by the end of April 2021. The timeline is exceptionally short. In exercising his discretion, the CCAA judge concluded that the risk to the potential restructuring of Laurentian within this extremely tight timeframe if the Exhibits were disclosed outweighed other relevant interests.

[31] The moving parties were (and are) concerned that they understand the Ontario government's position in relation to the restructuring, yet they did not seek to cross-examine Dr. Haché. The CCAA judge, who reviewed the Exhibits, strove to address that concern, carefully signaling that "the role, if any, that the Ministry will play is at this moment uncertain." Alive to concerns about fairness, he also signaled to the parties that it would be "speculative to conclude that the Exhibits contain information that is not helpful to [Laurentian's] position."

[32] The moving parties have expressed particular concern that the sealing order creates an informational imbalance that may hurt them in the mediation process. Nothing before us suggests that the moving parties who are participating in the court-ordered mediation (which appears to be only LUFA) have been hampered by any informational imbalance. The judicial mediator, who was appointed by the CCAA judge, is a bulwark against unfair treatment in the mediation. Should the judicial mediator have concerns that the moving parties have been hampered in the mediation by an informational imbalance or a perceived informational imbalance, it is open to him to raise them with the CCAA judge within the parameters of the February 5, 2021 order appointing the mediator.

[33] Nor do we see anything in the sealing provision that would prevent a party from making a request to the CCAA judge, at the appropriate time, for relief on appropriate terms. As noted, the sealing provision is expressly subject to "further order of the Court". The CCAA judge in his reasons of February 26 said only that an alternative to the sealing provision was not appropriate "at this time".

[34] In seeking leave, the moving parties have raised questions about how s. 2(d) of the *Charter of Rights and Freedoms* comes into play, as one of the purposes of the mediation is to conclude a new collective agreement with LUFA. But they do not dispute Laurentian's submission that this issue was not argued below. It is difficult to fault the CCAA judge for not weighing a competing interest that was not asserted before him.

[35] The moving parties also say that the CCAA judge failed to advert to the impact his ruling would have on freedom of expression. We are satisfied he did take that factor into account, as he mentions it in setting out the test and later says that the deleterious effects include "the public interest in accessing the Exhibits."

[36] The second and third questions raised by the moving parties ask the court to revisit an issue raised before the CCAA judge. He described the essence of the submissions made to him by those opposing the sealing order as there being no evidence that the sealing order was necessary to protect a valid commercial interest.

[37] The CCAA judge was satisfied that there was a sufficient evidentiary basis. He based his conclusion that disclosing the Exhibits posed a serious risk to the restructuring on his review of the Exhibits and Dr. Haché's evidence. The moving parties are correct that Dr. Haché did not opine in his affidavit that disclosure of the Exhibits posed a serious risk to the viability of the restructuring. But Dr. Haché's evidence describes something of the dynamics at play and is clear as to Laurentian's dire position and the timeframe within which the restructuring must be completed, if it is to be successful. It provided the foundation on which the Monitor, an officer of the court, supported Laurentian's position that disclosure posed a serious risk, and the CCAA judge, who has extensive experience in CCAA restructurings, concluded that disclosure posed a serious risk. The CCAA judge exercised his judgment, based on an evidentiary record.

[38] The fact the proposed appeal is not *prima facie* meritorious weighs significantly against granting leave.

Appeal Would Hinder Progress of the Action

[39] As we have said, this restructuring is on an exceptionally short timeline. We are told that the mediation is ongoing, with sessions occurring daily. There is urgency to being able to reach a successful restructuring by the end of April, in light of Laurentian's financial position and the need for certainty regarding the next academic year. There is too great a risk that an appeal would be a distraction from restructuring efforts and thus would unduly hinder the progress of the action, which also weighs significantly against granting leave.

No Significance to the Action

[40] Given the involvement of a court-appointed mediator and that it is open to the CCAA judge to revisit the sealing provision and possibly revoke it or limit its impact by allowing the parties to the CCAA proceeding to access the sealed documents, the significance of the proposed appeal to the action is insufficient to justify leave.

Significance to the Practice

[41] The facts of this case highlight some novel and interesting questions about the application of the *Sierra Club* test in the CCAA context.These include questions about granting sealing orders over information filed in support of the application for protection under the CCAA, the granting of sealing orders where interests under s. 2(d) of the *Charter* are arguably at play, and about the application of sealing orders to parties and stakeholders involved in the restructuring efforts. However, given our view of the merits of the proposed appeal and the other factors, this is not the appropriate case in which to explore these issues.

Disposition

[42] Leave to appeal is refused. In the circumstances, there shall be no order as to costs.

"Alexandra Hoy J.A.

"S.E. Pepall J.A."

"B. Zarnett J.A."

TAB 7

Laurentian University of Sudbury (Re), 2021 ONCA 448 (CanLII)

Date: 2021-06-23

File number: M52471

Citation: Laurentian University of Sudbury (Re), 2021 ONCA 448 (CanLII), <https://canlii.ca/t/jgl4l>, retrieved on 2024-08-27

COURT OF APPEAL FOR ONTARIO

CITATION: Laurentian University of Sudbury (Re), 2021 ONCA 448

DATE: 20210623

DOCKET: M52471

Hoy, Pepall and Zarnett JJ.A.

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 Laurentian University of Sudbury

Andrew J. Hatnay, Demetrios Yiokaris, and Sydney Edmonds, for the moving party, Thorneloe University

D.J. Miller, Scott McGrath and Derek Harland, for the responding party, Laurentian University of Sudbury

Vern W. DaRe, for the responding party, Firm Capital Mortgage Fund Inc.

Heard: in writing

Motion for leave to appeal from the order of Chief Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated May 2, 2021, with reasons reported at 2021 ONSC 3272 and 2021 ONSC 3545.

REASONS FOR DECISION

[1] Laurentian University of Sudbury ("Laurentian") is a publicly funded, bilingual and tricultural post-secondary institution, serving domestic and international undergraduate and graduate students.

[2] On February 1, 2021, it sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"), to permit it to restructure, financially and operationally, in order to emerge as a sustainable university for the benefit of all stakeholders.

[3] When it sought CCAA protection, Laurentian, with the assistance of the Monitor, identified a number of areas in which a financial restructuring was required. These included a downsizing of the number of programs being

offered by Laurentian, and new, sustainable collective agreements with the association and the union representing Laurentian faculty and staff. Laurentian also identified, at the outset of the CCAA proceeding, that it would be necessary to have a fundamental readjustment or realignment of its arrangements with the three Federated Universities: Thorneloe University ("Thorneloe"), Huntington University ("Huntington") and University of Sudbury ("USudbury").

[4] A court-ordered mediation facilitated Laurentian reaching agreements with parties to the collective agreements; however, Laurentian was not successful in reaching what it considered to be the required readjustments with the Federated Universities.

[5] On April 1, 2021, Laurentian sent notices of disclaimer of the agreements later described in these reasons to the Federated Universities. The Monitor approved the disclaimer notices.

[6] Thorneloe brought a motion pursuant to s. 32(2) of the CCAA challenging its disclaimer notice. (USudbury brought a similar motion, which was heard by a different judge.) Thorneloe and USudbury also brought a joint cross-motion, seeking an order to amend the Loan Amendment Agreement dated April 20, 2021 ("DIP Amendment Agreement") by deleting the condition that further financing and the extension of the DIP loan maturity date was conditional on disclaimer of agreements with the Federated Universities.

[7] The CCAA judge dismissed Thorneloe's motion and the cross-motion. Thorneloe now seeks leave to appeal both decisions. At the heart of its submissions is its contention that allowing the disclaimer will result in Thorneloe's insolvency and yet provide only *de minimis* financial benefit to Laurentian, and that the motive for the disclaimer is the elimination of competition, which is inconsistent with the duty to act in good faith.

[8] Thorneloe also seeks leave to admit fresh evidence consisting of an affidavit of its President. No opposition was taken by the responding parties to the fresh evidence and, in the circumstances, leave to admit the fresh evidence is granted.

[9] For the reasons that follow, we dismiss Thorneloe's leave motion.

A. BACKGROUND

Relationship between Laurentian and Federated Universities

[10] In 1960, Thorneloe, Huntington and USudbury were established by the Anglican, United and Roman Catholic churches, respectively. As religiously affiliated institutions, they were not eligible for government funding.

[11] The Province of Ontario passed *An Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151, and Laurentian was established.

[12] In September 1960, Laurentian entered into Federation Agreements with Huntington and USudbury. Two years later, Thorneloe also entered into a federation agreement with Laurentian ("1962 Federation Agreement").

[13] In its Third Report, dated April 26, 2021, the Monitor described the relationship that existed between the Federated Universities and Laurentian prior to the disclaimers:

The Federated Universities do not admit or register their own students, nor do they grant their own degrees (with the exception of Theology at Huntington and Thorneloe). All Federated University programs and courses are offered through [Laurentian], and all students apply to [Laurentian]. Students who enroll in a program at [Laurentian] may take elective courses at any or all of the three Federated Universities as well as [Laurentian], which are all physically located on [Laurentian's] campus. Students enrolled in programs, courses, majors and minors that are administered by the Federated Universities are students of [Laurentian] and these courses are credited towards a degree from [Laurentian], which has the sole authority to confer degrees upon students (with the exception of Theology at Huntington and Thorneloe).

...

[A]s all students are students of [Laurentian] regardless of whether they are enrolled in programs or take courses at one of the Federated Universities, the Federated Universities do not directly bill or collect tuition.

[14] The Monitor's Third Report also described the financial arrangements between Laurentian and the Federated Universities under Financial Distribution Notices sent by Laurentian to each of the Federated Universities in May 2019, amending the Proposed Grant Distribution and Service Fees agreement between Laurentian, USudbury, Thorneloe, and Huntington, dated November 10, 1993:

... [Laurentian] and the Federated Universities have certain financial agreements in place pursuant to which [Laurentian] receives, allocates and distributes a portion of [Laurentian's] revenue to the Federated Universities in accordance with a funding formula (the "**Federated Funding Formula**"). Through this Federated Funding Formula, [Laurentian] compensates the Federated Universities for delivering programs and services to [Laurentian] students. The key terms of the Federated Funding Formula include the following:

a. A portion of provincial grants received by [Laurentian] are distributed to the Federated Universities based on the proportion of students enrolled in the Federated Universities' programs;

b. A portion of tuition fees received by [Laurentian] are distributed to the Federated Universities based upon student enrolment in courses offered through the Federated Universities; and

c. An offsetting charge for service fees charged by [Laurentian] to the Federated Universities in exchange for [Laurentian] providing certain support services to the Federated Universities (calculated as 15% of grant and tuition revenues distributed to the Federated Universities). [Bold in original.]

CCAA Proceeding

[15] Under the Amended and Restated Initial Order dated February 11, 2021, the CCAA judge approved a debtor-in-possession ("DIP") interim financing agreement in the principal amount of $25 million.

[16] After the commencement of the CCAA proceeding, Laurentian participated in a mediation with some stakeholders. As a result of mediation, Laurentian entered into term sheets for new agreements with both the Laurentian University Faculty Association and the Laurentian University Staff Union, which have been approved by the CCAA judge. The new agreements are expected to generate an estimated annual savings of approximately $30.3 million, growing to $33.5 million over the next few years.

[17] Laurentian delivered disclaimer notices to each of the Federated Universities on April 1, 2021. The notices disclaim the Federation Agreements and Financial Distribution Notices with each of the Federated Universities.

[18] Huntington accepted its disclaimer and entered into the Huntington Transition Agreement with Laurentian. Among other things, it was agreed that Huntington would no longer deliver courses or programs as credit toward Laurentian degrees and Laurentian would no longer transfer funding to Huntington. The Huntington Transition Agreement contained a "most favoured nation" clause, whereby if Thorneloe or USudbury are permitted to continue to receive funding from Laurentian to teach courses or programs, Huntington will be similarly entitled.

[19] USudbury announced on March 12, 2021 that it would change to a francophone-only university. USudbury's motion to oppose its disclaimer was dismissed by Gilmore J.: see *Laurentian University of Sudbury v. University of Sudbury*, 2021 ONSC 3392. USudbury is not seeking leave to appeal that decision.

[20] On April 20, 2021, Laurentian and the DIP Lender, Firm Capital Mortgage Fund Inc., entered into a DIP Loan Amendment Agreement, which made the advance of an additional $10 million in DIP financing to Laurentian and the extension of the DIP loan maturity date subject to several conditions, including the following:

The Disclaimers of the Borrower's Federation Agreements and Financial Distribution Notices with each of Huntington University, Thorneloe University and the University of Sudbury (collectively, the Federated Universities") issued on April 1, 2021 shall become effective, binding and final on May 1, 2021.

[21] On April 21, 2021, the CCAA judge directed that "[i]f Thorneloe or USudbury have questions in respect of the DIP Loan, they can be directed to the Monitor": 2021 ONSC 2983, at para. 5.

[22] In its Third Report, the Monitor stated that the notices of disclaimer would enhance the prospects of a viable compromise and that, without them, Laurentian was unlikely to be able to complete a viable plan.

Decision Below

[23] Thorneloe applied for an order that the 1962 Federation Agreement, and the 2019 Financial Distribution Notice between Laurentian and Thorneloe, not be disclaimed.

[24] Under s. 32(1), the debtor company may, on notice to the other parties to an agreement and the monitor, disclaim an agreement to which the company is a party on the day on which CCAA proceedings commence. The monitor must approve the proposed disclaimer (otherwise, the debtor is required to make an application to the court for an order that the agreement be disclaimed). The counterparty has 15 days after notice is given under s. 32(1) to make an application to the court for an order that the agreement not be disclaimed. Section 32(4) describes the factors to be considered by the court in deciding whether to make the order:

(4) In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[25] The CCAA judge noted that s. 32(4) requires a balancing of interests. In his words, the court's discretion is exercised "by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer … is fair and reasonable." After engaging in that balancing exercise, he concluded that the better choice, or, to put it another way, the least undesirable choice, was to uphold the notice of disclaimer.

[26] In reaching that conclusion, he considered, among other things, the three itemized s. 32(4) factors. He took into account the fact the Monitor approved the disclaimer and that the Monitor's reasons for approving the disclaimer "reflect[ed] a proper balancing of the competing interests of Laurentian and all stakeholders, including Thorneloe." Among other things, the Monitor noted in its Third Report that Laurentian has limited opportunities to increase its revenues and that even though some net savings have been achieved that are significant and address Laurentian's operational deficit, they are unlikely to be sufficient to cover other items, including the repayment of the DIP Facility and the payment of distributions to creditors pursuant to a plan of compromise or arrangement. The

Monitor concluded that the additional savings to Laurentian that would result from the disclaimers were "required for (Laurentian) to have a reasonable opportunity to put forward a viable plan of compromise or arrangement and effect a successful restructuring", and that despite the hardship to the Federated Universities that it would cause, the disclaimers were necessary.

[27] The CCAA judge noted that Laurentian had identified that if the disclaimers involving Thorneloe and USudbury were upheld, together with the Huntington Transition Agreement, it would result in $7.7 million of additional funds remaining with Laurentian on an annual basis. That represented "a real source of annual financial relief for Laurentian". He addressed Thorneloe's argument that its relationship with Laurentian has only a minor financial impact on Laurentian:

Thorneloe counters by indicating that it is only one of three Federated Universities; the $7.7 million figure cannot be attributed, in total, to Thorneloe. At first glance, this is an attractive and persuasive argument. It does not, however, take into account that Huntington, in negotiating its settlement with Laurentian, has included what is known colloquially as a "most favoured nation" clause. Quite simply, if Thorneloe is able to negotiate a better alternative than the agreement negotiated by Huntington, Huntington is in a position to reopen negotiations with Laurentian to obtain similar treatment. Therefore, it seems to me that although there are three Federated Universities involved, their positions are interlinked and interrelated to such a degree that the $7.7 million calculation is relevant to take into account on this motion.

The Notices of Disclaimer are, in my view, central to the Applicant's restructuring. The Disclaimer will result in millions of dollars of additional tuition and grant revenue remaining within Laurentian. As noted in both the affidavit of Dr. Haché and the Monitor's Report, each time a Laurentian student takes an elective course offered through Thorneloe, revenue associated with that course is transferred from Laurentian to Thorneloe. Because the Applicant has the capacity to independently offer students the vast majority of all necessary programs and electives within its existing cost structure, each course taken by a Laurentian student through Thorneloe represents lost revenue for Laurentian.

[28] The CCAA judge also took into account the position of the DIP Lender, which Thorneloe challenged on a number of grounds. In his view, there was no basis to question the legitimacy of the DIP Lender or the conditions it put forward. The DIP Lender was entitled to take into account commercial reality in assessing its options. The DIP Lender was approved in February 2021, after a competitive process, with no party objecting and no appeals being filed.

[29] As for Thorneloe's objection to the reluctance of the DIP Lender to be cross-examined (which Thorneloe renews before this court), he noted that no affidavit had been filed by a representative of the DIP Lender and that there was no evidence that the DIP Lender had any ulterior motive in negotiating the condition to extend additional financing and extend the term.[1][25]

25. In its reply factum on the leave motion, Thorneloe argues that r. 39.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, would have been available to elicit information from the DIP Lender. It is unclear whether Thorneloe pursued that procedural route. That said, and in any event, it was reasonable for the CCAA judge to propose that written questions be posed to the Monitor.

[30] The CCAA judge rejected Thorneloe's argument that Laurentian acted in bad faith, contrary to s. 18.6 of the CCAA.

[31] The CCAA judge found that the disclaimer would enhance the prospects of a viable restructuring and also noted the significant compromise and hardship experienced by other stakeholders.

[32] Lastly, he considered the third itemized factor (whether the disclaimer would likely cause significant financial hardship to a party to the agreement). He recognized the significant financial impact of the disclaimer on Thorneloe, acknowledging that it could lead to the cessation of its operations. However, if the disclaimer was not effective, it could lead to an unraveling of Laurentian's restructuring and the collapse of Laurentian, which would have a significant impact on all faculty, students, the greater community and Thorneloe. In other words, it could lead to the collapse of not just Laurentian but of Thorneloe as well. At the end of the day, the least undesirable choice was to uphold the notice of disclaimer.

[33] In separate reasons, he also concluded that the criteria for approving the DIP Amendment Agreement were met. In reaching that conclusion, he adopted his earlier reasons for rejecting Thorneloe's arguments relating to the DIP financing.

B. ANALYSIS

Leave Test

[34] Section 13 of the CCAA provides that any person dissatisfied with an order or a decision made under the CCAA may appeal from the order or decision with leave. Leave to appeal in CCAA proceedings is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. As this court recently explained in *Laurentian University of Sudbury (Re)*, 2021 ONCA 199, at paras. 20-22, this cautious approach is a function of several factors:

First, a high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings, who are "steeped in the intricacies of the *CCAA* proceedings they oversee". Appellate intervention is justified only where the "supervising judge erred in principle or exercised their discretion unreasonably": *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, 78 C.B.R. (6th) 1, at paras. 53 to 54.

Second, CCAA proceedings are dynamic. It is often "inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests": *Edgewater Casino Inc. (Re)*, 2009 BCCA 40, 51 C.B.R. (5th) 1, at para 20.

Third, CCAA restructurings can be time sensitive. The existence of, and delay involved in, an appeal can be counterproductive to a successful restructuring.

[35] In addressing whether leave should be granted, the court will consider four factors, specifically whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the action.

See: *Nortel Networks Corp. (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

Leave is Not Warranted

[36] As we will explain, we refuse to grant leave because the proposed appeal is not *prima facie* meritorious, it is not of significance to the practice and granting leave would unduly hinder the progress of the action. While we agree that the proposed appeal is of significance to the action, that factor alone is not a sufficient basis on which to grant leave.

Leave not Prima Facie Meritorious

[37] Thorneloe proposes that five questions be answered should leave be granted:

1. Can the CCAA, a statute whose purpose is to *prevent* bankruptcies, be used by a debtor to eliminate competition and *cause* the bankruptcy of another solvent entity (in this case, another university)?

2. Should section 32 of the CCAA be interpreted so broadly that it allows the disclaimer of an agreement that will result in the bankruptcy of the counter-party, for the purpose of eliminating competition, *and* where the potential financial gain to the debtor is both uncertain and immaterial?

3. What inferences should be drawn by the CCAA court where a DIP lender demands the disclaimer of an agreement that will cause the bankruptcy of the counter-party or else it will refuse to extend a loan maturity date and advance further funds, yet the DIP lender refuses to attend an oral examination and refuses to produce documents and answer questions as to why it demands the disclaimer?

4. What is the role of the CCAA Court when confronted with a transaction condition that calls for the disclaimer of an agreement which the debtor admits is motivated to eliminate competition, and then presented as a threat that if the CCAA Court does not uphold the disclaimer, the debtor may not be able to restructure?

5. What are the factors applicable on persons to act in good faith under section 18.6 of the CCAA, and in particular where Laurentian and/or the DIP lender seek to close down Thorneloe for the admitted motive of eliminating Thorneloe as a competitor? [Italics in original.]

[38] We are not satisfied that the proposed appeal, challenging the CCAA judge's discretionary decision to approve the disclaimer and to refuse to delete the condition in the DIP Amendment Agreement, is *prima facie* meritorious. In reaching that conclusion we are cognizant that factual findings are owed considerable deference as are discretionary decisions, absent an extricable legal error. Each of Thorneloe's proposed questions has embedded in it factual assertions that run contrary to the CCAA judge's factual findings and each challenges the way he exercised his discretion.

[39] For example, Thorneloe's first two proposed appeal questions, about whether a disclaimer can be used if its effect is to eliminate competition and cause the bankruptcy of a solvent party, do not raise an extricable legal point, given the CCAA judge's findings.

[40] On those findings, Laurentian and Thorneloe were not truly competitors. They were working in a federated arrangement. Thorneloe's course offerings could only be taken up by Laurentian students, and they could "compete" with course offerings of Laurentian, only because the parties had entered into the federated arrangement. Contrary to Thorneloe's assertion, there was no admission by Laurentian that its motive was to eliminate Thorneloe as the competition. The evidence of Laurentian's President, Dr. Haché, was simply that Laurentian had the capacity itself and the need to provide the courses that the Federated Universities were providing to Laurentian students.

[41] Moreover, Laurentian is insolvent and the CCAA judge found that if Laurentian collapses, Thorneloe will collapse. Thorneloe could only be an ongoing solvent entity if Laurentian could successfully restructure while keeping the agreements with Thorneloe in place. But that option was not available, as the CCAA judge accepted the Monitor's view that the disclaimer of the agreements was necessary for a viable restructuring of Laurentian to occur.

[42] As for Thorneloe's other proposed appeal questions, the CCAA judge engaged in a serious and carefully considered exercise that required him to balance the proposed disclaimer for Laurentian against the detrimental impact on Thorneloe. He clearly explained what factors he was taking into account in making a determination under s. 32 and how he weighed competing considerations. He recognized the serious financial impact that approving the disclaimer could have on Thorneloe. He addressed Thorneloe's argument, which is repeated before this court, that the financial impact of not disclaiming the Thorneloe agreements, would be minimal for Laurentian and explained why he disagreed. He also considered and rejected allegations of bad faith. As the CCAA judge supervising the proceeding, he was aware of the bigger picture, including the savings that had already been achieved by Laurentian through the CCAA process. He addressed Thorneloe's arguments relating to the DIP Lender and found that there was no need to question its legitimacy or the conditions it put forward.

[43] Fundamentally, he found that the disclaimer would enhance the prospects of a viable plan of compromise or arrangement, while disallowing it could lead to the inability of Laurentian to restructure and to Laurentian's collapse, which would also entail the collapse of Thorneloe. The CCAA judge expressed the choice succinctly and accurately—it was between allowing the disclaimer, recognizing the hardship it would cause Thorneloe, and disallowing the disclaimer, recognizing the hardship it could

cause Laurentian and Thorneloe. In our view, the choice he made cannot be faulted. We would also observe that this conclusion was available in the absence of any consideration of the position of the DIP Lender.

[44] In conclusion, while we recognize the serious financial implications of the disclaimer for Thorneloe, we are simply not persuaded that there is an arguable basis for interfering with the CCAA judge's factual findings or legal conclusions.

Significance to the Action

[45] We accept that the proposed appeal is of significance to the action given the significant implications of the disclaimer for Thorneloe and for Laurentian. However, the significance of the proposed appeal to the action is insufficient to justify leave. This court's comment in *Nortel*, at para. 95, is apt:

...[S]tanding alone, this factor is insufficient to warrant granting leave to appeal. To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.

No Significance to the Practice

[46] We are not satisfied that the proposed appeal is of significance to the practice as the issues raised turn on the application of the law to the particular facts of the case.

Appeal Would Hinder Progress of the Action

[47] In our view, there is a risk that an appeal would be a distraction from the real-time restructuring efforts. Laurentian and the DIP Lender also raise legitimate concerns that attempting to "unscramble the egg" through an appeal would unduly hinder the progress of the CCAA proceeding.

C. DISPOSITION

[48] Leave to admit the fresh evidence is granted and leave to appeal is refused. In the circumstances, there shall be no order for costs.

"Alexandra Hoy J.A."

"S.E. Pepall J.A."

"B. Zarnett J.A."

TAB 8

Laurentian University of Sudbury, 2021 ONSC 3272 (CanLII)

Date:	2021-05-07
File number:	CV-21-656040-00CL
Other citation:	89 CBR (6th) 183
Citation:	**Laurentian University of Sudbury, 2021 ONSC 3272 (CanLII), <https://canlii.ca/t/jg03z>, retrieved on 2024-09-18**

CITATION**:** Laurentian University of Sudbury, 2021 ONSC 3272
COURT FILE NO.: CV-21-656040-00CL
DATE: 2021-05-07
SUPERIOR COURT OF JUSTICE - ONTARIO

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch W. Grossell, Andrew Hanrahan and Derek Harland*, for the Applicant

Ashley Taylor, Elizabeth Pillon and Ben Muller, for the Court-appointed Monitor Ernst & Young Inc

Vern W. DaRe, for the Firm Capital Corporation, the DIP Lender

Susan Philpott, Charles Sinclair and David Sworn, Insolvency Counsel for Laurentian University Faculty Association (LUFA)

Tracey Henry and Danielle Stampley, for Laurentian University Staff Union (LUSU)

Aryo Shalviri and Pamela Huff, for the Royal Bank of Canada

Andrew Hatnay, Demetrios Yiokaris and Sydney Edmonds and Eugene Meehan, Q.C., for Thorneloe University

Dylan Chochla and Stuart Brotman, for the Toronto Dominion Bank

André Claude, for the University of Sudbury

Donia Hashem, for the Canada Foundation for Innovation

Virginie Gauthier, for Lakehead University

George Benchetrit, for the Bank of Montreal

Joseph Bellissimo and Natalie Levine, for Huntington University

Gale Rubenstein and Bradley Wiffen, for the Financial Services Regulatory Authority

Sarah Godwin, for the Canadian Association of University Teachers

David Salter and Peter J. Osborne, for the Board of Governors

Rachel Moses, for Royal Trust

Mark G. Baker and Andre Luzhetskyy, for Laurentian University Students' General Association

Michelle Pottruff, for the Ministry of Colleges and Universities

Charlotte Servant-L'Heureux, for the Assemblée de la francophonie

de l'Ontario

Linda Chen, for the Information and Privacy Commissioner of Ontario

HEARD: April 29, 2021

DECISION RELEASED: May 2, 2021

REASONS: May 7, 2021

ENDORSEMENT

[1] On Sunday, May 2, 2021, the following endorsement was released:

[1] Thorneloe University ("Thorneloe") brings this motion under section 32(2) of the *Companies' Creditors Arrangement Act* ("CCAA") for an order that the following two agreements in the Notice of Disclaimer of Laurentian University of Sudbury ("Laurentian") dated April 1, 2021 are not to be disclaimed or resiliated:

(a) the Federation Agreement between Laurentian and Thorneloe, dated 1962 (the "Federation Agreement"); and,

(b) the Financial Distribution Notice between Laurentian and Thorneloe dated May 1, 2019, amending the Proposed Grant Distribution and Services agreement between Laurentian, the University of Sudbury, Thorneloe University, and Huntington University dated November 10, 1993 (the "Financial Distribution Notice") (collectively, the "Agreements");

and, for an order amending the Loan Amendment Agreement dated April 20, 2021 (the "DIP Amendment Agreement"), to delete the following condition:

> 4. The Disclaimers of the Borrower's Federation Agreements and Financial Distribution Notices with each of Huntington University, Thorneloe University and the University of Sudbury (collectively, the "Federated Universities") issued on April 1, 2021 shall become effective, binding and final on May 1, 2021 (the "New Disclaimer Term").

[2] This motion was heard via Zoom on April 29, 2021.

[3] The University of Sudbury also brought a motion pursuant to section 32(2) of the CCAA with respect to a Federation Agreement between Laurentian and the University of Sudbury. This motion was heard via Zoom on April 30, 2021 by Gilmore J.

[4] This endorsement is being released concurrently with the endorsement of Gilmore J.

[5] For reasons to follow, Thorneloe's motion is dismissed.

[2] These are my reasons.

BACKGROUND

[3] In 1960, Thorneloe, Huntington University ("Huntington"), and the University of Sudbury ("U Sudbury") (collectively, the "Federated Universities"), were established by the Anglican, United and Roman Catholic churches, respectively. As religiously affiliated institutions, they were not eligible for government funding. The Province of Ontario passed an *Act to Incorporate Laurentian University of Sudbury*, S.O. 1960, c. 151, and Laurentian was established. On September 10, 1960, U Sudbury and Huntington entered into Federation Agreements with Laurentian and in 1962, Thorneloe entered into a Federation Agreement with Laurentian (collectively, the "Federation Agreements").

[4] The Federated Universities agreed to suspend degree-granting authority (other than Theology, in the case of Thorneloe and Huntington) and effectively operate as a single university. The Federated Universities would teach courses to students for credit at Laurentian. Funding from the provincial government was provided to the Federated Universities, through Laurentian.

[5] The arrangement among the Federated Universities to distribute government grants is set out in the Proposed Grant Distribution and Services Fees Agreement dated November 10, 1993.

[6] The funding arrangement was changed commencing in the 2019 – 2020 academic year, per the Financial Distribution Notice.

[7] Laurentian wants to disclaim the Federation Agreements and the Financial Distribution Notice with respect to Thorneloe and U Sudbury.

[8] As referenced in the Third Report of the Monitor, the Federated Universities do not admit or register their own students, nor do they grant their own degrees (with the exception of Theology at Huntington and Thorneloe). All Federated University programs and courses are offered through Laurentian, and all students apply for admission to Laurentian. Students who enroll in a program at Laurentian may take elective courses at any or all of the Federated Universities as well as Laurentian. Students enrolled in programs, courses, majors and minors that are administered by the Federated Universities are students of Laurentian, and these courses are credited towards a degree from Laurentian. Laurentian provides certain services to the Federated Universities, however, each of the Federated Universities is separately governed and manages its finances separately from Laurentian and each other.

[9] The Monitor also reported that as all students are students of Laurentian regardless of whether they are enrolled in programs or take courses at one of the Federated Universities, the Federated Universities do not directly bill or collect tuition. Laurentian manages admission. Students are billed tuition by Laurentian. Students then choose courses from a Laurentian course catalogue which includes courses offered through the Federated Universities.

[10] While Laurentian does not receive grant revenue or tuition revenue that is directly intended for the benefit of the Federated Universities, Laurentian and the Federated Universities have certain financial agreements in place pursuant to which Laurentian receives, allocates and distributes a portion of Laurentian's revenue to the Federated Universities in accordance with the funding formula (the "Federated Funding Formula"). Through this Federated Funding Formula, Laurentian compensates the Federated Universities for delivering programs and services to Laurentian students. The key terms of the Federated Funding Formula include the following:

(a) A portion of provincial grants received by Laurentian are distributed to the Federated Universities based on the proportion of students enrolled in the Federated Universities' programs;

(b) A portion of tuition fees received by Laurentian are distributed to the Federated Universities based upon student enrolment and courses offered through the Federated Universities; and

(c) An offsetting charge for service fees charged by Laurentian to the Federated Universities in exchange for Laurentian providing certain support services to the Federated Universities (calculated as 15% of grant and tuition revenues distributed to the Federated Universities).

[11] As of the fall 2020 academic term, there were 417 students enrolled in full-time and part-time programs through the three Federated Universities (271 full-time equivalents). This includes 91 full-time and part-time students of Thorneloe (62.8 full-time equivalents), 108 full-time and part-time students at U Sudbury (69.6 full-time equivalents), and 163 full-time and part-time students at Huntington (103.2 full-time equivalents). The remaining students are enrolled in programs jointly offered by the Federated Universities.

[12] Students who enrolled at Laurentian have had the ability to take elective courses at any or all of the Federated Universities, as well as at Laurentian. The main activity of both U Sudbury and Thorneloe is to offer elective courses through the Faculty of Arts for students enrolled in the Applicant's programs.

[13] Each of the Federation Agreements contains an aspirational statement which addresses the Federated relationship:

> [B]oth Laurentian University and [the Federated University] declare and express the firm hope and conviction that the relationship between the Universities established by this agreement will be a permanent one… [a]nd to build a great institution of learning which shall forever be bilingual and nondenominational in its character.

[14] Laurentian has Indenture Agreements with each of the Federated Universities, pursuant to which the Federated Universities lease land owned by Laurentian and on which they have constructed their own buildings. Each indenture provides for lease terms of 99 years, with the possibility of further renewal.

[15] The indentures contain termination provisions which allow for the termination of the indenture if the relevant Federated University withdraws from the Federation with the Applicant. No notice of disclaimer was issued by Laurentian in respect of any of the indentures and the indentures are not the subject matter of this motion.

[16] Laurentian takes the position that the main activity of the Federated Universities is offering elective courses that are administered for Laurentian's students. Each time a Laurentian student takes an elective course through the Federated Universities, rather than an elective through Laurentian, that represents lost tuition revenue to Laurentian.

[17] Laurentian takes the position that in fiscal year 2020, as a result of Laurentian students' enrolment in programs and courses through the Federated Universities, Laurentian transferred to the Federated Universities approximately $3.5 million in total grants, $5.3 million in net tuition and $0.3 million in material fees, for a total of $9.1 million. That amount was offset by the administrative services fee of approximately $1.4 million, for a net transfer from Laurentian to the Federated Universities of approximately $7.7 million in fiscal year 2020.

[18] Laurentian has approximately 9,300 undergraduate and graduate students. Laurentian asserts that its Faculty of Arts has the ability and capacity to offer a range of alternative electives to its students, such that there is no need for Laurentian to lose revenue because its students take elective courses

offered through the Federated Universities. Since students enrolled in programming offered by the Federated Universities can otherwise be accommodated and enrolled in programs offered by Laurentian, Laurentian asserts that a substantial portion of the grant revenue represents lost revenue for Laurentian. Laurentian and the Monitor concede that Laurentian will not be able to accommodate 100% of the displaced students but anticipate that it will be able to accommodate most of them.

[19] Laurentian also asserts that approximately 70% of its revenues in 2019-2020 is comprised of tuition and grant funding, and, due to the freeze of tuition fees, Laurentian cannot increase revenue through tuition fees. Thus, the only opportunity for Laurentian to fully utilize the revenue it receives in respect of its students is for them to be enrolled in programs and courses at Laurentian.

[20] Thorneloe presents the facts from its viewpoint. It considers that the funds flow through Laurentian to Thorneloe pursuant to the Financial Distribution Notice. The funds do not belong to Laurentian and the funds do not represent a subsidy. As set out in the Financial Distribution Notice, Laurentian charges Thorneloe an additional 15% of Thorneloe's earned government grants and tuitions.

[21] Thorneloe also points out that it is a small component of the Laurentian Federation, employing a total workforce of 28, including seven full-time faculty members, 12 sessional faculty members, six staff and three casual staff.

[22] Notwithstanding its small size, Thorneloe contends that it has a big impact. In 2019-2020, Thorneloe taught 2861 Laurentian students, representing 297 full-time equivalents ("FTEs"). In 2020-2021, Thorneloe taught slightly fewer (2477) Laurentian students, after it made the decision to close underperforming programs.

[23] Thorneloe also contends that the financial problems of Laurentian are not attributable to Thorneloe or the Federation model.

CCAA PROCEEDINGS

[24] Laurentian obtained an initial stay of proceedings under the CCAA on February 1, 2021. The objective of the CCAA filing was the subject of comment in the affidavit of Dr. Robert Haché, sworn January 30, 2021, filed in support of the initial application. Section VIII covers the "Proposed Restructuring of Laurentian", the "Evaluation of the Federated Universities Model" and the "Restructuring of Program Offerings".

[25] Paragraph 295 of the affidavit reads as follows:

The Laurentian 2.0 framework seeks to accomplish the foregoing through:

> (a) **Restructuring the Academic Model** by streamlining academic programming and delivery through the reduction of number of programs, restructuring academic supports and terminating the agreements and relationship with the Federated Universities; and

(b) **Restructuring the Business Model** by updating business operations, restructuring existing obligations through a compromise in the CCAA and ultimately balancing the budget.

[26] Paragraph 298 reads, in part, as follows:

[298] More particularly, during this CCAA proceeding, LU ("Laurentian") intends to:

...

(b) re-evaluate the Federated Universities model in such a way that the historic significance of the Federated Universities can be preserved while ensuring that the relationships reflect the current realities of each organization;

[27] Paragraphs 299 – 301 read as follows:

[299] In 2019, LU provided notice of a change in the funding agreement between LU and each of the Federated Universities. While this amendment was necessary to make the funding arrangements consistent with metrics in respect of tuition and grants from the Province, further work is required. LU estimates that the Federated Universities model costs LU approximately $5 million each year.

[300] Currently, the Federated Universities have duplicate organizational infrastructure, functions and services. Although LU respects the autonomy of the Federated Universities, the Federated Universities also have financial challenges. One successful outcome of this CCAA proceeding may be the remolding of the Federated Universities model in such a way that creates economies of efficiency for LU and the Federated Universities while maintaining the historical significance and identities of the Federated Universities.

[301] This Court-supervised proceeding will assist LU in focusing its discussions and negotiations with leadership of the Federated Universities to arrive at a compromise and solution that is acceptable and, more importantly, ensures the long-term sustainability of LU. If necessary, LU may utilize the proposed mediation to address and resolve the Federated Universities model.

[28] The Honourable Justice Sean Dunphy conducted a judicial mediation to address a number of issues facing Laurentian. Although the contents of any discussions have not been made public, it is apparent that the issues as between Laurentian and the Federated Universities were discussed but were not resolved.

[29] On April 1, 2021, Laurentian gave Notice to Disclaim or Resiliate an Agreement with Thorneloe and with U Sudbury. The notice covered both the Federation Agreements and the Financial Distribution Notice.

[30] The Monitor approved the Notices of Disclaimer.

[31] On April 15, 2021, Thorneloe delivered a Motion Record opposing the Notice of Disclaimer issued to Thorneloe.

[32] U Sudbury also delivered a Motion Record opposing the Notice of Disclaimer. The motion was the subject of a bilingual hearing before Gilmore J.

ISSUE

[33] Thorneloe submits there is one issue to be determined on this motion: should the court prohibit the disclaimer?

ANALYSIS

[34] Section 32 of the CCAA addresses the disclaimer or resiliation of agreements.

[35] The debtor company may, on notice to the other parties to an agreement and the monitor, disclaim or resiliate an agreement to which the company is a party at the commencement of the CCAA proceedings: s. 32(1). The monitor must approve the proposed disclaimer or resiliation. Otherwise, the debtor is required to make an application to the court for an order that the agreement be disclaimed or resiliated: ss. 32(1) and (3). The counterparty has 15 days to make an application to the court opposing the disclaimer or resiliation: s. 32(2). In deciding whether to make the order, the court is to consider, among other things, the factors set out in s. 32(4), which read as follows:

> **Factors to be considered**
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[36] Thorneloe makes the following arguments in opposition to the disclaimer:

(a) Thorneloe did not cause Laurentian's financial problem;

(b) The disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make an insolvency filing pursuant to the CCAA or the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3;

(c) Thorneloe is immaterial to Laurentian's financial situation and therefore, the disclaimer would not result in a material improvement to Laurentian's restructuring;

(d) The relationship between Laurentian and Thorneloe is not a commercial relationship to which the disclaimer provisions of the CCAA were intended to apply; and

(e) Laurentian is acting in bad faith contrary to s. 18.6 of the CCAA.

[37] The Monitor approved the disclaimer for reasons set out in the Third Report as follows:

169. ... [I]t is the Monitor's view that the Notices of Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of the Applicant. In fact, it is the Monitor's view that without the Notices of Disclaimer, the Applicant is unlikely to be able to complete a viable plan of compromise or arrangement.

...

172. While the net estimated savings achieved to date is significant and addresses the Applicant's operational deficit, it is unlikely to be sufficient to cover among other items: (a) the repayment of the DIP Facility (even if refinanced over time) and (b) payment of distributions to creditors pursuant to a plan of compromise or arrangement in connection with the compromise of their claims.

173. As a not-for-profit, LU is unable to issue equity to creditors. It has no or limited ability to service additional debt beyond the refinancing of the DIP. As set out above, LU has limited opportunity to drive increased revenue. Therefore, LU must, through its restructuring, generate sufficient savings to provide for the ability to make payments over time to its creditors in partial satisfaction of their claims. The savings generated to date through the LUFA Term Sheet, LUSU Term Sheet and non-union employee savings represent a significant component of the required savings, but not the entirety.

> 174. The Federated Universities model represents a significant cost to LU. In Fiscal 2020, LU transferred approximately $7.7 million to the Federated Universities as a result of LU students taking programs and courses offered through the Federated Universities. This included the transfer of approximately $3.5 million of grants received by LU, $5.3 million in net tuition collected from LU students and $0.3 million in material fees in respect of Federated Universities courses all offset by a 15% service fee of approximately $1.4 million. ...
>
> 175. The Monitor understands that the majority of the funds transferred to the Federated Universities relates to the delivery by the Federated Universities of elective courses taken by students enrolled in LU programs as opposed to students enrolled in programs offered through the Federated Universities.
>
> 176. In conducting its review of its academic offerings and operational restructuring model, LU determined that it has the ability and capacity to offer a comprehensive list of programs and courses to LU students from the suite of programs and courses delivered by LU faculty in the absence of continuing the Federated Universities relationship. As a result, LU determined that it could retain the vast majority of the funds transferred to the Federated Universities and continue to support students without incurring those incremental costs.
>
> 177. As a result, LU is of the view that savings estimated in the range of $7.1 to $7.3 million annually can be generated through the disclaimer of the Federated Universities as part of this restructuring.
>
> 178. The Monitor recognizes the potential financial hardship that the Notices of Disclaimer may have for the Federated Universities. However, given the additional savings required for LU to have a reasonable opportunity to put forward a viable plan of compromise or arrangement and effect a successful restructuring, the Monitor is of the view that the disclaimer of the Federated Universities agreements is necessary.

[38] To counter the submissions of Laurentian and the views and recommendations expressed by the Monitor, Thorneloe filed a Report on Financial Impact of Termination of Federated Agreement and Financial Distribution Agreement on Thorneloe University. The Report was prepared by Mr. Allan Nackan, a partner with A. Farber & Partners Inc. Mr. Nackan has been identified as an expert for the purposes of providing his opinion. I am satisfied that Mr. Nackan is an expert in the area of insolvency and restructuring. However, Mr. Nackan acknowledged in cross-examination that he is not an expert in terms of government funding of universities and that he has no prior experience in determining university funding. His lack of industry-specific experience has to be taken into account when considering his report and conclusions.

[39] It is also necessary to acknowledge the expertise of Ernst & Young Inc., the court-appointed Monitor. The Monitor is an officer of the court, with a duty to be neutral and objective: *Bell Canada International Inc. (Re)*, [2003] CarswellOnt No. 4537 (S.C.). The principals of Ernst & Young Inc., including Sharon Hamilton, who signed the Monitor's Third Report, are widely acknowledged as being experts in the field of insolvency and restructuring. Moreover, the Monitor has been involved since the proceedings began and has extensive knowledge of the Applicant's operations and restructuring efforts.

[40] Farber was retained to provide an opinion on whether the termination of the Federated Agreement and the Financial Distribution Notice would result in significant financial hardships to Thorneloe, and whether or not the termination would enhance Laurentian's prospects of a viable compromise or arrangement.

[41] Farber concludes the termination of the Federated Agreement will cause serious financial hardship to Thorneloe as a consequence of which Thorneloe will have to resort to a formal insolvency process.

[42] Farber also concludes that the termination of the Federated Agreement will have an immaterial impact on overall costs reduction in Laurentian's restructuring process and is unlikely to enhance prospects of Laurentian making a viable plan.

[43] In a supplementary report, Farber concludes that:

- Laurentian is not facing an immediate liquidity crisis on May 1, 2021;
- there is no compelling reason that would necessitate termination of the federated arrangement with Thorneloe on May 1, 2021;
- from a financial perspective, Laurentian and the DIP Lender have not provided information to support the need for a Disclaimer Deadline of May 1, 2021.

> [44] A consideration of the s. 32(4) factors requires a balancing of interests. The subsection is silent with respect to the relative importance of any one of the factors to be considered and is not restricted to the listed factors. The test does, however, require the court to balance the benefit of the proposed disclaimer for Laurentian against the detrimental impact on Thorneloe. The disclaimer of a contract must be fair, appropriate and reasonable in all the circumstances. Ultimately, it is a discretionary decision to determine whether the disclaimer should be upheld. This discretion is exercised by weighing the competing interests and prejudice to the parties and assessing whether the disclaimer or resiliation is fair and reasonable.

[45] In my view, the considerations in the Third Report of the Monitor reflect a proper balancing of the competing interests of Laurentian and all stakeholders, including Thorneloe. The Third Report discusses the financial challenges facing Laurentian and proposes solutions that could enhance the

prospects of a viable plan of compromise or arrangement, while acknowledging the potential financial hardship on the Federated Universities. The Farber Report and the Supplementary Farber Report focuses of the impact of the disclaimer on Thorneloe and the short term DIP Financing requirements. In narrowing its focus, the Farber Report does not take into account that in order to enhance the prospects of a viable plan of compromise or arrangement, it is often necessary to take into account the potential compromises that will have to be made by all stakeholder groups. For this reason, I have concluded that the Third Report of the Monitor has to be given greater weight than the Farber Report and the Supplementary Farber Report.

[46] Laurentian submits that the Courts have identified guiding principles for the analysis:

(a) the recommendation of the Monitor is afforded significant weight in CCAA proceedings (see *Nortel Network Corp. Re*, 2018 ONSC 6257 at para. 27; *Aralez Pharmaceuticals Inc., Re*, 2018 ONSC 6980 at para. 36; and *Aveos Fleet Performance Inc.*, 2012 QCCS 4074 at para. 50(f);

(b) the disclaimer does not need to be essential to the restructuring, it only need be advantageous and beneficial (see *Timminco Ltd., Re*, 2012 ONSC 4471 at para. 54 ("*Timminco*"); see also *Homberg Invest Inc.*, 2011 QCCS 6376 at para. 103);

(c) the threshold to establish "significant financial hardship" in opposing a disclaimer is high. There must be specific evidence of financial hardship. Mere loss or damage is not sufficient, and it must be likely that the hardship is caused by the disclaimer (see *Target Canada Co. Re*, 2015 ONSC 1028 at para. 26);

(d) the test to establish "significant financial hardship" is subjective and depends on an examination of the individual characteristics and circumstances of the counterparty (see *Timminco* at para. 60); and

(e) the Court should take into consideration the effect that the disclaimer will have on the outcome for all other unsecured creditors and be an equitable result that is dictated by the guiding principles of the CCAA (see *Timminco* at para. 62).

[47] There is no doubt that Laurentian has significant financial challenges. There is also no doubt that, if a successful restructuring is to be achieved, it must be done on an expedited basis. If Laurentian is to successfully restructure its affairs, it is essential that it maintain continuity of operations. The spring term commences May 3, 2021 and extends until the latter part of July 2021. The fall term commences at the beginning of September 2021. If the restructuring is to succeed, Laurentian must be in a position to provide assurances to both its students and faculty that it has a viable plan that will ensure continued operations for both the spring term, the fall term and beyond.

[48] Laurentian, with the assistance of the Monitor, identified a number of areas in which a financial restructuring was required. These include a downsizing of the number of programs being offered by Laurentian and also the necessity to arrive at new, sustainable collective agreements with LUFA and LUSU. These requirements and accommodations are set out in the motion to extend the stay of proceedings.

[49] Laurentian also identified, at the outset of the CCAA proceedings, that it would be necessary to have a fundamental readjustment or realignment with the Federated Universities.

[50] Although Thorneloe is of the view that its relationship with Laurentian has only a minor impact on the financial position of Laurentian, it seems to me that this view is far too narrow in scope. Laurentian has identified that if the disclaimers involving Thorneloe and U Sudbury are upheld, together with the revised agreement with Huntington, this will result in $7.7 million of additional funds remaining with Laurentian on an annual basis. This calculation has been identified by the Monitor and, in my view, represents a real source of annual financial relief for Laurentian.

[51] Thorneloe counters by indicating that it is only one of three Federated Universities; the $7.7 million figure cannot be attributed, in total, to Thorneloe. At first glance, this is an attractive and persuasive argument. It does not, however, take into account that Huntington, in negotiating its settlement with Laurentian, has included what is known colloquially as a "most favoured nation" clause. Quite simply, if Thorneloe is able to negotiate a better alternative than the agreement negotiated by Huntington, Huntington is in a position to reopen negotiations with Laurentian to obtain similar treatment. Therefore, it seems to me that although there are three Federated Universities involved, their positions are interlinked and interrelated to such a degree that the $7.7 million calculation is relevant to take into account on this motion.

[52] The Notices of Disclaimer are, in my view, central to the Applicant's restructuring. The Disclaimer will result in millions of dollars of additional tuition and grant revenue remaining within Laurentian. As noted in both the affidavit of Dr. Haché and the Monitor's Report, each time a Laurentian student takes an elective course offered through Thorneloe, revenue associated with that course is transferred from Laurentian to Thorneloe. Because the Applicant has the capacity to independently offer students the vast majority of all necessary programs and electives within its existing cost structure, each course taken by a Laurentian student through Thorneloe represents lost revenue for Laurentian.

[53] The Applicant contends that it simply cannot afford to continue its relationship with the Federated Universities. In order to right-size the University, Laurentian cannot continue paying for programs and courses supplied by the Federated Universities that it does not require and are revenue negative for Laurentian.

[54] The Applicant submits that it cannot simply "balance its budget" in order to achieve financial sustainability. It submits that it must generate positive cash flow from operations on an annual basis, prior to the funding of expenses, to achieve financial sustainability. In my view, this submission is consistent with the objective and necessity of achieving long-term sustainability.

[55] Laurentian has also submitted that the savings to be realized from the disclaimer are necessary for the purposes of submitting a viable plan. The Monitor is in agreement with this submission.

[56] Although the savings realized from the disclaimer do not, in isolation, represent a significant amount, in my view, that is not the end of the inquiry. In order to enhance the prospects of a viable plan of reorganization being put forward, it is necessary to assess the totality of what Laurentian is attempting to achieve in this restructuring.

[57] Laurentian suggests that savings have to be realized from a number of sources, including the Federated Universities. Without the total amount of savings being realized, Laurentian submits that it will been unable to put forward the basis of a plan that will be acceptable to its various constituents.

[58] It is necessary to take into account another factor, namely that there is evidence that Laurentian has achieved other milestones in its attempt to put forward a viable plan of reorganization. These include the revised relationships with LUFA and LUSU, the reduction in the number of courses, and the reduction in the number of staff. None of these milestones were realized without significant compromise and hardship being experienced by faculty, students and the greater Sudbury community. Without such compromises, Laurentian will not be able to survive.

[59] It is also necessary to take into account the position of the DIP Lender. The DIP Lender has put forth a condition for its continued support and for increased financing. That condition is that the Disclaimer with respect to Thorneloe and U Sudbury had to be finalized by May 1, 2021, subject to any reserved decision of the court.

[60] Thorneloe challenges the position of the DIP Lender for two reasons. First, the condition relating to the Disclaimer was not a condition of the original DIP and was inserted only after the Notice of Disclaimer was issued. Second, the analysis performed by Farber indicates that the increased DIP Loan is not required until the latter part of June at the earliest.

[61] There is, in my view, no basis to question the legitimacy of the DIP Lender nor question the conditions that the DIP Lender has put forth with respect to any request to extend the DIP Loan and to increase the amount of the DIP Financing. The DIP Lender is entitled to take into account commercial reality in assessing its options.

[62] The DIP Lender is not a pre-existing lender to Laurentian, nor is there any evidence that the DIP Lender is engaged in a "loan to own strategy". These facts distinguish this DIP Lender from a number of DIP lenders that have been involved in the cases referenced by counsel to Thorneloe, as referenced in Rostom and Fell, "Recent Trends in DIP Financing" (2016) 5-4 IIC Journal; *Essar Steel Algoma (Re),* Endorsement of Newbould J. dated November 16, 2015; and *Great Basin Gold Ltd. (Re)*, 2012 BCSC 1459.

[63] It is also relevant to remember that this is not a situation where the Court is being asked to approve DIP financing with this DIP Lender. These approvals were granted in February 2021 with no party objecting and with no appeals being filed. It was a competitive process and the DIP Lender was one of eight potential DIP lenders identified at the outset of the proceedings.

[64] Thorneloe also takes issue with respect to the reluctance of a representative of the DIP Lender to be cross-examined or to answer any questions with respect to the DIP Financing.

[65] In response, Laurentian takes the position that the terms for the continued DIP were negotiated as part of a process of achieving a viable long-term plan. Second, although the increased DIP may not be necessary until mid-June, it is a requirement for any extension of the stay to provide a cash flow statement that takes into account the entirety of the Stay Period, and it is necessary to provide the necessary assurances to faculty and students that Laurentian will be able to operate for the next academic term, which commences May 3, 2021 and extends towards the middle to the latter part of July 2021. It is simply not feasible, from its standpoint, to operate without the continued DIP Facility and the certainty that the DIP Facility will be available throughout the entirety of the academic term and the Stay Period.

[66] With respect to the cross-examination of the DIP Lender, I note that no affidavit has been filed in these proceedings by a representative of the DIP Lender. In addition, the DIP Lender is not a pre-existing lender. The DIP Lender is not involved in any of the pre-CCAA DIP contractual relationships. It is up to the debtor, with the assistance of the Monitor, to negotiate the terms of the DIP Financing. There is no evidence that the DIP Lender has any ulterior motive in negotiating the condition to extend additional financing and to extend the term.

[67] Thorneloe also raises the concern that the Disclaimer will result in significant financial hardship for Thorneloe and result in Thorneloe having to make insolvency filings pursuant to the CCAA or the *Bankruptcy and Insolvency Act*.

[68] There is no doubt that this is a legitimate point being raised by Thorneloe. The impact of the disclaimer on Thorneloe is significant. The consequence of the disclaimer is such that Thorneloe will be unable to operate in its current form. However, Thorneloe was offered alternatives. The form of the Huntington Transition Agreement was offered to Thorneloe but was not accepted. More importantly, it is also necessary to take into account that if Laurentian's restructuring does not succeed and it ceases operations, Thorneloe, as conceded by its counsel, will also be unable to continue operations.

[69] Thorneloe also contests the disclaimers on the basis that the relationship between Laurentian and Thorneloe is not a commercial relationship to which the disclaimer provisions of the CCAA were intended to apply. In my view there is no merit to this submission. The CCAA proceedings were commenced on February 1, 2021. The Initial Order declares that Laurentian is insolvent and is a company to which the CCAA applies. The disclaimer provisions in s. 32 are available to a debtor company. The exceptions set out in s. 32(9) have no application in the circumstances. Laurentian is entitled to utilize the disclaimer provisions in accordance with s. 32.

[70] Thorneloe also takes the position that Laurentian is acting in bad faith contrary to s. 18.6 of the CCAA which provides:

Good faith

18.6 (1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.

Good faith – powers of court

(2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

[71] In support of this argument, Thorneloe points to Laurentian's attempt to terminate its relationship with Thorneloe, knowing that the disclaimer will result in Thorneloe's insolvency, and to Laurentian's persistence in the face of evidence that termination will not materially assist its restructuring. Thorneloe also submits that Laurentian has consistently and continually wanted to terminate its relationship with Thorneloe and thereby failed to engage in good faith negotiations.

[72] I do not accept that Laurentian has acted in bad faith. Restructurings are not easy and often result in treatment that a party can consider to be extremely harsh. However, that does not necessarily mean that the other party has not been acting in good faith. In its Third Report, the Monitor makes specific reference to the bad faith argument being raised by Thorneloe. It is significant that the Monitor makes no statement that would suggest in any way that Laurentian has been acting in bad faith. The Monitor ultimately recommends at paragraph 206 of its Third Report that the court grant the relief sought by the Applicant, which includes the disclaimer and also an extension of the stay of proceedings.

[73] Section 11.02(3) of the CCAA addresses the burden of proof on an application for an extension of the stay of proceedings other than the initial application. This includes a requirement that the applicant satisfy the court that it has acted, and is acting, in good faith and with due diligence. By supporting the application for the extension and upholding the disclaimer, it can be inferred that the Monitor does not support the argument of Thorneloe to the effect that Laurentian has been acting in bad faith.

[74] My summary of the factors set out in s. 32(4) of the CCAA is as follows:

(a) the Monitor approved the proposed disclaimer;

(b) the Disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Laurentian;

(c) the Notice of Disclaimer will have financial consequences to Thorneloe, but this is not a sufficient reason to disallow the Notice of Disclaimer. Thorneloe was offered an alternative, similar to Huntington, which was not accepted.

[75] In addition, it seems to me that, in the circumstances of this case, it is necessary to consider the broader implication of disallowing the Notice of Disclaimer – namely the potential demise of Laurentian.

> [76] The dilemma facing the court is clear. If Thorneloe's motion succeeds, with the result that the Disclaimer is not effective, it could lead to an unraveling of Laurentian's restructuring plan and the collapse of Laurentian. This in turn would have significant impact on all faculty, students and the greater Sudbury community. It would also result in the financial collapse of Thorneloe. Obviously, this is not a desirable outcome.

[77] If the Notices of Disclaimer are upheld, I acknowledge that this could lead to the cessation of operations of Thorneloe. I do not lightly discount the impact on faculty, employees and students at Thorneloe, but the impact is significantly less than if Laurentian and Thorneloe are both forced to suspend or cease operations.

[78] Given these two undesirable options, the better choice or to put it another way, the least undesirable choice, is to uphold the Notices of Disclaimer.

DISPOSITION

[79] In the result, the motion brought by Thorneloe to invalidate the Notice of Disclaimer is dismissed.

Chief Justice G.B. Morawetz

Date: May 7, 2021

TAB 9

LoyaltyOne, Co. (Re), 2024 ONSC 3866 (CanLII)

CITATION: LoyaltyOne, Co. (Re), 2024 ONSC 3866
COURT FILE NO.: CV-23-0069601736651-00CL
DATE: 20240710

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: 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 LOYALTYONE, CO.

BEFORE: Conway J.

COUNSEL: *Timothy Pinos, Alan Merskey and Kiyan Jamal*, for LoyaltyOne, Co.

Peter Ruby, Kirby Cohen and Meghan De Snoo, for KSV Restructuring Inc.

Robert W. Staley and Dylan Yegendorf, for the Ad Hoc Group of Term B Lenders

Markus Kremer and Alex Moser, for Bank of America, N.A. as administrative agent and Term Loan A Lenders

Eliot Kolers, Maria Konyukhova, Lesley Mercer and RJ Reid, for Bread Financial Holdings, Inc.

Edward Park, CRA, Department of Justice Canada

HEARD: June 13 and 14, 2024

Reasons for decision
(re: tax matters agreement)

[1] LoyaltyOne, Co. ("**LoyaltyOne**") operated the AIR MILES loyalty rewards business for three decades. In March 2023, it sought protection under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended ("**CCAA**"). In June 2023, Bank of Montreal ("**BMO**") bought the assets of the AIR MILES business as a going concern in the CCAA proceedings.

[2] LoyaltyOne's largest remaining asset is a claim against the Canada Revenue Agency ("**CRA**") for a refund of $96 million with respect to taxes LoyaltyOne paid in 2013 (the "**Tax Refund**"). The trial over the Tax Refund is scheduled to commence in September 2024.

[3] Until November 2021, LoyaltyOne was a subsidiary of Alliance Data Systems Corporation ("**ADS**"). At that time, ADS divested itself of the AIR MILES business through a "spin transaction", explained below. One of the documents signed in the spin transaction is a tax matters agreement dated November 3, 2021 (the "**TMA**").

[4] The issue on the motions before me is who is entitled to the Tax Refund – ADS or LoyaltyOne.

[5] LoyaltyOne and KSV Restructuring Inc. (the "**Monitor**"), supported by the ad hoc group of Term B loan lenders (the "**Lenders**"), say that LoyaltyOne and its creditors are entitled to the Tax Refund. Their motion seeks a declaration that the TMA is not binding on LoyaltyOne or alternatively that it is void as a transfer at undervalue ("**TUV**").[1][26] LoyaltyOne has issued a notice of its intention to disclaim the TMA dated October 27, 2023 (the "**Disclaimer**"). LoyaltyOne and the Monitor say that in any event, Bread's claim to the Tax Refund is only a provable pre-filing unsecured claim.

[6] ADS (now Bread Financial Holdings, Inc. ("**Bread**")) says that it is entitled to the Tax Refund pursuant to the terms of the TMA. It has brought a cross-motion to set aside the Disclaimer. It says that it is entitled to the full amount of the Tax Refund.

[7] For the reasons that follow, I have determined that (i) LoyaltyOne is bound by the TMA; (ii) the TMA is not void as a TUV; (iii) the Disclaimer is not approved; and (iv) it is premature to determine the nature of Bread's rights with respect to the Tax Refund at this time.

Background

[8] The following facts are undisputed, unless otherwise noted.

Divestiture of the Loyalty Rewards Business

[9] Prior to 2019, ADS had three distinct business units: (a) credit card and banking services; (b) consumer loyalty reward program services; and (c) data-driven marketing services. In 2018, ADS decided to shift its focus to the card business. In 2019, ADS sold the marketing business.

26. LoyaltyOne confirmed that it was not pursuing its claims based on oppression or unconscionability.

[10] Charles Horn, a former executive of ADS, became the Executive Vice President and Senior Advisor to oversee the divestment of the loyalty rewards business. ADS first tried to sell the business. Then, in 2021, ADS decided to divest itself of the business through a spin transaction (the "**Spin Transaction**"). Mr. Horn had a team of six ADS executives (the "**Spin Team**") who assisted him on the Spin Transaction and took positions with the new company.[2][27]

[11] The Spin Transaction was completed on November 5, 2021 (the "**Spin Date**"). The majority of shares of LoyaltyOne and another ADS subsidiary, BrandLoyalty Group B.V. ("**BrandLoyalty**"),[3][28] were transferred to a new Delaware public company, Loyalty Ventures Inc. ("**LVI**"). ADS retained a 19% interest in LVI. The remaining shares of LVI were distributed to the ADS shareholders. These steps were documented in several key agreements, including a Separation and Distribution Agreement dated November 3, 2021 (the "**Separation Agreement**").

[12] One of the key agreements was the TMA. As detailed below, it provides that ADS is responsible for all taxes payable prior to the Spin Date and LVI is responsible for all taxes payable thereafter. Section 8(a) states that ADS is entitled to all tax refunds received by any member of the Loyalty Ventures Group (which includes LoyaltyOne), including those set out in Schedule C. That schedule lists the Tax Refund at issue on this motion.

[13] As part of the Spin Transaction, LVI entered into a credit agreement dated November 3, 2021 (the "**Credit Agreement**"), pursuant to which US$675 million was advanced to LVI and its subsidiaries. LoyaltyOne and BrandLoyalty guaranteed the obligations of LVI under the Credit Agreement.[4][29] LVI used the funds from the Credit Agreement and a further US$100 million dividend from LoyaltyOne and BrandLoyalty to pay ADS, which in turn used these funds to pay down its long-term debt.

[14] The distribution of debt between ADS and LVI was supported by a report prepared by ADS' professional advisors, Ernst & Young LLP.

Post-Spin Events

[15] The financial position of LVI and LoyaltyOne deteriorated following the Spin Date. In March 2023, those companies filed for creditor protection in the United States and Canada, respectively. As noted, the assets of the LoyaltyOne business were sold to BMO in June 2023.

[16] There are several outstanding pieces of litigation over the Spin Transaction. LoyaltyOne brought a claim in Ontario against Joseph Motes III (the sole director of LoyaltyOne until the Spin Transaction) and Bread in October 2023, seeking US$775 million in damages for breach of fiduciary

27. Cynthia Hageman, Jeffrey Fair, Jeffrey Tusa, Jack Taffe, Jeffrey Chesnut, and Laura Santillan. The first four individuals have consulting agreements with the "LVI trustee" (defined in footnote 5).

28. BrandLoyalty was based in the Netherlands and provided customer loyalty campaign services to retailers in Europe, Asia, and the Middle East.

29. The wording of the Credit Agreement is that LoyaltyOne is a primary obligor and not a surety. BrandLoyalty is also a primary obligor and not a surety under the Credit Agreement.

duty in connection with the Spin Transaction. The LVI trustee[5][30] has commenced two actions against Bread in the courts of Delaware and Texas, alleging fraudulent transfer and seeking recovery of US$750 million and the Tax Refund. There is a U.S. securities class action against Bread based on the allegations in the bankruptcy actions. A central allegation in the U.S. proceedings is that ADS failed to disclose to its advisors and lenders that Sobeys had decided to terminate its relationship with the AIR MILES program.

The Tax Matters Agreement

[17] The preamble to the TMA recites that it is being entered into as part of the transactions set out in the Separation Agreement. The TMA is governed by Delaware law.

[18] The TMA states that it is entered into between ADS, on behalf of itself and the members of the ADS Group, and LVI, on behalf of itself and the members of the Loyalty Ventures Group. LoyaltyOne is a member of the Loyalty Ventures Group. The TMA was signed by Jeffrey Fair as authorized representative for LVI. He was LoyaltyOne's Vice President, Taxation at the time.

[19] The purpose of the TMA is set out in the recitals – to deal with the administration and allocation of taxes incurred in the periods prior to the Distribution Date (the Spin Date), taxes resulting from the Distribution (of LVI shares to ADS shareholders), and various other tax matters. In s. 3, the general allocation of taxes is to ADS for the periods prior to the Spin Date and to the LoyaltyOne Group for the periods thereafter.

[20] Section 8 addresses tax refunds. Section 8(a) states that, except as provided by s. 8(b), ADS is "entitled to all Tax Refunds received by any member of the ADS Group or any member of the Loyalty Ventures Group, including but not limited to Tax Refunds resulting from the matters set forth on Schedule C." That schedule explicitly describes the Tax Refund that LoyaltyOne is claiming from the CRA with respect to taxes paid in 2013.

[21] Pursuant to s. 8(c), LoyaltyOne is required to pay over the amount of the Tax Refund to ADS within 30 days of receipt, net of reasonable costs associated therewith.

[22] Section 11 deals with indemnities. Each of the parties indemnifies the other for any tax liability allocated to it under the TMA, any breach of the agreement, and any costs associated therewith. It is common ground that if LoyaltyOne is unsuccessful in recovering the Tax Refund, Bread will have to indemnify LoyaltyOne for further tax liabilities, potentially in excess of $30 million, that it might have to pay to CRA.

30. Pirinate Consulting Group, LLC in its capacity as trustee of the Loyalty Ventures Liquidating Trust in the U.S. Chapter 11 Proceedings of LVI.

[23] Section 15 provides that LVI has the right to control its tax proceedings. However, in the case of a tax refund to which ADS is entitled under s. 8, LVI is required to keep ADS informed of material developments related to the proceeding and not settle any proceeding without the consent of ADS. Further, ADS has the right to participate in the proceeding at its expense and to assume control of the proceeding if LVI does not comply with its obligations to prosecute the proceeding.

The Sobeys Issue

[24] Prior to the Spin Date, Sobeys had been one of the two primary sponsors of the LoyaltyOne business. In June 2022, Sobeys gave formal notice to LoyaltyOne that it would be exiting the program in March 2023.

[25] LoyaltyOne submits that as at the Spin Date, ADS knew Sobeys would be exiting the program by the end of 2022. Alternatively, it submits that the Sobeys exit was reasonably foreseeable on the Spin Date. It submits that based on that fact, revenues from Sobeys should not have been included in projections for the LoyaltyOne business and that LoyaltyOne was insolvent on the Spin Date for purposes of the TUV analysis. The Lenders support LoyaltyOne's position on Sobeys and submit that Sobeys' intention to terminate was never disclosed to them.

[26] LoyaltyOne tendered two affidavits from Cynthia Hageman, former legal counsel at ADS, and conducted a Rule 39.03 examination of Blair Cameron, President and Chief Executive Officer of LoyaltyOne until April 2022. LoyaltyOne relies on documentary evidence from January and February 2021, including emails between Mr. Horn and Mr. Medline of Sobeys, and minutes of ADS board meetings. Those materials indicate that Sobeys had told ADS that it intended to leave the program but that its decision was not final and that ADS said that Sobeys' story kept changing. LoyaltyOne also relies on the amendment to the Sobeys sponsor agreement that provided for the contract to be terminated no earlier than July 1, 2022 and no later than February 1, 2023.

[27] Bread submits that the evidentiary record is insufficient to make the significant factual findings sought by LoyaltyOne. It notes that (i) neither Ms. Hageman nor Mr. Cameron were the individual that had direct dealings with Sobeys. That was Mr. Horn, who gave no evidence on this motion; (ii) there is no evidence from the members of the Spin Team who prepared the projections for the Spin Transaction that included revenue from Sobeys; and (iii) there is no evidence from the Lenders as to what they were told about sponsors of the business before they advanced funds under the Credit Agreement.

[28] Bread has tendered evidence from Mr. Motes. His evidence is that the Spin Transaction was a "pure play" strategy for all of its business units, that the transaction was intended to create two successful companies, and that it was undertaken with the benefit of numerous professional advisors. He says that at the time, people were optimistic about the future success of the spun-out loyalty rewards business.

[29] I accept Bread's submission with respect to the record. The evidence is insufficient to make any factual findings with respect to Sobeys. The allegations are serious, and the record leaves many questions unanswered. For example:

- Why did Mr. Horn purchase US$400,000 of LVI stock the month after the Spin Date if he knew Sobeys was leaving the program?
- Why did the Spin Team members prepare projections for the Spin Transaction that included Sobeys revenue? Why did LVI continue to include Sobeys' revenues in its projections after the Spin Date?
- Did the executives at ADS reasonably believe that Sobeys was simply posturing and trying to get more concessions and a better deal? Ms. Hageman admitted "[t]hat's what clients do". Mr. Cameron admitted that he continued to work with Sobeys through 2021 and 2022 with different initiatives to address their concerns and entice them to stay in the program.
- Did the executives at ADS reasonably believe that Sobeys was coordinating with a prospective bidder in acquiring the LoyaltyOne business? Did they think that Sobeys was posturing and putting pressure on LoyaltyOne in order to assist that bidder? Mr. Cameron's email of January 28, 2021, to Todd Gulbransen at ADS, suggested that might be the case.
- Why did ADS retain a 19% interest in LVI if it thought a major sponsor was going to leave the program?
- Why did ADS not make any public disclosure about Sobeys before the Spin Date? Why did LVI not make any public disclosure about Sobeys until the formal notice was given in June 2022?

[30] The evidence before me is conflicting and does not provide sufficient context as to what was actually going on with Sobeys prior to the Spin Date. There are issues of credibility in making these determinations. The findings are critical and central to allegations made in the U.S. litigation. I simply cannot make these factual findings on the record before me. I have therefore not factored any findings with respect to Sobeys into my analysis of the issues.

Issues

[31] There are four issues on these motions:

a. Is LoyaltyOne bound by the TMA?

b. Is the TMA void as a TUV?

c. If LoyaltyOne is bound by the TMA and it is not void as a TUV, should the Disclaimer of the TMA be approved?

d. What are Bread's rights and remedies under the TMA?

Issue #1 – Is LoyaltyOne Bound by the TMA

[32] It is undisputed that LoyaltyOne was not a signatory to the TMA. LVI signed the TMA "on its own behalf and on behalf of the members of the Loyalty Ventures Group". LoyaltyOne is a member of the Loyalty Ventures Group. Jeffrey Fair signed the TMA as the authorized representative of LVI. As noted, he was also LoyaltyOne's Vice President, Taxation.

[33] Bread tendered expert evidence that under the law of the contract (Delaware), a parent is entitled to bind its subsidiary to a contract. LoyaltyOne submits that the law of the contract does not determine whether LoyaltyOne is bound by it. The law applicable to that issue can only be the law of Nova Scotia (LoyaltyOne's jurisdiction of incorporation) or Ontario (where LoyaltyOne's head office was located). It submits that under Ontario or Nova Scotia law, a subsidiary is only bound by a contract it expressly signs, authorizes another entity to sign on its behalf, or ratifies, none of which occurred here.

[34] Even accepting LoyaltyOne's submission on the applicable law, I am satisfied that on the facts of this case, Mr. Fair's signature of the TMA bound LoyaltyOne to that agreement. He was LoyaltyOne's Vice President, Taxation, and Senior Vice President, Tax, at ADS and LVI. According to Mr. Motes, Mr. Fair was the executive who oversaw the structuring of the TMA and was the logical representative of both parties. On cross-examination, Mr. Fair confirmed that he understood that he was signing the TMA on behalf of all of LVI's subsidiaries. Mr. Motes was the sole director of LoyaltyOne at the time and clearly approved the entering into of the TMA as part of an overall transaction involving LVI and its wholly-owned subsidiaries. I note that in s. 27 of the TMA, LVI represents and warrants that it has the authorization to sign the agreement on behalf of each member of its group.

[35] Further, after the TMA was signed, LoyaltyOne conducted itself as though it was bound by it. According to Mr. Motes, LoyaltyOne and BrandLoyalty have been reimbursed by ADS for pre-separation tax obligations and ADS has received tax refunds and other receivables that arose from the pre-separation periods. In addition, Ms. Hageman requested indemnification from Bread for the costs of the tax litigation over the Tax Refund and provided the backup information Bread required in connection with that request.

[36] I therefore reject LoyaltyOne's submission that it is not bound by the TMA.

Issue #2 – Is the TMA Void as a TUV

[37] The Monitor seeks a declaration that the TMA was a TUV pursuant to s. 96(1)(b)(ii)(A) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"), as incorporated by reference in s. 36.1(1) of the CCAA. Those sections state that the Monitor may declare that a TUV is void against the Monitor if:

> **(b)** the party was not dealing at arm's length with the debtor and
>
> …
>
> **(ii)** the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> **(A)** the debtor was insolvent at the time of the transfer or was rendered insolvent by it,

[38] The Monitor notes that the term "debtor" in the BIA is redefined as "debtor company" in the CCAA (s. 36.1(2)(c)) – in this case, LoyaltyOne.

[39] The TMA was entered into between ADS and LVI (on behalf of the members of the Loyalty Ventures Group, which included LoyaltyOne), who were not dealing at arm's length. The TMA was signed less than five years before LoyaltyOne's CCAA filing.

[40] In order to succeed on its TUV claim, the Monitor must establish that (i) LoyaltyOne was insolvent at the time the TMA was signed in November 2021; and (ii) the consideration received by LoyaltyOne under the TMA was less than the consideration given to Bread under that agreement.

[41] The Monitor has not established the first element of the test.

[42] First, LoyaltyOne's expert, Mr. Harrington, gave various ranges of the fair market value of LoyaltyOne as at the Spin Date. These values range from a low of $452 million (comparable companies approach) to $656 million (discounted cash flow approach). He then added the full amount of LoyaltyOne's $675 million liability under the Credit Agreement to conclude that the company was insolvent.

[43] Bread submits that I have been given no basis to attribute the full amount of the debt to LoyaltyOne. The debt was owed and reflected as a liability of LVI, which was solvent on the Spin Date. It was guaranteed by both of its subsidiaries (LoyaltyOne and BrandLoyalty), who were expected to contribute towards the debt. There is no analysis of how the debt was allocated among the three companies and whether the portion allocated to LoyaltyOne exceeded its fair market value.

> [44] Second, the experts took different approaches with respect to Sobeys. Mr. Harrington was asked to assume that Sobeys' departure was reasonably foreseeable. He deducted 100% of the Sobeys revenue in his five-year cash flow calculations and concluded that LoyaltyOne was insolvent on that basis. He acknowledged on cross-examination that he did not know what the value would have been without this assumption.

[45] Mr. Davidson, Bread's expert, was not asked to make this assumption but nonetheless did the calculations based on various probabilities that Sobeys would exit the program. He concluded that LoyaltyOne was still solvent taking these probabilities into account. He attributed LoyaltyOne's subsequent decline to post-spin intervening factors and macroeconomic issues.

> [46] As set out above, based on the record before me, I am not prepared to find that Sobeys' departure was reasonably foreseeable as at the Spin Date. I therefore prefer Mr. Davidson's analysis of the issue.

> [47] I am not persuaded that LoyaltyOne was insolvent on the Spin Date. The Monitor has not established that the TMA is void as a TUV.

Issue #3 – Should the Disclaimer be Approved

[48] LoyaltyOne delivered the Disclaimer of the TMA pursuant to s. 32(1) of the CCAA. Bread applied to this court under s. 32(2) for an order that the TMA is not to be disclaimed or resiliated.

[49] The factors for the court to consider in upholding or setting aside a disclaimer are set out in s. 32(4):

> **(4)** In deciding whether to make the order, the court is to consider, among other things,
>
> **(a)** whether the monitor approved the proposed disclaimer or resiliation;
>
> **(b)** whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> **(c)** whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[50] The list of factors in s. 32(4) of the CCAA is not exhaustive and courts have added the requirement that the disclaimer be fair, appropriate, and reasonable in all circumstances: *Re Laurentian University of Sudbury*, 2021 ONSC 3272, 89 C.B.R. (6th) 183, at para 44.

[51] The first element of the test is met. The Monitor approved the Disclaimer. It states in its Fifth Report dated November 23, 2023, "the Tax Appeal is a significant remaining source of potential recovery for LoyaltyOne's creditors."

[52] Bread submits that the second element is not met because the business of LoyaltyOne has already been sold to BMO and there is no plan to be filed. I accept this submission.

[53] There are no timing requirements for issuing disclaimers under the CCAA. However, the court's focus is on whether the disclaimer of the contract will enhance the prospects of the debtor making a viable compromise or arrangement. It is clear from the cases that the purpose of the disclaimer is to relieve the debtor from the burden of performing a contract where it would prevent or delay a successful restructuring (*Laurentian*), a sale of the business (*Timminco Ltd. (Re)*, 2012 ONSC 4471, 93 C.B.R. (5th) 326), or an orderly winddown and distribution of assets to creditors (*Target Canada Co. (Re)*, 2015 ONSC 1028, 23 C.B.R. (6th) 303).

[54] Here, the Disclaimer of the TMA will accomplish none of those objectives. There is no restructuring in process. The business has been sold. LoyaltyOne is no longer an operating business. There is no suggestion of a plan to be put to creditors. There is no basis to find that LoyaltyOne's prosecution of the tax proceeding and payment of the Tax Refund to Bread under the TMA will impair or delay a restructuring, sale, or orderly distribution to creditors. Rather, in my view, the Disclaimer by LoyaltyOne is an attempt to secure funds for itself that it was never entitled to retain pursuant to the Spin Transaction.

[55] With respect to the third element, Bread's evidence is very limited. Mr. Motes says that Bread has already suffered losses as a result of the LoyaltyOne insolvency. He says that the disclaimer of the TMA will result in further financial hardship to Bread because it divested the loyalty rewards businesses on the basis that the transaction would be effected as set out in the transaction documents, including the TMA. Mr. Motes did not provide evidence as to the impact that failing to receive the Tax Refund will have on Bread's overall financial position.

[56] Apart from the enumerated factors in s. 32(4), the question is whether it is fair, appropriate, or reasonable for the Disclaimer to be approved: see *Laurentian*. Bread says that the Disclaimer is an attempt of the Lenders to shift the value of the Tax Refund from Bread to themselves since the Lenders represent approximately 90% of the unsecured claims of LoyaltyOne.[6][31] Bread submits that the unfairness is even greater because the Lenders knew about the TMA, required that it be signed as a condition of the Credit Agreement, and excluded the Tax Refund from their security.

[57] I agree. The Lenders constitute the vast majority of LoyaltyOne's creditors and are the creditors that will benefit the most from the Disclaimer. Indeed, they filed their own factum and made submissions in support of this motion.

31. The Lenders accounted for 96% of the unsecured creditors as at March 2023.

> [58] The Lenders accepted the terms of the TMA when they advanced funds to LVI in the Spin Transaction. It was a condition of the Credit Agreement that the TMA be entered into. The TMA explicitly states that the Tax Refund was payable to Bread. The Tax Refund was specifically excluded from the Lenders' security in the Credit Agreement.

> [59] It would be entirely unfair, inappropriate, and unreasonable for LoyaltyOne to disclaim the TMA. The effect of the Disclaimer would be to reverse the bargain that LoyaltyOne made when it entered into the Spin Transaction and that the Lenders made when they entered into the Credit Agreement as part of the transaction. This is even more unfair when I consider that LoyaltyOne has already paid tax refunds to ADS under the provisions of the TMA and has sought indemnity for its costs of pursuing the Tax Refund.

> [60] I find that the Disclaimer is being used to get out of the deal that was made in the Spin Transaction, secure the funds for LoyaltyOne that it was never entitled to retain, and assist the Lenders in recovering the losses that they sustained on the transaction. That is not the intended purpose of a disclaimer under s. 32(4) of the CCAA.

[61] I therefore grant Bread's motion and disallow the Disclaimer of the TMA. The TMA will remain in full force and effect.

Bread's Rights and Remedies under the TMA

[62] The parties disagree on the nature of Bread's rights under the TMA. The Monitor and LoyaltyOne say that even if the Disclaimer is not approved, Bread's only entitlement to the Tax Refund is a pre-filing unsecured claim.

[63] Bread disagrees. It submits that it is entitled to the entire amount of the Tax Refund through the remedy of a constructive trust or an order that LoyaltyOne comply with its obligations under the TMA.

[64] In my view, it is premature to make any of the orders sought by the parties. The TMA remains in effect. LoyaltyOne remains subject to its obligations thereunder. Under the terms of that agreement, LoyaltyOne is required to pursue the tax proceeding and remit the Tax Refund to Bread if and when received. There is no need to consider the consequences of any prospective breach of those obligations should that occur.

[65] If LoyaltyOne fails to perform its obligations under the TMA, Bread can seek a remedy from this court and those issues can be considered at that time.

Decision

[66] The joint motion of LoyaltyOne and the Monitor is dismissed. Bread's motion is granted.

[67] If the parties are unable to agree on the costs of these motions, they shall arrange a scheduling appointment before me to address the process for costs submissions.

Conway J.

Date: July 10, 2024

TAB 10

Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd., 2014 ONCA 500 (CanLII)

Date: 2014-06-26

File number: C57967; M43450

Other citations: 323 OAC 101 — 17 CBR (6th) 91 — [2014] OJ No 3051 (QL)

Citation: Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd., 2014 ONCA 500 (CanLII), <https://canlii.ca/t/g7pl5>, retrieved on 2024-09-25

COURT OF APPEAL FOR ONTARIO

CITATION: Ontario Wealth Management Corporation v. Sica Masonry

and General Contracting Ltd. , 2014 ONCA 500

DATE: 20140626

DOCKET: C57967/M43450

Strathy J.A. (In Chambers)

In the matter of Section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, as amended; Section 101 of the *Courts of Justice Act*, R.S.O. 1990 C.C. 43, as amended; and Section 68(1) of the *Construction Lien Act*, R.S.O. 1990, C.30 as amended

BETWEEN

Ontario Wealth Management Corporation

Responding Party (Respondent)

and

1713515 Ontario Limited

Responding Party (Respondent)

and

Sica Masonry and General Contracting Ltd.

Moving Party (Appellant)

Jason A. Schmidt, for the moving party

David P. Preger and Michael J. Brzezinski for the responding party, SF Partners Inc. (court-appointed receiver for 1713515 Ontario Limited)

Amy Lok for responding party, Ontario Wealth Management Corporation

Heard: April 10, 2014

On motion from the order of Justice Hugh K. O'Connell of the Superior Court of Justice, dated October 18, 2013.

Strathy J.A.:

[1] The threshold question on this motion is whether this court should grant the moving party an extension of time to appeal from the motion judge's order determining a priorities dispute between a mortgagee and a construction lien claimant. The motion judge held that the mortgage of the respondent, Ontario Wealth Management Corporation ("Ontario Wealth"), had priority over the construction lien of the moving party, Sica Masonry and General Contracting Ltd. ("Sica"). He directed the Receiver of the property owner to disburse the balance of the proceeds of sale of the mortgaged property to Ontario Wealth. Sica wishes to appeal on the basis the motion judge incorrectly interpreted the priority scheme in s. 78 of the *Construction Lien Act*, R.S.O. 1990, c. C.30 (*CLA*).

[2] Rule 31(1) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, provides that a notice of appeal must be filed within ten days after the day of the order appealed from or within such further time as a judge of this court stipulates.

[3] Sica's notice of appeal was filed 28 days after the order was made – that is, 18 days late. In the meantime, the Receiver had disbursed the proceeds of sale in accordance with the court's order.

[4] If an extension is granted, Sica seeks a declaration that it has an appeal as of right to this court. Alternatively, it seeks leave to appeal.

[5] When the motion was heard, there was no signed and entered order before the court. The appeal lies from the order, not from the reasons: see *Re Bearcat Exploration Ltd.*, 2003 ABCA 365, at para. 13. The formal order must be before an appellate court, because it is the correctness of the disposition, and not the reasons, which is in issue: see *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.).

[6] I agreed to hear the parties' submissions and reserved judgment on the motion on the understanding that the parties would take out the formal order. That has now occurred.

[7] For the reasons that follow, the motion for an extension of time to appeal is dismissed. Although that disposes of the matter, leave to appeal is required in any event and I would not have granted leave.

A. Background facts

[8] The Walton Hotel in Port Hope, Ontario ("the Property") has been under renovation for use as a boutique hotel.

[9] On April 11, 2007, 1713515 Ontario Ltd. ("1713") purchased the Property for $339,623.

[10] On the same date, the Property was mortgaged to Crombee Construction Ltd. for $830,000.

[11] The project was refinanced on November 10, 2008. Ontario Wealth took a first mortgage on the Property for $1.23 million. Between November 2008 and December 2009, Ontario Wealth made advances on the mortgage totalling $1.191 million. The initial advance was for $500,000. The motion judge found that, of that advance, $457,117.75 was applied to re-finance the Crombee mortgage.

[12] Sica is a general contractor that worked on the Property between January 12, 2009 and March 18, 2010. On April 8, 2010, Sica registered a construction lien on the Property. Its priority claim relates to a deficiency of $123,947 in the holdback which it claims 1713 was required to retain.

[13] Sica perfected its lien in June 2010 by registering a certificate of action against the Property and issuing a statement of claim against 1713. The claim asserted that Sica's lien had priority over Ontario Wealth's mortgage, because the mortgage was taken with the intention of securing financing of an improvement.

[14] On September 1, 2010, SF Partners was appointed Receiver and Trustee of 1713. On May 16, 2012, the Receiver sold the Property for $600,000.

[15] The Receiver brought a motion seeking directions regarding the distribution of the proceeds of sale, given the competing priority claims of Sica and Ontario Wealth.

[16] The motion judge released his endorsement on October 18, 2013. He held at para. 52 that Ontario Wealth's mortgage had priority over Sica's lien and that "The Receiver may remit the balance of the funds under its administration to Ontario Wealth Management Corporation."

[17] The Receiver remitted the balance of the funds to Ontario Wealth three days later, on October 21, 2013.

[18] Sica served its notice of appeal on November 15, 2013.

B. the *construction lien act*

[19] The priority of the parties' respective claims depends upon the terms of s. 78 of the *CLA*. Under that provision, liens arising from an "improvement" have priority over mortgages, unless one of the exceptions in the section applies. There is an exception in s. 78(3) for mortgages registered prior to the time when the first lien arose in respect of an improvement.

[20] Section 78(2) provides that where a mortgagee takes a mortgage to secure the financing of an "improvement", liens arising from that improvement have priority over the mortgage, and over any mortgage taken to repay the original mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner.

[21] The relevant subsections provide:

78(1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement.

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

[22] The interpretation of s. 78 depends on the meaning of the word "improvement", as defined in s. 1(1) of the *CLA:*

"improvement" means, in respect of any land,

(a) any alteration, addition or repair to the land,

(b) any construction, erection or installation on the land, including the installation of industrial, mechanical, electrical or other equipment on the land or on any building, structure or works on the land that is essential to the normal or intended use of the land, building, structure or works, or

(c) the complete or partial demolition or removal of any building, structure or works on the land.

C. the decision below

[23] The motion judge held that Ontario Wealth's initial advance fell within s. 78(3) of the *CLA*, and therefore had priority over Sica's lien. Separate and distinct advances under a single mortgage intended for different purposes should be afforded separate and distinct priority treatment under the *CLA*: *Royal Bank of Canada v. Lawton Developments Inc.* (1994), 1994 CanLII 7215 (ON SC), 16 O.R. (3d) 450 (Gen. Div), rev'd on other grounds (1996), 1996 CanLII 10246 (ON CA), 27 O.R. (3d) 417 (C.A.). Ontario Wealth agreed to take a mortgage with the dual intention of financing the repayment of the existing Crombee mortgage and renovating the Property. It advanced $457,117.75 to refinance that mortgage. This was a non-construction advance and therefore a "prior advance" within s. 78(3) of the *CLA*, rather than s. 78(2). Prior advances that are not taken with the intention of securing the financing of an improvement take priority over subsequent liens under s. 78(3).

[24] The motion judge rejected Sica's argument that although its own lien arose after registration of Ontario Wealth's mortgage, its work related to an earlier improvement and the first lien in respect of that improvement arose before the mortgage was registered. The motion judge found that Sica's improvement did not relate to an earlier contract involving prior lien claimants, although it may well have related to the same project.

[25] The motion judge therefore directed that the Receiver remit the balance of the proceeds to Ontario Wealth and the order so provides.

D. Should an extension of time be granted?

[26] The overarching principle is whether the justice of the case requires that an extension be granted. The relevant factors may include:

(a) whether the applicant had a *bona fide* intention to appeal before the expiration of the appeal period;

(b) the length of and explanation for the delay in filing;

(c) any prejudice to the responding parties caused by the delay; and

(d) the merits of the proposed appeal.

See *Howard v. Martin*, 2014 ONCA 309; *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636. See also *Braich (Re)*, 2007 BCCA 641.

[27] There is no evidence that Sica formed an intention to appeal prior to the expiry of the appeal period. It did not inform the Receiver of its intent to appeal until it served the notice of appeal. The length of the delay was not inordinate, although Sica has not offered any explanation for it.

[28] Sica submits that the delay has not caused any significant prejudice to the Receiver, given that the Receiver did not wait until the expiry of the appeal period before distributing the funds to Ontario Wealth. The Receiver does not point to specific prejudice, but it contends that the appeal is moot.

[29] I am not persuaded that the appeal has any merit. The only evidence before the motion judge was the Receiver's third report. Sica filed no evidence on the motion. The motion judge made the following critical findings of fact:

> I agree with the position of Ontario Wealth. When Ontario Wealth came onto the scene, there were no construction liens on title. They had been vacated or discharged. They were not something for which Ontario Wealth was bound.
>
> I accept therefore that Ontario Wealth advanced the original $500,000 to pay out the Crombee mortgage. That advance was for payout of the land portion of the mortgage and not improvements.
>
> I therefore agree with Ontario Wealth that section 78(3) of the CLA is applicable. The advance of Ontario Wealth takes priority over any lien claim in favour of Sica.
>
> ...
>
> In any event, there is no evidence before me that the improvement undertaken by Sica related to any of the same improvements undertaken prior to Ontario Wealth coming on board in November 2008. In this regard I note that Sica claims for contractual undertakings for the period January 12, 2009 – March 28, 2010, for which it registered its lien in April 2010.

[30] While Sica contends that the motion judge erred in finding that its work did not relate to improvements financed by the Crombee mortgage, the motion judge found that there was no evidence to support that conclusion. The appeal is, at its core, fact-based, and the moving party has identified no palpable or overriding error in the motion judge's findings of fact.

[31] The Receiver submits that the appeal is moot because it distributed all of the funds in reliance on the order below. It relies on *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (C.A.). The brief endorsement in that case indicates that it was an appeal from an order for sale. A motion for a stay was dismissed, the sale closed, a vesting order was made and the proceeds of sale were distributed. This court held that that the order was spent and quashed the appeal.

[32] The Receiver submits it had no obligation to satisfy itself that Sica would not appeal the order before distributing the funds. Where there is no automatic stay of an order, a losing party is well-advised to seek a stay pending appeal: *Regal Constellation Hotel Ltd. (Re)* (2004), 2004 CanLII 206 (ON CA), 71 O.R. (3d) 355 (C.A.), at para. 49.

[33] The Receiver had no notice, prior to the expiration of the time to appeal, that the moving party intended to appeal the order. Section 195 of the *BIA* provides for a stay of proceedings pending appeal, but no request was made for a stay of execution pending the filing of a notice of appeal. The funds have been disbursed and the operative parts of the order are spent. Receivers are entitled to act on the advice they receive from the court. It would not be fair to revisit the issue when the funds are out of the Receiver's hands.

[34] In all the circumstances, the justice of this case does not require an extension of time. The application to extend the time to appeal is dismissed.

E. Leave to appeal

[35] It is unnecessary to consider the application for leave to appeal. However, as the parties made submissions on the issue, I will indicate that, in my view, leave to appeal is required and I would not have granted leave.

[36] The parties agreed that the appeal route is governed by s. 193 of the *BIA*: see *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697; *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 1998 CanLII 7165 (ON CA), 41 O.R. (3d) 97 (C.A.), at para. 13, leave to appeal to S.C.C. refused, [1998] S.C.C.A. No. 372; L.W. Houlden, G.B. Morawetz and Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (2009-Rel. 5), 4th ed. (Toronto: Carswell, 2013) vol. 3 at p. 7-106; Donald J.M. Brown, Q.C., *Civil Appeals*, loose-leaf (June 2013) (Toronto: Carswell, 2013) vol. 1 at para. 2:1120. See also *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Ltd.*, 2013 ONCA 769, 118 O.R. (3d) 161 on the paramountcy of the *BIA*.

[37] Section 193 provides:

193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

[38] An appeal lies to this court as of right in the circumstances described in s. 193(a) to (d) of the *BIA*. In all other cases, leave must be sought from a single judge under s. 193(e).

[39] Rule 31(2) of the *Bankruptcy and Insolvency General Rules* provides that where an appeal is brought under s. 193(e), the notice of appeal must include the application for leave. This rule was not observed in this case

[40] The appeal does not involve future rights, other cases in the bankruptcy proceedings or the granting or refusal of a discharge. The issue therefore is whether there is an appeal as of right under s. 193(c) or whether leave is required under s. 193(e) and, if so, whether leave should be granted.

[41] Based on this court's decision in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, and the decision of the New Brunswick Court of Appeal in *Royal Bank of Canada v. Profor Kedgwick Ltd.,* 2008 NBCA 69, 299 D.L.R. (4th) 727, s. 193(c) is to be narrowly construed and restricted to cases where the appeal directly involves property exceeding $10,000 in value. While the practical effect of the motion judge's decision is that Ontario Wealth will receive proceeds of sale exceeding $10,000 and Sica will not, this results not from the decision itself but from the reality that there are insufficient funds in the estate to repay both creditors. As in *Pine Tree Resorts*, there is no dispute as to the *value* of the claims at issue or the proceeds of sale. Thus, I would follow the reasoning in *Pine Tree Resorts* and in *Profor Kedgwick* and hold that the appeal does not directly involve property which exceeds $10,000 in value.

[42] The issue before the motion judge was simply a matter of which claim had priority. This is the daily fare of judges in bankruptcy proceedings. To provide an appeal as of right from such decisions would negate the court's gatekeeping function under s. 193(e) and would tie up bankruptcy proceedings in interlocutory appeals over routine issues.

[43] The exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way: *Pine Tree Resorts*, at para. 29. The prevailing considerations are whether the proposed appeal:

(a) raises an issue of general importance to the practice in bankruptcy/insolvency matters or the administration of justice as a whole;

(b) is *prima facie* meritorious;

(c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

The parties agree that the appeal would not unduly hinder the proceedings, so the analysis turns on the answer to the first two questions.

[44] For the reasons set out above, I am not persuaded that the proposed appeal is meritorious.

[45] I am also not convinced that this appeal raises an issue of general importance to the practice of bankruptcy and insolvency given that it turns on the motion judge's very specific and central findings of fact that the mortgage funds were advanced prior to Sica's involvement, all construction liens had been discharged, and Sica's improvement did not relate to the earlier contract.

[46] I would not therefore have granted leave to appeal even if the notice of appeal had been served in time.

F. DISPOSITION

[47] The application for an extension of time is dismissed. If the parties are unable to resolve costs, they may make written submissions. The respondents' submissions shall be served and filed with the Registrar within 15 days. The moving party may have 15 days to respond. The submissions shall not exceed 5 pages in length, exclusive of the costs outline.

"G.R. Strathy J.A."

TAB 11

Target Canada Co. (Re), 2015 ONSC 1028 (CanLII)

Date: 2015-02-18

File number: CV-15-10832-00CL

Other citation: 23 CBR (6th) 303

Citation: **Target Canada Co. (Re), 2015 ONSC 1028 (CanLII), <https://canlii.ca/t/ggndq>, retrieved on 2024-09-18**

CITATION: Target Canada Co. (Re), 2015 ONSC 1028
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-02-18
SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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 TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *Jeremy Dacks, John MacDonald* and *Shawn Irving,* for the Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC (the "Applicants")

Jay Swartz, for the Target Corporation

William Sasso, Sharon Strosberg and *Jacqueline Horvat*, Proposed Representative Counsel for the Pharmacy Franchisee Association of Canada

Susan Philpott, Employee Representative Counsel for employees of the Applicants

Alan Mark, Melaney Wagner, Graham Smith and *Francy Kussner*, for the Monitor, Alvarez & Marsal Inc.

J. Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC

Andrew Hodhod, for Bell Canada

Harvey Chaiton, for the Directors and Officers

HEARD: February 11, 2015

RELEASED: February 18, 2015
ENDORSEMENT

[1] The Pharmacy Franchisee Association of Canada ("PFAC") brought this motion for the following relief:

a. appointing PFAC as the representative of the Pharmacists and Franchisees (collectively, the "Pharmacists") under the Pharmacy Franchise Agreements ("Franchise Agreements");

b. appointing Sutts, Strosberg LLP as the Pharmacists' Representative Counsel (the "Representative Counsel");

c. appointing BDO Canada ("BDO") as the Pharmacists' financial advisor;

d. directing that the Pharmacists' reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charges to secure payment;

e. directing that the "Disclaimer of Franchise Agreements" dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP ("Target Pharmacy") be set aside;

f. declaring that the Franchise Agreements and/or related agreements may not be disclaimed without court order; and

g. directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist's operations without that Pharmacist's consent or a court order.

[2] On January 26, 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec), seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

[3] The Pharmacists ask the court to deny Target Pharmacy's Disclaimer of the Franchise Agreements because (i) the Disclaimers will not enhance the prospects of a viable arrangement being made; and (ii) the Pharmacists will suffer significant financial hardship as a consequence of the disclaimer, with insolvency and/or bankruptcy awaiting many of them.

[4] Under the proposed wind-down, Target Pharmacy is not responsible for pharmacy shut- down costs. Instead, the Pharmacists are responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors; (ii) the relocation costs of their pharmacies; and (iii) the continuation of services to their patients in accordance with professional standards.

[5] The Pharmacists recognize that they face numerous challenges as a result of Target store closures. In relocating, or winding-down pharmacy operations, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as: notice of pharmacy closure; notice of intention to open a new pharmacy; the safe-guarding of personal health records; providing notice to patients respecting their personal health information; and safeguarding and disposing of narcotics and controlled substances.

[6] The Pharmacists seem to accept that when a Target store closes, the pharmacy within that store will also close. They state that they require "breathing space" that may be afforded to them by an order that the Franchise Agreements are not to be disclaimed at this time. They ask the court to direct Target Pharmacy and its Affiliates not to deny them access to their licenced space or otherwise interfere with the Pharmacist's operations without the consent of or on terms directed by the court. Practically speaking, the Pharmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time.

[7] There is no doubt that the closure or pending closure of Target Canada is causing and will cause significant dislocation for a number of parties. For the most part, Target Employees will lose their jobs. Representative Counsel have been appointed to assist employees in a process that includes an Employee Trust.

[8] The closure of Target Canada also impacts suppliers to Target, especially sole suppliers. The insolvency of Target Canada and its filing under the *Companies' Creditors Arrangement Act* (CCAA) has no doubt resulted in Target defaulting on a number of contractual relationships. These suppliers will have claims against Target Canada that will be filed in due course.

[9] The closure of Target Canada also affects the Pharmacists. The insolvency of Target and its filing under the CCAA has resulted in Target defaulting on its contractual relationships with the Pharmacists. Target wishes to disclaim the Franchise Agreements. The Monitor approved the proposed disclaimer and, as noted, disclaimer notices were sent on January 26, 2015.

[10] The Pharmacists are challenging the disclaimer and seek an order under s. 32(2) of the CCAA that the Franchise Agreements not be disclaimed. Section 32(4) of the CCAA references a section 32(2) order and provides:

Factors to be considered – In deciding whether to make the order, the court is to consider, among other things,

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[11] The reality that the Target stores will be closing provides, in my view, the starting point to analyze the issue being brought forward by the Pharmacists.

[12] Following the closing of a particular Target Store, it is unrealistic for the Pharmacist to carry on the operation of the pharmacy. As noted by counsel to the Applicants, as soon as operations cease at a particular location, the store will "go dark" and there will no longer be employee or security support that would permit the Franchisees to continue to operate. Further, counsel to the Applicants submits it would not be either commercially reasonable or practical for the Franchisees to continue to operate in a closed store, nor would it be reasonable or in the interests of stakeholders to require these locations to remain open in order to serve the interests of the Franchisees.

[13] It is in this context that the issue of the disclaimer has to be considered.

[14] Counsel to the Pharmacists seem to appreciate the reality of the situation, as reflected in the following references in their factum.

> 49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreement are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if the funds are available in the Target Pharmacy Estate.
>
> 50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer contracts is insufficient. Setting aside the disclaimers in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damages to themselves and those who depend on them. ...
>
> 53. Respectfully, such disclaimer should not be permitted until the court receives an independent report of the circumstances of each of the Pharmacists and directs the orderly wind-down and/or relocation of such operations on terms that are fair and reasonable. ...
>
> 55. In no respect is the 30-day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, [and] will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

[15] It seems to me, having considered these submissions, that the Pharmacists recognize that it is inevitable that the pharmacies will be shut down.

[16] With respect to the factors to be considered as set out in s. 32(4), the disclaimer notices were approved by the Monitor. The Pharmacists complain that no reasons were provided in the notice approved by the Monitor. However, there is no requirement in s. 32(1) for the Monitor to provide reasons for its approval. This is reflected in Form 4 – Notice by Debtor Company to Disclaim or Resiliate an Agreement.

[17] However, the absence of reasons does not lead necessarily to the conclusion that the Monitor did not consider certain factors prior to providing its approval.

[18] The Monitor has made reference to the issues affecting the pharmacies in its Reports.

[19] The pharmacies were specifically the subject of comment in the Monitor's First Report at sections 8.2 – 8.5, and in the Second Report at section 6. Section 6.1 (h) of the Second Report specifically comments on the disclaimer notices. A summary of the reasons is provided at section 6.2.

[20] The information contained in the Monitor's reports establishes that there was communication as between Target Canada, the Monitor and the Franchisees such that it was clear that the stores were being closed. Specific reference to the communication is set out in the Monitor's Report at section 6.1(f), which in turn references the second Wong affidavit, filed by the Applicants.

[21] I am satisfied that the Monitor considered a number of relevant factors prior to approving the disclaimer notices.

> [22] With respect to the second factor to be considered, namely whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company, the Applicants have indicated they may be filing a plan of arrangement. I note that a plan may be required to ensure an orderly distribution of assets to the creditors.

> [23] The Applicants seek to achieve an orderly wind-down and maximization of realizations to the benefit of all unsecured creditors. It seems to me that if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

> [24] The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in *Timminco Ltd.*, *Re*, 2012 ONSC 4471 at paragraph 62 as follows:

> [62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

> [25] I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

[26] The third factor is whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This factor is addressed by Counsel to the Monitor at paragraph 27 of its factum.

> 27. On its own terms the CCAA effectively imposes a high threshold, beyond economic or financial loss, for the consideration under section 32(4): there must be evidence of financial *hardship*, it must be *significant* financial hardship, and it must be *likely* to be caused by the disclaimer. Financial loss or damage, without more, is not sufficient, in the Monitor's submission. It appears that Section 32 itself recognizes the distinction, providing expressly in ss. 32(7) that where a party suffers "a loss" in relation to the disclaimer the consequence is that such party "is considered to have a provable claim." (emphasis in original)

> [27] In these circumstances, the pharmacies will inevitably close in the very near future whether or not the Franchise Agreements are disclaimed. I accept the submission of counsel to the Monitor to the effect that no Franchisee has adduced evidence that disallowing the Disclaimer and continuing to operate in otherwise dark, vacated premises would improve its financial circumstances.

[28] The situation facing the Pharmacists is not pleasant. However, in my view, setting aside the disclaimer will not improve their situation. Extending the time before the disclaimers take effect has the consequence of requiring Target Canada to allocate additional assets to the Pharmacists in priority to other unsecured creditors. This is not a desirable outcome.

[29] The Target Canada Entities, in consultation and with the support of the Monitor, have offered a degree of accommodation to the Pharmacists. The details are set out at paragraphs 64-66 of the affidavit of Mark Wong sworn February 16, 2015:

64. As outlined above, in consultation with and with the support of the Monitor, on February 9, 2015 the Target Canada Entities' legal advisors delivered an accommodation to PFAC's counsel intended to address the primary concern expressed by PFAC, namely that franchisees require additional time to transfer patient files and drug inventory and to relocate their respective pharmacy businesses. Under

the terms of the accommodation, TCC will permit the pharmacists to continue to operate at their respective existing TCC locations until the earlier of March 30, 2015 and three days following written notice by TCC to the pharmacist of the anticipated store closure at such pharmacist's location. The accommodation provides that the Notices of Disclaimer will continue in effect and the franchise agreements will be disclaimed on February 25, 2015, but the pharmacists will be entitled to remain on the premises for an additional period of time.

64. Under the terms of the accommodation, pharmacists will be able to continue operating in TCC stores for longer than the 30-day period contemplated. Depending on the date the Agent decides to vacate certain TCC stores, many pharmacists may be able to continue operating for 60 days or more following delivery of the Notices of Disclaimer and approximately 75 days following the date of the Initial Order. As I described above, at any time after the third anniversary of the opening date of the pharmacy, TCC Pharmacy would have the right to terminate the franchise agreement for any reason on 60 days' notice.

66. The March 30, 2015 date indicated in the accommodation made by Target Canada Entities is intended to be a reasonable compromise whereby pharmacist franchisees will get additional time to transfer patient files and inventory and relocate their businesses, while at the same time permitting the Target Canada Entities to undertake the orderly wind down of TCC pharmacy operations and the TCC retail stores as a whole. As I described above, in order to accommodate the continued operations of the pharmacies during the wind down process, TCC Pharmacy and TCC have not yet delivered notices of disclaimer to a number of third-party providers such as McKesson, Kroll and others, which TCC Pharmacy has maintained at considerable cost. The March 30, 2015 outside date for the operation of all TCC pharmacies will allow TCC Pharmacy to time the delivery of disclaimer notices to these third-party providers so as to avoid incurring additional unnecessary costs. The certainty provided by the firm outside date is also to the benefit of the pharmacies themselves, each of whom will be required to win down their operations and make alternate arrangements in the very short term as a result of the imminent closures of TCC retail stores.

[30] In the circumstances of this case, this accommodation represents, in my view, a constructive, practical and equitable approach to address a difficult issue.

[31] Having considered the factors set out in section 32(4) of the CCAA, the motion of PFAC for a direction that the disclaimer of the Franchise Agreements be set aside is dismissed, together with ancilliary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

[32] I turn now to the request of PFAC that it be appointed representative of the Franchisees and that Sutts, Strosberg LLP be appointed as the Pharmacists' Representative Counsel, and BDO as the Pharmacists' financial advisor.

[33] In view of my decision relating to the disclaimers, the scope of legal and financial services required by the Pharmacists may be limited. However, there are many transitional issues that remain to be addressed. First and foremost is dealing with the patient records and ensuring uninterrupted delivery of prescription drugs to all such patients. There is also interaction required between Target Pharmacy, the Franchisees, and the regulators, concerning the relocation or shut down of pharmacies and the return of certain products to suppliers. This is not a simple case where the Franchisee receiving the disclaimer notice can simply walk away from the scene. From a professional and regulatory standpoint, they still have to participate in the process.

[34] In addressing these transition issues and recognizing that similar circumstances exist for the Franchisees, there would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

[35] The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the claims process. I am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

[36] The funding of this representational role is to be limited. The Applicants are to make available up to $100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings. PFAC can provide copies of invoices to the Monitor, who can arrange for payment of same. Any surplus funds at the conclusion of the representation are to be returned to the Applicants. The contribution to PFAC can be used only to cover legal and financial advisory services provided to date in these proceedings as well as to assist on the going forward matters, subject to the following parameters.

[37] Such assistance is to be limited to:

a. corresponding with the regulators concerning the wind-down process and the relocation process;

b. return of inventory; and

c. participating in the claims process.

[38] If the individual franchisees decide not to participate in PFAC, they should not expect any further accommodation in a financial sense.

[39] In arriving at this accommodation, I have taken into account that this limited funding will provide benefits to the Applicants under CCAA protection insofar as the legal and financial advisory services provided by Representative Counsel and BDO should reduce the overall administrative cost to the estate and will avoid a multiplicity of legal retainers. The representation and funding will also benefit the franchisees so that they can effectively shut-down or relocate their business and prepare any resulting claim in the CCAA proceedings.

[40] Given the limited nature of the Applicants' financial contribution, an administrative charge is not, in my view, required.

[41] In the result, PFAC's motion for representation status is granted, with limitations set out above. The motion in respect of the disclaimers is dismissed.

R.S.J. Geoffrey Morawetz

Date: February 18, 2015

TAB 12

Timminco Limited (Re), 2012 ONSC 4471 (CanLII)

Date: 2012-08-03

File number: CV-12-9539-00CL

Other citations: 93 CBR (5th) 326 — [2012] OJ No 4008 (QL)

Citation: **Timminco Limited (Re), 2012 ONSC 4471 (CanLII), <https://canlii.ca/t/fsh63>, retrieved on 2024-09-18**

CITATION: Timminco Limited (Re), 2012 ONSC 4471

COURT FILE NO.: CV-12-9539-00CL

DATE: 20120803

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC., Applicants**

BEFORE: **MORAWETZ J.**

COUNSEL: **Maria Konyukhova, for the Applicants**

Robin B. Schwill, for J. Thomas Timmins

Steven J. Weisz, for the Monitor

Debra McPhail, for the Superintendent of Financial Services

Thomas McRae, for B51 Non-Union Employee Pension Committee and B51 Union Employee Pension Committee

Charles Sinclair, for the United Steelworkers

James Harnum, for Mercer Canada

HEARD: **JUNE 4, 2012**

ENDORSEMENT

OVERVIEW

[1] Mr. J. Thomas Timmins, a former Chief Executive Officer ("CEO") of Timminco Limited ("Timminco") moves for an order that Timminco be ordered to comply with its obligations under a consulting agreement between Timminco and Mr. Timmins dated September 19, 1996 (the "1996 Agreement") and to remit to Mr. Timmins the monthly amounts that he claims to be entitled to under the 1996 Agreement.

[2] In response, Timminco brought a cross-motion for an order declaring that Timminco's obligations under the 1996 Agreement, as amended by letter agreement effective May 28, 2011 (the "Letter Agreement" and, together with the 1996 Agreement, the "Agreement"), constitute pre-filing obligations which are stayed by the Initial Order granted in these proceedings on January 3, 2012.

[3] Alternative positions have also been presented by the parties.

[4] Timminco puts forth the alternative that, if Mr. Timmins' motion is granted, Timminco seeks an order that the 1996 Agreement be disclaimed in accordance with section 32 of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("CCAA") and that the effective date of the disclaimer of the Agreement (if such a disclaimer is held to be required) should be April 30, 2012.

[5] In response to this alternative position, Mr. Timmins seeks an order that the court deny Timminco's request to have the 1996 Agreement disclaimed and, in any event, if the 1996 Agreement is disclaimed, Timminco should not be relieved of its obligation to pay the monthly fees that have and continue to accrue from the date Timminco commenced CCAA proceedings until the date that any such disclaimer is effective.

[6] Mr. Timmins asks that the court deny Timminco's request to have the 1996 Agreement disclaimed in accordance with section 32 of the CCAA as the disclaimer would not necessarily enhance the prospects of a viable arrangement being made in respect of Timminco, and would objectively result in significant financial hardship to Mr. Timmins.

FACTS

[7] Mr. Timmins resigned from his position as CEO on May 28, 2001, but remained a director of Timminco until mid-2007, at which time he resigned from the board and sold all of his remaining equity interests.

[8] The preamble to the 1996 Agreement provides:

The Consultant is an executive of the Corporation who has gained such a level of knowledge, experience and competence in the Corporation's business that it is in the Corporation's interest, following his retirement from employment, to ensure that the Corporation continues to have access to the Consultant for advice and consultation and the Corporation wishes to ensure that the Consultant shall not engage in activities which are competitive with the Corporation's business.

[9] The 1996 Agreement provides that Timminco agreed to pay Mr. Timmins a monthly amount by which $29,166.66 exceeds the monthly amount to which [Mr. Timmins] is entitled on [Mr. Timmins] retirement under any pension or retirement plans of [Timminco].

[10] The monthly payments were to commence on the first day of the month following Mr. Timmins retirement and terminate only on Mr. Timmins death (subject to earlier termination due to any breach of obligations by Mr. Timmins). There has been no alleged breach on the part of Mr. Timmins of any such obligations.

[11] Under the 1996 Agreement, Mr. Timmins was to consult with Timminco "within the time limits from time to time of his physical and other abilities…; provided, however, that consultation and advice shall never occupy [Mr. Timmins] time to such an extent as shall prevent him from devoting the greater portion of his time to other activities".

[12] At the time of his resignation as CEO, the 1996 Agreement was amended by the Letter Agreement.

[13] Pursuant to the Letter Agreement, Timminco agreed to pay Mr. Timmins a monthly amount of $20,833.33 without further deduction except as may be required by law, commencing on July 1, 2001.

[14] The Letter Agreement also provided that Timminco would terminate various employment benefits of Mr. Timmins (such as car lease and parking) and would cease to provide Mr. Timmins with office space and secretarial assistance after September 30, 2001.

[15] In connection with the Letter Agreement, Mr. Timmins executed a release and indemnity which provides, in part, as follows:

Whereas I have agreed to retire voluntarily as Chief Executive Officer and an employee of Timminco Limited and as a director and/or officer of any subsidiaries of Timminco Limited (hereinafter referred to collectively as "Timminco") effective immediately.

And whereas I have agreed to accept the consideration described in the attached letter to me from Timminco dated May 28, 2001 and in the agreement between Timminco and me dated as of September 19, 1996 (collectively, the "Retirement Agreement"), in full settlement of any and all claims I may have relating to my employment with Timminco or the termination thereof;…I understand and agree that the consideration described above satisfies all obligations of Timminco, arising from or out of my employment with Timminco or the termination of my employment with Timminco, including without

limitation obligations pursuant to the *Employment Standards Act (Ontario)* and the *Human Rights Code (Ontario)*. For the said consideration, I covenant that I will not file any claims or complaints under the *Employment Standards Act (Ontario)* or the *Human Rights Code (Ontario)*.

[16] Following his retirement in 2001, Mr. Timmins remained a member of Timminco's board of directors until October 2007 and served as a member of several board committees until that time, including the strategic committee of the board from June 2003 until October 2007. He received director fees and was reimbursed for his expenses in connection with his services as a member of the board of directors of Timminco and its various committees.

[17] Mr. Timmins states that he has fulfilled all contractual obligations imposed on him by the 1996 Agreement and that he has always been prepared to provide his consulting services to Timminco, as required by the 1996 Agreement, whenever from time to time requested by Timminco.

[18] The evidence of Mr. Kalins, President, General Counsel and Corporate Secretary of Timmins, is that Timminco has not sought or received any consulting services from Mr. Timmins following his retirement.

[19] Mr. Timmins has a different view. His evidence is that he provided consulting services during the early period of Dr. Schimmelbuch's term as CEO.

[20] Since the execution of the Letter Agreement, Timminco has paid Mr. Timmins approximately $2.625 million. Mr. Kalins states that the payments under the Letter Agreement constitute the entirety of Mr. Timmins' entitlements from Timminco following his retirement.

[21] Timminco has filed statements of pension, retirement, annuity and other income ("T4A Forms") and/or statements of amounts paid or credited to non-residents of Canada ("NR4 Forms") with the Canada Revenue Agency in connection with payments made by Timminco to Mr. Timmins in each year from 2002 to 2011. The T4A Forms and NR4 Forms filed by Timminco with respect to Mr. Timmins in each of those years list amounts paid to Mr. Timmins under the category of "retiring allowances". Mr. Kalins deposed that Timminco is not aware of any requests from Mr. Timmins to amend or refile any of the T4A Forms or NR4 Forms filed by Timminco since 2002.

[22] Timminco complied with its obligations to pay the monthly consulting fee to Mr. Timmins until December 2011.

[23] Payment was due on January 1, 2012, which was not made. The Initial Order was granted on Tuesday, January 3, 2012.

[24] On February 8, 2012, a debtor-in-possession financing agreement (the "DIP Agreement") between Timminco and QSI Partners Ltd. ("QSI" or the "DIP Lender") was approved. Mr. Timmins was not served with notice of the motion to approve the DIP Agreement.

[25] On March 30, 2012, counsel for Timminco sent a letter to counsel for Mr. Timmins enclosing a formal notice of disclaimer of the 1996 Agreement pursuant to section 32 of the CCAA. According to the correspondence, the 1996 Agreement was to be disclaimed effective April 30, 2012.

ANALYSIS

[26] Counsel to Mr. Timmins set out four issues:

(a) Was Timminco entitled to stop paying the monthly consulting fee to Mr. Timmins, notwithstanding Mr. Timmins' position that these payments are post-filing obligations under the 1996 Agreement between the parties?

(b) Should Timminco be entitled to disclaim the 1996 Agreement notwithstanding that:

(i) the company's ongoing obligations under the 1996 Agreement have not impeded its ability to effect a successful sale of its assets; and

(ii) the disclaimer would result in significant financial hardship to Mr. Timmins.

(c) In the event that Timminco was not entitled to stop paying the monthly consulting fee, is Mr. Timmins entitled to payments for the period from January 1, 2012 up to the effective date (if any) of the disclaimer?

(d) In the event that Timminco is entitled to disclaim the 1996 Agreement, what should the effective date of that disclaimer be?

[27] Counsel to Timminco set forth the issue as being whether Timminco's obligations under the Agreement constitute pre-filing obligations which are stayed by the Initial Order.

[28] In a supplementary factum, counsel to Timminco broadened the issue to read as follows:

(a) Should Mr. Timmins' motion for an order that the 1996 Agreement is not to be disclaimed or resiliated be granted; and

(b) If Mr. Timmins' motion referenced in (a) above be granted, should the effective date of the disclaimer of the 1996 Agreement be extended past April 30, 2012 (the day that was 30 days after the day on which Timminco gave notice of the disclaimer to Mr. Timmins).

[29] Counsel to Mr. Timmins submits that the 1996 Agreement is clear and unambiguous and that Timminco's attempts to describe the unpaid monthly consulting fees as a pre-filing claim inappropriately mischaracterizes the nature of the 1996 Agreement. Counsel submits that the unpaid amounts can only be characterized as the pre-filing claim if Mr. Timmins earned the right to be paid an amount during his employment with Timminco (which amount was then to be paid out to him over time after the termination of his employment), without further obligations owing from Mr. Timmins to

Timminco. Counsel to Mr. Timmins submits that clearly is not the case as the monthly consulting fees do not constitute compensation deferred from a prior employment agreement between the parties and the fees cannot be said to be owing for employment services previously performed by Mr. Timmins.

[30] Mr. Timmins takes the position that, while the Letter Agreement dealt with a number of termination of employment issues, it specifically did not amend the 1996 Agreement other than to fix the monthly consulting fee and, in other respects, the 1996 Agreement was to remain in full force and effect.

[31] Specifically, from Mr. Timmins standpoint, there were no pension or retirement benefits to forego at the time he entered into the Letter Agreement as the pension plan in which he had participated prior to his resignation was terminated and wound up in 1998 with a lump sum entitlement having been paid out.

[32] Counsel for Mr. Timmins goes on to submit that the purpose and effect of the 1996 Agreement is clear and unambiguous on its face – (i) to ensure that Mr. Timmins advice remains available to Timminco; (ii) to ensure that he or his investment company do not engage in activities which are competitive to Timminco's business; and (iii) to ensure that Mr. Timmins does not disclose or otherwise use confidential information.

[33] Counsel submits that Mr. Timmins' and Timminco's obligations under the 1996 Agreement are ongoing post-filing obligations, and as such cannot be stayed and suspended in the CCAA proceedings.

[34] In my opinion, the arguments of Mr. Timmins are flawed.

[35] It seems to me that the benefits conferred on Mr. Timmins under the 1996 Agreement, as amended by the Letter Agreement are, in substance, termination and/or retirement benefits. These are unsecured claims. Counsel to the Applicant has summarized the following attributes or characteristics of the Agreement in support of the Applicant's position that the claim of Mr. Timmins is, in substance, for termination and/or retirement benefits:

(a) the amount of Mr. Timmins' monthly fee under the 1996 Agreement was essentially a "top up" to any other retirement and pension benefit that Mr. Timmins would receive from Timminco;

(b) the "consulting" term of the 1996 Agreement was to commence the first day of the month following Mr. Timmins' retirement;

(c) under the Agreement, Mr. Timmins is not entitled to any retirement or pension benefits from Timminco following his retirement other than the payments;

(d) neither the 1996 Agreement nor the Letter Agreement provide for any minimum amount of consulting to be provided by Mr. Timmins in order to be entitled to receive the monthly payments;

(e) all other employment benefits and provision of services to enable Mr. Timmins to provide employment services to Timminco were terminated by the Letter Agreement; and

(f) Mr. Timmins has not provided any consulting services to Timminco following his retirement as CEO.

[36] From the standpoint of Timminco, for all intents and purposes, the Letter Agreement concluded whatever employment relationship remained between Mr. Timmins and Timminco.

[37] In addition, in connection with the Letter Agreement and his retirement, Mr. Timmins also executed a release in indemnity wherein he released any and all claims he may have had relating to his employment with Timminco or the termination thereof and agreed that the consideration described in the Agreement satisfies all of the obligations of Timminco arising from or out of his employment with Timminco or the termination of his employment.

[38] It is especially significant that the release and indemnity specifically references both the 1996 Agreement and the Letter Agreement.

[39] Further, the filings made by Timminco with the Canada Revenue Agency constitute further evidence of the payments made to Mr. Timmins under the Agreement are, in substance, unsecured termination and/or retirement benefits. Mr. Timmins discounts this point indicating that it is the responsibility of Timminco to issue the tax forms. However, it is the responsibility of Mr. Timmins to file the return and to ensure its accuracy.

[40] In my view, the inescapable conclusion is that when the 1996 Agreement is considered together with the amendments set out in the Letter Agreement, in substance, the parties entered into an arrangement that addressed termination and/or retirement benefits.

> [41] The law in this area is clear. The courts have repeatedly found that termination and/or retirement benefits are pre-filing unsecured obligations of debtor companies undergoing CCAA proceedings. See *Indalex Limited (Re)* (2009), 55 C.B.R. (5) 64 (Ont. S.C.J.), *Re Nortel Networks Corporation, Re* [Recommencement of Benefit Motion] (2009) 2009 CanLII 31600 (ON SC), 55 C.B.R. (5) 68 [Nortel] and *Fraser Papers Inc. (Re)* (2009), 2009 CanLII 39776 (ON SC), 55 C.B.R. (5) 217.

> [42] Further, the debtor company's obligation to make retirement, termination, severance and other related payments to unionized and non-unionized employees have been held to be pre-filing obligations. See Nortel, paras. 10, 12, 67. At para. 67, I stated:
>
> ...The exact time of when the payment obligation crystallized is not, in my view, the determining factor under section 11.3 [of the CCAA]. Rather, the key factor is whether the employee performed services after the date of the Initial Order. If so, he or she is entitled to compensation benefits for such current service.

> [43] It is clear in this case that Mr. Timmins did not provide any services after the date of the Initial Order.

> [44] The Timminco Entities are insolvent and are not able to honour their obligations to all creditors. If the benefits conferred on Mr. Timmins under the Agreement are not stayed, Mr. Timmins would, in effect, receive an enhanced priority over other unsecured creditors, which would be contrary to the scheme and purpose of the CCAA. In this respect, it is noted that the position of the Applicant on this motion was supported by counsel to FSCO, both the Non-Union and Union Employee Pension Committee, the United Steelworkers and Mercer Canada.

> [45] The Monitor expressed no view on whether the monthly payment obligations were a pre-filing or a post-filing obligation. The Monitor did, however, approve of the proposed disclaimer (see below).

> [46] In my view, it is necessary to briefly address the submission made by counsel to Mr. Timmins that the CCAA order does not preclude Mr. Timmins' claim for the unpaid monthly consulting fees and the related submission that the CCAA order does not stay pre-filing obligations. Paragraph 11 of the CCAA clearly provides that the Timminco Entities are directed to make no payments of principal, interest or otherwise on account of monies owing by the Timminco Entities to any of their creditors as of January 3, 2012. Having made the determination that the obligation of Timminco to Mr. Timmins under the Agreement constitutes a pre-filing claim, this provision is broad enough to cover any and all pre-filing obligations owing to Mr. Timmins.

> [47] The foregoing is sufficient to dispose of the issues raised in the motion and cross-motion. However, in the event that I am in error in my conclusion, the secondary issue has to be addressed; namely, whether Timminco should be entitled to disclaim the 1996 Agreement and, if so, what should be the effective date of the disclaimer.

[48] Section 32 of the CCAA permits a counter-party to a contract disclaimed by the debtor company to apply to court for an order that the agreement is not to be disclaimed or resiliated.

[49] Section 32(4) sets out factors to be considered by the court, among other things, in deciding whether to make the order:

(a) whether the monitor approved the proposed disclaimer or resiliation;

(b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and

(c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[50] In alternative submissions, counsel to Timminco takes the position that the motion of Mr. Timmins should be dismissed because:

(a) the Monitor has approved the proposed disclaimer;

(b) the disclaimer will enhance the prospects of a viable compromise or arrangement being made in respect of Timminco;

(c) the disclaimer is expected to benefit the stakeholders of Timminco as a whole in that it will permit Timminco to maximize recoveries to its stakeholders;

(d) the disclaimer will not cause any significant financial hardship to Mr. Timmins; and

(e) prohibiting Timminco from disclaiming the Agreement will result in a windfall to Mr. Timmins at the expense of the other unsecured creditors of the Timminco Entities.

[51] In analyzing this aspect of the motion, I accept the submission of counsel to Timminco that the scope of the CCAA and the various protections it affords debtor companies should not be interpreted so narrowly as to apply only in the context of a restructuring process leading to a plan arrangement for a newly restructured entity. The Court of Appeal for Ontario stated in *Nortel (Re)* 2009 ONCA 833, there is "no reason…why the same analysis cannot apply during a sale process that requires the business to be carried as a going concern".

[52] In my view, the section 32 (4)(b) requirement that a disclaimer of an agreement with a debtor company enhance the prospects of a viable compromise or arrangement being made should be interpreted with a view to the expanded scope of the statute.

[53] In this particular case, the overriding objective of the CCAA must be to ensure that creditors in the same classification are treated equitably. Such treatment will enhance the prospects of a viable compromise or arrangement being made in respect of the debtor company.

[54] Similar views were expressed by the court in *Homberg Invest Inc. (Arrangement Relatif á*), 2011 QCCS 6376 where the Quebec Superior Court held, among other things, that it is not necessary to demonstrate that a proposed disclaimer is essential for the restructuring period. It merely has to be advantageous and beneficial.

[55] It is also noted that counsel to the Applicants submitted that at the commencement of the CCAA proceedings, the Timminco Entities ceased making payments with respect to many of their pre-filing obligations in order to preserve their ability to continue operating and to implement a successful sale of their assets. The continued existence of the Agreement and of the requirement to make the payments thereunder would have further strained the Timminco Entities already severely constrained cash flows. Further, counsel contends that disclaimer of the Agreement and the cessation of payments to Mr. Timmins thereunder improved the Timminco Entities' cash flows and their ability to continue implementing a sales process with respect to their assets.

> [56] Counsel to Timminco also points out that under the DIP Agreement, approved on February 8, 2012, the Timminco Entities are restricted to use the proceeds of the DIP Facility for the purpose of funding operating costs, expenses and liabilities in accordance with the cash flow projections. Although the DIP Agreement does not prohibit the payment of amounts akin to the amounts owing under the Agreement, the cash flow projections approved by the DIP Lender do not provide for a payment of the monthly payments under the Agreement; making such payments would accordingly result in an event of default under the DIP Agreement. Further, counsel adds that without access to the DIP Facility, the Timminco Entities would have been unable to implement a sales process designed to maximize the benefits to their stakeholders.

> [57] I am satisfied that, in the context of this alternative argument, the disclaimer of the Agreement, if necessary, is fair, reasonable, advantageous and beneficial to the Timminco Entities' restructuring process.

[58] Counsel to Mr. Timmins also raised the issue that the disclaimer of the 1996 Agreement would objectively result in significant financial hardship to Mr. Timmins.

[59] However, Mr. Timmins did acknowledge that, if the test of whether the disclaimer of an agreement that pays a party $250,000 per year will cause "significant financial hardship to that party" depends on the individual characteristics and circumstances of that party, the disclaimer of the 1996 Agreement will not cause significant financial hardship to Mr. Timmins.

[60] I am in agreement with the submission of the Timminco Entities that the test of whether a disclaimer of an agreement will cause significant financial hardship to the counter party depends and is centered on an examination of the individual characteristics and circumstances of such counter party. Further, an objective test for "significant financial hardship" would make it difficult to debtor companies to disclaim large contracts regardless of the financial ability of the counter parties to absorb the resultant losses. It seems to me that such a result would be contrary to the purpose of principles of the CCAA.

[61] Based on the record, I am unable to conclude that the disclaimer would likely cause significant financial hardship to Mr. Timmins.

[62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

[63] For the foregoing reasons, the alternative relief sought by Mr. Timmins, to the effect that the Agreement is not to be disclaimed, is denied.

[64] The remaining outstanding issue is whether or not the disclaimer of the Agreement should be effective April 30, 2012. Counsel to Mr. Timmins takes the position that the effective date of the disclaimer should be no earlier than the date of the determination of this motion.

[65] On March 30, 2012, counsel for Timminco sent a letter to Mr. Timmins' counsel enclosing a formal notice of disclaimer which was to be effective April 30, 2012. In accordance with section 32 (2) of the CCAA, on April 13, 2012, Mr. Timmins filed his motion objecting to the disclaimer. Counsel to Mr. Timmins sought to have the motion heard in advance of April 30, but on account of scheduling issues, the motion did not proceed until June 4, 2012. Counsel to Mr. Timmins takes the position that given that the CCAA Order prohibits Mr. Timmins from ceasing to comply with his obligations under the 1996 Agreement, it is only fair that payment for such obligations should be made up until the date that the court makes its determination on this motion.

[66] The contrary position put forth by counsel to Timminco is that the Timminco Entities did not deliver a notice of disclaimer until March 30, 2012 because they were of the view that the obligations under the Agreement constitute Timminco's unsecured pre-filing obligations which were stayed by Initial Order and that Timminco was authorized to stop making the payments under the Agreement without being required to disclaim the Agreement. Consequently, counsel submits that the Timminco Entities only delivered a notice of disclaimer in response to correspondence with Mr. Timmins' counsel and did so expressly without prejudice to their position that the obligations under the Agreement were pre-filing obligations.

[67] Counsel to Timminco acknowledged that, if the court found that Timminco's obligations did not constitute pre-filing obligations and the Agreement needed to be disclaimed prior to Timminco being entitled to cease making payments, Timminco would be obligated to make the payments that became due prior to the effective day of the disclaimer, namely, April 30, 2012.

[68] I am satisfied that the delay between the commencement of this motion by Mr. Timmins and its hearing was attributable to scheduling issues and the demands on Timminco's management and counsel's time placed by the Timminco Entities' CCAA Proceedings, including the sales process being undertaken by the Timminco Entities for the benefit of their stakeholders. Given these competing priorities, it seems to me that it would be unfair to extend the effective date of the disclaimer, if necessary, beyond April 30, 2012.

[69] As noted, my comments with respect to the disclaimer issue are for the assistance of the parties, in the event that my determination of the pre-filing issue is found to be in error.

DISPOSITION

[70] In the result, the motion of Mr. Timmins is dismissed. The relief requested by Timminco in the cross-motion is granted.

MORAWETZ J.

Date: August 3, 2012

TAB 13

Urbancorp Inc. v. 994697 Ontario Inc., 2023 ONCA 126 (CanLII)

Date: 2023-02-27

Citation: Urbancorp Inc. v. 994697 Ontario Inc., 2023 ONCA 126 (CanLII), <https://canlii.ca/t/jvt4s>, retrieved on 2024-09-25

COURT OF APPEAL FOR ONTARIO

CITATION: Urbancorp Inc. v. 994697 Ontario Inc., 2023 ONCA 126

DATE: 20230227

DOCKET: C70732

Benotto, Roberts and Harvison Young JJ.A.

BETWEEN

Guy Gissin, in his capacity as the Foreign Representative of
Urbancorp Inc. and the Israeli Court Appointed Functionary officer of
Urbancorp Inc. and Downing Street Financial

Plaintiffs
(Respondents)

and

994697 Ontario Inc., KJ Equity Inc., Ned Holdings Inc.,
Peakhill Investments Ltd., Wellesley Residences (2014) Corp.
formerly 2000 Jane Street Inc., Yonge-Abell GP Limited in its capacity as
the general partner of the Yonge-Abell Limited Partnership

Defendants
(Appellants)

Chris E. Reed, for the appellants

Jeremy Sacks, for the respondents

Heard: November 25, 2022

On appeal from the order of Justice Barbara A. Conway of the Superior Court of Justice, dated May 11, 2022.

By the Court:

[1] The appellants appeal the motion judge's order that struck out various paragraphs of their amended statement of defence.

[2] On October 6, 2016, Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., and Edge Residential Inc. (the "Urbancorp Companies") were placed under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-38 ("CCAA") and The Fuller Landau Group Inc. was appointed as their Monitor. The order at issue in this appeal arose in an action ("the claim") that was originally commenced by the Monitor in April 2018. On May 9, 2018, Myers J. authorized the assignment of the Monitor's claim to the CCAA creditors. The Monitor assigned the claim to Guy Gissin in his capacity as the Foreign Representative of the CCAA creditors of the Urbancorp Companies ("the respondents").

[3] In their statement of claim, the respondents seek to set aside or invalidate transfers of condominium units to the appellants on various bases, including oppression under s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), transfers at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), fraudulent conveyances under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, and/or fraudulent preferences under the *Assignments and Preferences Act*, R.S.O. 1990, c. A. 33.

[4] The respondents brought a pleadings motion to strike allegations in certain paragraphs of the appellants' amended statement of defence on the basis that they are irrelevant in that they are related to the events connected with the appointment and knowledge of the Foreign Representative. The motion judge agreed and struck certain sections of the amended statement of defence that contained the irrelevant allegations.

(1) Is leave to appeal required?

[5] The court raised the preliminary question of whether leave to appeal is required under s. 13 of the CCAA. Section 13 reads that:

Except in Yukon, any person dissatisfied with an order, or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[6] The appellants argue that leave to appeal is not required because the motion judge's order was not made under the CCAA or in CCAA proceedings but in an independent action, and that the order under appeal related to pleadings and could have been made in any action. Moreover, the appellants

submit that as the order related to portions of the defence made in response to the respondents' oppression remedy claim, they have an automatic right of appeal to the Divisional Court under s. 255 of the OBCA, as from "any order made by the court under this Act".

[7] The respondents submit that leave is required under the CCAA and the OBCA does not apply. In any event, the order under appeal is interlocutory so leave to appeal must be obtained from the Divisional Court under s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[8] For the reasons that follow, we conclude that the motion judge's order was "made under" the CCAA such that leave to appeal is required pursuant to s. 13 of the CCAA.

(a) Analytical framework

[9] The correct analytical framework to be followed in determining whether an order requires leave to appeal under s. 13 of the CCAA was set out by Brown J.A., sitting as a single motions judge, in *Essar Steel Algoma (Re)*, 2016 ONCA 138, 33 C.B.R. (6th) 172. He advanced a purpose-focused inquiry that was informed by the legislative purpose underlying the s. 13 leave requirement and reflected in his survey of Canadian cases.

[10] As Brown J.A. concluded, the leave requirement in s. 13 reinforces the CCAA goal of enabling a company to deal with creditors while carrying on business by resolving matters and obtaining finality without undue delay: *Essar*, at para. 20. As a result, the words, "made under this Act" in s. 13 must be given a broad interpretation to achieve the Act's legislative purpose: *Essar*, at para. 22.

[11] Brown J.A. very helpfully set out a summary of relevant indicia for an appellate court to consider when determining whether an order requires leave to appeal under s. 13 of the CCAA, at para. 34:

To aid that purpose-focused inquiry, the case law has identified some indicia about when an order is "made under" the CCAA. In [*Redfern Resources Ltd. (Re)*, 2011 BCCA 333, 94 C.B.R. (5th) 53], Tysoe J.A. stated a court should ask whether the order was "necessarily incidental to the proceedings under the CCAA" or "incidental to any order made under the CCAA": at paras. 9 and 10. In [*Monarch Land Limited v. CIBC Mortgages Inc.*, 2014 ABCA 143, 575 A.R. 46], O'Brien J.A. looked at whether the order required the interpretation of a previous order made in the CCAA proceeding or involved an issue that impacted on the restructuring organization of the insolvent companies: at paras. 8 and 15. As mentioned, in [*Sandhu v. MEG Place LP Investment Corporation*, 2012 ABCA 91], Paperny J.A. stated that s. 13 of the CCAA would apply if "CCAA considerations informed the decision of and the exercise of discretion by the chambers judge" or "if a claim is being prosecuted by virtue of or as a result of the CCAA": at paras. 16 and 17. [Emphasis added.]

See also: *Hemosol Corp. Re*, 2007 ONCA 124, 31 CBR (5th) 83.

[12] This framework is also consistent with and similar to the approach followed by this court and the Supreme Court of Canada in determining whether leave to appeal should be granted under other statutes with similar language and similar legislative purpose: see, for example, 1) with respect to leave

to appeal provisions under the BIA: *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, 69 C.B.R. (6th) 13; *Dal Bianco v. Deem Management Services Ltd.*, 2020 ONCA 585, 82 C.B.R. (6th) 161; *Ting (Re)*, 2021 ONCA 425, 90 C.B.R. (6th) 32, leave to appeal refused, [2021] S.C.C.A. No. 307; *Rusinek & Associates Inc. v. Arachchilage*, 2021 ONCA 112, 87 C.B.R. (6th) 1; and 2) with respect to the leave provisions under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA") and the OBCA: *Kelvin Energy Ltd. v. Lee*, 1992 CanLII 38 (SCC), [1992] 3 S.C.R. 235 (CBCA); *Ontario Securities Commission v. McLaughlin*, 2009 ONCA 280, 75 C.P.C. (6th) 26; and *1186708 Ontario Inc. v. Gerstein*, 2016 ONCA 905 (OBCA).

(b) Framework applied

[13] The motion judge's order striking out the paragraphs of the amended statement of defence was bound up with and incidental to the CCAA proceedings out of which the present proceedings arose.

[14] The foundation of the motion judge's decision was that the struck paragraphs were irrelevant to the assigned claim of the Monitor that was brought for the benefit of all creditors in the CCAA proceedings.

[15] The struck paragraphs 3, 6, 22, 25 and 26 read as follows:

3. The plaintiff Guy Gissin (the "Foreign Representative") is an Israeli lawyer. He has been recognized as a "foreign representative" for Urbancorp Inc. under section 45 of the *Companies Creditors Arrangement Act* by an order of this Court on May 18, 2016.

...

6. Urbancorp Inc. became insolvent within months of the Israeli debentures being sold. The Foreign Representative was appointed functionary officer over Urbancorp Inc. on April 25, 2016. The functionary's role is to manage the operations of Urbancorp Inc. and its subsidiaries in the interests of the creditors of Urbancorp Inc., i.e. in the interests the Israeli debenture holders.

...

22. The Termination occurred before Urbancorp Inc., which the Foreign Representative represents, sold any debentures to Israeli investors. It occurred before Urbancorp Inc. had any creditors.

...

25. Title to the condominium units held, respectively, in the names of Edge and of the defendants to this lawsuit was a matter of public record through the land registry. At the time that Urbancorp Inc. began to carry on active business and sold its debentures, it was a matter of public record that the defendants in this lawsuit owned 100% of the Transferred Units and that members of the Urbancorp Group owned 100% of the Assets Transferred to Urbancorp (other than any of these assets that had been disposed of by the Urbancorp Parties in the meantime).

26. Full details of assets owned by the Urbancorp Parties was provided to the Israeli underwriters of the debenture issue. A copy of the Termination Agreement was made available to those underwriters. The underwriters and the Israeli public knew, or ought to have known, that Urbancorp Inc. and the Urbancorp Parties had no direct or indirect ownership interest in the Transferred Units. They knew, or ought to have known, that the Transferred Units formed no part of the assets that were collateral for, and provided support for, Urbancorp Inc.'s sale of debentures to the Israeli public.

[16] The portions struck from paragraphs 5, 9 and 31 read as follows:

5. … There were no creditors of Urbancorp Inc. prior to December 2015. The only material creditors of Urbancorp Inc. are the Israeli debenture holders.

…

9. As set out below, the Termination took place at a time when Urbancorp Inc. was a shell company, had not carried on any material business, and had no debt. … Urbancorp Inc. and its creditors never had any interest in, and did not expect any recovery from, the property transferred to the defendants in the Termination.

…

31. …

> (a) The Termination occurred before Urbancorp Inc. began to carry on business in any material way.
>
> (b) The result and effect of the Termination was known or should have been known to Urbancorp Inc. and any investors in Urbancorp Inc.

[17] The motion judge struck the sections in issue because she determined that those statements relating exclusively to Guy Gissin in his personal capacity are irrelevant. They would not be considered if the Monitor had pursued the claim. Relying on well-established principle, the motion judge held that, by virtue of the assignment, Mr. Gissin stands in the shoes of the Monitor and pursues the claim for the benefit of all creditors: see *Shaw Estate v. Nichol Island Development Incorporated*, 2009 ONCA 276, 51 C.B.R. (5th) 12, at paras. 69-72; *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.* (1993), 1993 CanLII 7074 (AB KB), 140 A.R. 1 (K.B.), at para. 55, aff'd 1994 ABCA 261, 155 A.R. 241.

[18] The motion judge concluded that pleading facts that relate to the unique circumstances of Mr. Gissin would indirectly and impermissibly convert the character of the claim from that of the Monitor to one of the assignee creditors, which would lead to distraction and an unfair trial into areas that are not properly considered on an assignment of the claim.

[19] We do not accept the appellants' submissions that the order in issue relates to the oppression remedy pleaded by the respondents. Respectfully, this narrow approach ignores the entirety of the respondents' claims. Moreover, it risks devolving the requisite analysis into a parsing exercise and undermines the broad functional inquiry that this court must apply in determining whether the order in issue was "made under" the CCAA.

[20] Where the jurisdiction of a court emanates from both the CCAA and another statute, it is unhelpful to deconstruct the proceedings to determine which elements of the case fall under the CCAA and therefore require leave. Rather, as Paperny J.A. noted in *Sandhu*, at para. 17, "if a claim is being prosecuted by virtue of or as a result of the *CCAA*, section 13 applies."

[21] In *McLaughlin*, this court followed the same broad approach in determining whether an order dismissing a motion to amend a statement of defence was made under the OBCA such that s. 255 required the appeal to proceed before the Divisional Court. O'Connor A.C.J.O. rejected the appellant's argument that the order dismissing his motion was made under the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, and not the OBCA, so s. 255 of the OBCA did not apply, and as an appeal of a final order, the appeal would properly lie to the Court of Appeal under the *Courts of Justice Act*, s. 6(1)(b): at para. 12. In dismissing this argument, O'Connor A.C.J.O reasoned that the power exercised by the motion judge was "sufficiently 'close'" to a legislative source under the OBCA, "namely, the power to adjudicate on oppression claims under s. 248" and that, "[i]mplicit in that power is the authority to allow or deny certain claims and defences": at para. 16. He also relied on the same policy grounds that are applicable to CCAA proceedings, concluding that his interpretation was consistent with the legislative purpose of providing "a fast and effective remedy": at para. 18.

[22] The appellants rely on *McLaughlin* and argue that the case at hand is distinguishable because it dealt only with an appeal of an order made under the OBCA, whereas this appeal involves claims based on both the CCAA and the OBCA, and the order to strike pleadings was made based on the court's inherent jurisdiction to control its own process, as codified in the *Courts of Justice Act*. While the court held that the legislative power exercised by the motion judge in *McLaughlin* was "sufficiently close" to the OBCA, the appellants argue that because the order on appeal in this case involves the adjudication of claims under two statutes and a final order made under a common law power, it does not meet the "sufficiently close" test set out in *McLaughlin*. Specifically, the appellants contend that since the dismissal of the oppression remedy addresses a defence under the OBCA alongside the underlying CCAA proceedings, the appeal does not arise from the exercise of a legislative power that is "sufficiently close" to either the CCAA or the OBCA to constitute an appeal of a decision made under either Act. Accordingly, the appellants argue that their appeal lies properly to this court under the *Courts of Justice Act*.

[23] We disagree. The struck pleadings are connected to the knowledge of the Foreign Representative to whom the claim was assigned. They are aimed specifically at the transfers at undervalue, which is directly connected with the Urbancorp Companies' insolvency and the creditors' claims under the

CCAA. Moreover, the order striking the paragraphs potentially impacts the restructuring under the CCAA as it defines the scope of available defences in relation to the s. 96 BIA claims. Circumscribing the breadth of the defence may impact the potential success of the insolvency-related causes of action and the resulting recovery on the part of the creditors. The tangential impacts on the oppression remedy defence referenced by the appellants do not affect our conclusion that the appeal is of a decision made under the CCAA.

[24] We therefore conclude that the appeal fits within the scope of the CCAA, and as such, the appellants require leave to appeal under s. 13 of the CCAA.

(2) Should leave to appeal be granted?

> [25] We start with the well-established principle that leave to appeal under s. 13 of the CCAA is granted sparingly and only where there are "serious and arguable grounds that are of real and significant interest to the parties": *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

[26] In *Urbancorp Toronto Management Inc. (Re)*, 2022 ONCA 181, at para. 3, this court recently reiterated the following factors for consideration in determining whether leave should be granted:

a. the proposed appeal is *prima facie* meritorious or frivolous;

b. the points on the proposed appeal are of significance to the practice;

c. the points on the proposed appeal are of significance to the action; and

d. the proposed appeal will unduly hinder the progress of the action. [Citations omitted.]

[27] The appellants meet none of the criteria for leave. We see no error in the motion judge's analysis or conclusions in striking as irrelevant the paragraphs from the amended statement of claim; no grounds of the appeal are of significance beyond the parties to this litigation; the amended statement of defence does not depend on the struck paragraphs with the result that the outcome of the proposed appeal will have little real effect on the action other than create unnecessary delay; and the proposed appeal will unduly hinder the progress of the action which is arrested at the pleadings stage. We also note that the proposed appeal equally hinders the progress of the CCAA proceedings and the distribution of assets to creditors.

Disposition

[28] Accordingly, we deny leave to appeal and dismiss the appeal.

[29] The respondents are entitled to their costs of the appeal. If the parties cannot agree on the amount, they may make brief written submissions of no more than two pages within seven days of the release of these reasons.

Released: February 27, 2023. “MLB”

“M.L. Benotto J.A.”

“L.B. Roberts J.A.”

“A. Harvison Young J.A.”

TAB 14

CANADA

House of Commons Debates

VOLUME 140 • NUMBER 128 • 1st SESSION • 38th PARLIAMENT

OFFICIAL REPORT
(HANSARD)

Thursday, September 29, 2005

Speaker: The Honourable Peter Milliken

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(Table of Contents appears at back of this issue.)

HOUSE OF COMMONS

Thursday, September 29, 2005

The House met at 10 a.m.

Prayers

● (1000)

[*English*]

BUSINESS OF THE HOUSE

The Speaker: It has been brought to my attention that a clerical error has been found in the report to the House on Bill C-11, the public servants disclosure protection act.

In the Standing Committee on Government Operations and Estimates, a subamendment to clause 24(1)(b) was not recorded correctly in the English version of the report. Regrettably, the report to the House and the reprint of the bill have included this error.

Clause 24(1)(b) should read as follows:

> (b) the subject-matter of the disclosure is not sufficiently important or the disclosure is not made in good faith;

Therefore, I am directing that a corrigendum to the report be prepared to insert the correct words in the English version of clause 24(1)(b). In addition, the working copy of the bill will be corrected in its next edition after third reading.

* * *

[*Translation*]

ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

The Speaker: I have the honour to lay upon the table, pursuant to subsection 23(3) of the Auditor General Act, the report of the Commissioner of the Environment and Sustainable Development to the House of Commons for the year 2005.

This report is deemed permanently referred to the Standing Committee on the Environment and Sustainable Development.

* * *

[*English*]

CHIEF ELECTORAL OFFICER

The Speaker: I also have the honour to lay upon the table the report of the Chief Electoral Officer, entitled "Completing the Cycle of Electoral Reforms". This report is deemed permanently referred to the Standing Committee on Procedure and House Affairs.

[*Translation*]

INDIVIDUAL MEMBERS' EXPENDITURES

The Speaker: I have the honour to table the document entitled "Individual Members' Expenditures for the Fiscal Year 2004-05".

ROUTINE PROCEEDINGS

[*English*]

ORDER IN COUNCIL APPOINTMENTS

Hon. Dominic LeBlanc (Parliamentary Secretary to the Leader of the Government in the House of Commons, Lib.): Mr. Speaker, the government has been very busy over the last number of months, and that is why I have the honour to table, in both official languages, a considerable number of orders in council recently made by the government. These will be deemed referred to the appropriate standing committees.

* * *

● (1005)

[*Translation*]

COMMITTEES OF THE HOUSE

PROCEDURE AND HOUSE AFFAIRS

Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.): Mr. Speaker, I have the honour to present the 46th report of the Standing Committee on Procedure and House Affairs received from the Subcommittee on Private Members' Business.

[*English*]

Therefore, pursuant to Standing Order 91.1(2), this report contains items added to the order of precedence under private members' business that should not be designated non-votable.

* * *

PETITIONS

AUTISM

Mr. Bill Siksay (Burnaby—Douglas, NDP): Mr. Speaker, I am honoured to table a petition this morning from a number of residents of Vancouver Island, in Parksville, Chemainus, Nanaimo and Qualicum. The petitioners are calling on Parliament to amend the Canada Health Act and corresponding regulations to include intensive behaviour intervention therapy treatment and applied behaviour analysis for children who live with autism.

The petitioners are also calling on Parliament to contribute to the creation of academic chairs at universities in each province to teach these important therapies. These folks are calling on Parliament to serve children with autism and their families in a way that is better than what is currently happening.

* * *

[*Translation*]

QUESTIONS ON THE ORDER PAPER

Hon. Dominic LeBlanc (Parliamentary Secretary to the Leader of the Government in the House of Commons, Lib.): Mr. Speaker, I ask that all questions be allowed to stand.

The Speaker: Is that agreed?

Some hon. members: Agreed.

* * *

[*English*]

COMMITTEES OF THE HOUSE

FISHERIES AND OCEANS

Hon. Karen Redman (Kitchener Centre, Lib.): Mr. Speaker, discussions have taken place among all parties concerning the debate scheduled for later this day on the second report of the Standing Committee on Fisheries and Oceans. I believe that you would find consent for the following motion:

That the debate on the second report of the Standing Committee on Fisheries and Oceans scheduled for later this day be deemed to have taken place, the question deemed put, a recorded division requested and deferred to the end of government orders on Wednesday, October 5, 2005.

The Speaker: Does the hon. chief government whip have the unanimous consent of the House to propose the motion?

Some hon. members: Agreed.

Mr. John Duncan: Mr. Speaker, we would be prepared to adopt the motion on division, if that would be preferable to the government.

The Speaker: Can the first motion be put and the division deferred until next week? Is that part agreed to now? Having agreed to that, is it possible to have the motion deemed adopted on division instead of proceeding with the deferral?

Hon. Karen Redman: Mr. Speaker, we would require some time to consult. If we could, we would like to revisit this perhaps later today.

The Speaker: The matter has now been dealt with. The motion has been put to a vote and the division has been deemed demanded and deferred to next Wednesday at the conclusion of government orders. If there are any changes, we will hear from the members of the House in due course and can change it.

GOVERNMENT ORDERS

[*English*]

WAGE EARNER PROTECTION PROGRAM ACT

The House resumed from September 28 consideration of the motion that Bill C-55, 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, be read the second time and referred to a committee.

Hon. Joe Fontana (Minister of Labour and Housing, Lib.): Mr. Speaker, as I began my debate yesterday with regard to Bill C-55, the wage earner protection program, I indicated that I think this is a fundamental new bill that speaks to the aspirations of working men and women who get up each and every day to work and expect to be paid for the work and the time they have put in.

Bill C-55, a combined effort with my colleague, the Minister of Industry, is about helping working men and women, about the protection of workers whose employers are undergoing restructuring or become bankrupt. Under the current system, as I said yesterday, too many workers are vulnerable when employers enter into a restructuring or file for bankruptcy. Canadian workers suffer lost wages, reduced pension benefits and an uncertainty that the collective agreements in place may be unilaterally challenged by a court. That is unacceptable to this government and, I am sure, unacceptable to most members in the House.

Let me explain again what this program will mean for those unpaid workers. Under the current system in a bankruptcy, three-quarters of the workers receive nothing for their work even though they had gone to work for their employers. At the end of the day, three-quarters of them get absolutely nothing. Overall, the average payout is only about 13¢ on the dollar. That is why I believe this bill is important for working men and women.

The situation facing unpaid workers in Canada exposes a real gap in our system. Clearly, changes are needed. That is why this government is taking action to protect workers' wages. For example, we are now proposing new measures in this bill that will provide workers guaranteed payment for unpaid wages of up to $3,000. An estimated 10,000 to 15,000 workers in all sectors, in all provinces, in both jurisdictions, are left with unpaid wages or reduced pensions due to employer bankruptcies in Canada. We intend to rectify that situation.

The reforms will also amend the Bankruptcy and Insolvency Act to establish a limited superpriority for unpaid wage claims of up to $2,000. Under the new limited superpriority, a unpaid worker will be one of the first to be paid from the current assets of the bankrupt employer.

The limited superpriority for unpaid wages better balances the risk of bankruptcy between employees and other creditors of the bankrupt company. We believe that right now the burden weighs too heavily on the employees and that workers' wages, their time, their effort and their covenant to go to work each and every day must be respected. I believe this will also assist the government in recouping its costs in the wage earner protection program because it will be the government which will try to recoup this from the estate of the bankrupt company and the workers will not necessarily have to do that.

The payment of up to $3,000 will immediately be paid to those workers who are waiting for their wages to be paid for work they have already done. To provide a better balancing of risks, secured creditors whose security was comprised by the limited superpriority will be granted a preferred claim to the extent that their security was compromised. This will reduce the effects of the reforms on secured creditors.

The issue of pensions also concerns many Canadian workers. Currently when a company goes bankrupt, contributions taken from employees' paycheques may not be paid to the pension plan for them, and the contributions that employers should have made are only paid after almost every other creditor gets paid. I am sure we would all agree that this is unacceptable. People go to work each and every day, each and every week, each and every year, and surely at the end of their working career, through a choice of their own, perhaps, their pensions ought to be there. The proposed reforms would improve this situation.

● (1010)

In a bankruptcy, a receivership, a proposal or a CCAA filing, contributions that an employer should have made or that were deducted from an employee's paycheque would be required to be paid into the pension plan for the benefit of workers because most other creditors get paid.

When employers are trying to restructure under the Companies' Creditors Arrangement Act to avoid bankruptcy, this reform would provide a mechanism whereby employers and unions could try to renegotiate the collective agreements under the relevant labour legislation, and that is because this government believes in collective bargaining. It believes that the arrangements that have been made between an employer and its employees should be respected and not be allowed to be taken away, that contract that has been entered into should not be frivolously taken away from the parties. If there is no arrangement that can be made, then existing collective agreements remain in force. I believe that is an important principle to which we want to adhere.

If changes were agreed to, the union representing the employees would have a right to claim in the bankruptcy an equal amount to the concessions that they granted as damages and this amount would be as an unsecured creditor. Again, that speaks to a great principle. Above all it would guarantee workers' rights again under existing collective agreements.

The reforms would also clarify that the regulatory procedures available under any labour legislation would be allowed to continue when an employer is trying to restructure under the insolvency regime. This would ensure that the rights and the obligations of the employers, unions and employees in the areas of industrial relations, occupational health and safety and labour standards would continue to be enforced by the regulators. However regulators would continue to be stayed if they were acting as a creditor to the employer.

We have listened to the stakeholders and to our partners. We have listened to Mr. Georgetti at the CLC; to Mr. Hassan Yussuff, the secretary-treasurer; to Mr. Buzz Hargrove from the CAW; and to Mr. Ken Neumann from the United Steelworkers Union. We have consulted widely with the small business community to ensure that this is a balanced act that speaks to not only the needs and the requirements of small business but, more important, to the working men and women who in fact make businesses successful and make this economy so successful.

Therefore we have put forward an ambitious legislative agenda. I believe there is consensus in the House to support the bill. I would hope that the other parties support the bill. The day has come that we stand up for working men and women in this country, protect their wages, protect their pensions, protect their collective bargaining and the negotiations that have taken place. We believe this is a forward looking plan that speaks to our constituents, to the men and women who, each and every day, get up and go to work. All they expect is to be paid their wages, that their pensions are in place and that their collective agreements will stand.

We look forward to the support of all parties. This is too important of an issue for us to play politics with. We would hope that the committee would deal with it as quickly as possible so we can become law in the next number of weeks.

● (1015)

Mr. Pat Martin (Winnipeg Centre, NDP): Madam Speaker, I thank the minister for introducing the bill. It is something we in the NDP have been awaiting for a long time and we welcome it. As the minister pointed out in his remarks yesterday, there are over 10,000 commercial bankruptcies a year in this country leaving many employees owed back wages, benefits, et cetera. The bill, I would hope, puts the interests of workers first in the event of a bankruptcy.

My question is a technical question which has two parts.

First, the total amount of back wages that the employee could draw from the new wage protection fund is $3,000. We find that figure low by the calculations that we have done of the bankruptcies that we know of. I would ask him how they arrived at that figure, and it is something we obviously will raise at committee.

The second part of the question, though, is that the government would seek to have those wages reimbursed by standing in line as a creditor when the trustee of the bankruptcy discharges the bankruptcy. In other words, it would try to get that money back from the bankruptcy but it would only try to get back $2,000. Why should the bankrupt company be allowed to get away with the other $1,000 margin that it is contemplating? Why do we not try to get all the money back that the government pays out to the affected employee?

● (1020)

Hon. Joe Fontana: Madam Speaker, I appreciate the comments of the hon. member from Winnipeg who has been very supportive of the bill. He has even had a private member's bill that was sort of complementary to this one. However let me address his question.

First and foremost, I think we have done a great deal of analysis with regard to the $3,000 cap. We believe that the $3,000 cap will be sufficient to cover off approximately 97% to 97.5%. In other words, when we calculated the small businesses and wages that have been lost, the $3,000 seems to capture most of it. We will look forward to presenting some of that information in committee.

I am flexible. If we need to move it up I can only say that I think the $3,000 will meet the true test to ensure that everybody gets his or her money. We do not want to play games with people's wages, at least as a government and through this particular bill. Obviously that is a great leap from the 13¢ on the dollar that is now being recovered under a piece of legislation that is obviously not working for workers, and so on and so forth.

Yes, we will try to cost recover but the government will be the creditor in terms of being able to recover money from the estate of the bankrupt company if there is any particular money. We believe that not only the $3,000 but the limited super priority will ensure that we can recover some of that money, which is why I indicated up to $2,000. We are prepared to look at whether that needs to be changed. That is why we think the net cost for this particular program, once there is cost recovery of some sort, is about $30 million or could increase to $50 million.

We look forward to discussing the details of whether that cap of $3,000 is sufficient, which we believe it is, and whether the $2,000 cap with regard to cost recovery is enough. We are prepared to present evidence that it would be enough. I thank the member and his party for their support as we move forward on this important legislation.

Mr. Peter Goldring (Edmonton East, CPC): Madam Speaker, I appreciate the goal of the bill. I think it is an admirable goal because employees are sometimes the ones who lose out in cases of bankruptcies. However the question and concern I have is about the number of bankruptcies a year, at about 11,000 that is indicated by the information. Of those, how many actually do leave the employees in the lurch? Is there an average percentage or number?

From my own business experience, it is very common that most companies going into bankruptcy do have options. They have options sometimes of paying employees, paying key suppliers or protecting their own personal loans and securities. They have these options and that is just a reality. To come back afterwards on those is extremely difficult.

However with those types of options my concern is too that if the great majority of companies that would be subject to this, or of the 10,000 businesses a year now that do pay out their employees, would there be some monitoring in the future to see if the percentage changes or shifts, to see if this does not actually help those potential bankruptcy companies to off-load the responsibility onto the government, viewing this more as, in effect, an additional revenue source that they can use on their last minute bailout? Will there be monitoring of those circumstances?

Hon. Joe Fontana: Madam Speaker, that is an important question. During the consultations we wanted to ensure that the burden would not be shifted to the taxpayer or to the government and that it would remain where it should. In our consultations with the Bankers Association and other small business groups, we were able to set the priorities that we thought would not switch the balance but would make employers that much more responsible.

Yes, we need to monitor to ensure that kind of offloading does not happen.I The member has raised an important question. The employer does have options before receivership or bankruptcy. Most of the small business people I know treasure their workers and go out of their way to ensure they look after what they can. However sometimes situations occur where that might be impossible and therefore four or six weeks worth of wages may very well be impacted.

We are really talking about people who are the working poor. In most cases, in the federal jurisdiction, in telecommunications, transportation and so on, labour unions and employees look after themselves but it is the small business people who are making $6, $7 and $8 an hour. I think members will find, as we debate this and as it goes through committee, that we have looked at a way of ensuring we have balanced the interests of small businesses, that do have a number of options and do look after their own employees, with the needs of the people who are working, for the most part, in the retail sector, in the low wage sectors of our economy. Those are the very people we want to protect.

● (1025)

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Madam Speaker, I thank the minister for his presentation.

The Bloc Québécois will be supporting this bill in every way, because we believe that it is a step, albeit a small one, in the right direction. The direction taken is what matters to us above all.

We do have some concerns, however, which I will raise later during the course of the day.

Yesterday, the minister said there were precedents to the wage earner protection program. That is indeed the part of the bill that presents the most interest. Similar programs already exist in the United Kingdom and Australia, where action was taken on this issue.

I would like the minister to describe these precedents and tell us when such approaches were developed and which were the most interesting and conclusive results. I would also like to know which aspects of these precedents the minister took his inspiration from.

[*English*]

Hon. Joe Fontana: Madam Speaker, I thank the Bloc Québécois and its critic for their support of the bill. I look forward to positive and constructive suggestions from her and her party.

Canada will be among some countries that have indicated that they want to protect wages for working men and women. The member mentioned the U.K. and Australia. In some cases there are other countries where the employers must pay for this particular benefit for their workers and in some cases it is the government, through the taxpayer, that will look after these particular workers. There are various arrangements between countries.

Ontario had a wage earner protection program some time ago but the employer was expected to contribute. Of course when the Conservative government of Mr. Harris came into Ontario he scrapped the wage earner protection program because obviously he did not want the employers to have to pay for it.

We will share numerous examples with our colleagues. We believe this model of having the government, through the taxpayers, make an investment of $30 million to $50 million a year to look after our working men and women, the most vulnerable in our society, is a small investment. We will share examples from other countries with the committee as it looks to developing the proper model. After having looked at all of the models around the world we believe this one is the right one for Canada.

Mr. James Rajotte (Edmonton—Leduc, CPC): Madam Speaker, it is my pleasure to address Bill C-55, an act to establish the wage earner protection program act and also to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and make consequential amendments to other acts.

This is very complicated but important legislation. I am pleased to say that my Conservative colleagues have shown a great interest in the bill. A number of them will be speaking to the various aspects of it and the amendments. We will be proposing amendments at committee stage on this bill which we think will improve the bill.

It is appropriate, and the minister mentioned this, that we should recognize the member for Winnipeg Centre who raised this issue in a private member's bill. It should be noted that he brought the issue to Parliament's attention. Our party certainly appreciated his efforts in this area. We did have some disagreements, but our response, I thought, was very responsible.

We formed an internal committee under the leadership of our labour critic to try to formulate our party position on the issue even prior to the government bill being introduced. We wanted to be ready as a party to debate this issue substantively. Today I would like to offer our party's position on this legislation, but obviously other Conservative members will expand the comments in other areas.

Our view is that Bill C-55 is a good first step. We recognize that both the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act need to be amended.

It is a sad fact that every week dozens of companies and individuals declare bankruptcy in this country. We need to make sure that we amend our bankruptcy legislation so that it is clear and workable. Some 11,000 businesses and 100,000 individuals use the Bankruptcy and Insolvency Act on an annual basis. Therefore, I support making changes to both acts.

One particular proposal I support is that bankrupt individuals with more than $200,000 in personal income tax debt representing 75% or more of their total unsecured liabilities will not be eligible for an automatic discharge.

I am also pleased that we are trying to bring our bankruptcy laws in line with international insolvency laws. That being said, there are some problems with Bill C-55 that we will be seeking to remedy at committee. I have made some efforts to be in touch with various associations, organizations, labour groups and people in the private sector who are anxious to make representations on the bill. Hopefully they will all be able to do so at committee.

We will seek to clarify some issues because the legislation is rather complicated, particularly on the bankruptcy side.

The first issue I want to touch upon is wage earner protection. I want to be clear that prior to this legislation our party fully supported, as we do now, the payment of unpaid wages in a quick manner.

Bill C-55 will compensate individuals for amounts earned but not paid during the six months preceding the bankruptcy or receivership of their employer. The wage earner protection program will be funded by the consolidated revenue fund, which is essentially the taxpayers of Canada. Payments of up to $3,000 will be made to employees. I support the expedited payments to workers who are caught in bankruptcy proceedings. It is an appropriate amount of income to be paid in these situations.

Our party does have some concerns with the proposed change in the rank of creditors. Though it may sound strange, good national and provincial bankruptcy and insolvency laws improve the investment environment. Investors gain confidence knowing that should something go wrong, a stable system is in place to protect what is left of their assets.

With that in mind, wages are currently paid fifth after secured creditors and other preferred creditors. I am concerned that elevating wages above secured creditors may lead to increased financing costs for small business owners and therefore fewer investments. While I support the wage earner protection program, I do not believe that the rank should be changed from fifth to third or to a limited superpriority status. I want to be clear on this. We are not opposing payments to the workers. That should be done and it is something that our party supports.

● (1030)

Our party is concerned that once the government pays the worker, the government then takes a position and its position as a creditor is what has changed from fifth to third. Our concern is that this may impact the investment climate, particularly for small and medium size businesses that are attempting to access capital. I believe my colleague from Edmonton addressed that in a question to the minister.

We look forward to input from the Canadian Federation for Independent Business. I know it is concerned about this specific issue. In an attempt to address an imbalance in a system for workers for a small amount of income, we should not in remedying that injustice cause an injustice to small business owners who are creating an awful lot of jobs across this country.

We think it could be left in fifth place where it is currently. To be clear, the worker would be paid but the government would take fifth place and therefore not upset the investment climate for small and medium size businesses. My colleague from Souris—Moose Mountain will be addressing the wage earner protection program in his speech in great detail.

What I want to touch on next is the whole issue of RRSPs. Under the current laws if people go bankrupt, the trustee will seize their RRSPs. Bill C-55 will make RRSPs exempt from seizure with a few exceptions. For instance, contributions made in the 12 months prior to bankruptcy will not be exempt.

RRSPs have become a contentious issue. For example, the province of Saskatchewan exempts RRSPs entirely in bankruptcy proceedings. One of the issues we will need to address at the committee stage is whether or not there should be a cap on the dollar value of the RRSP. While pension plans can safely accumulate, RRSPs are still partly vulnerable and self-employed individuals could lose their investments and security upon bankruptcy.

This is something that was called for by investors and self-employed people who use RRSPs to build up their nest egg for retirement. We think it is a reasonable change to make, such that if people in their 40s or 50s have to declare bankruptcy, their entire nest egg will not be taken from them at that stage. Obviously the exception of the 12 months prior is to prevent someone from loading up his or her RRSP in the last few months and then declaring bankruptcy. This is a good change, especially for entrepreneurs who rely very heavily on RRSPs for their retirement years.

In addition, the bill is silent on registered education savings plans. This is an issue on which the Senate committee on banking made a recommendation in 2003 in its comprehensive report regarding bankruptcy and insolvency. I was remiss in not complimenting the report and the senators who worked on it, as well as the member from Winnipeg. The report was certainly instrumental in bringing forward a lot of the changes to the bankruptcy laws. The Conservative senators who worked on it did an absolutely outstanding job, in my view.

In addition, Bill C-55 makes changes to the treatment of student loans. Currently student loans are not discharged in a bankruptcy unless 10 years has passed since the applicant was a student. Bill C-55 reduces the period from 10 years to 7 years. In other words, the student loans of a person who goes bankrupt after having ceased being a full time or part time student for seven years will be automatically discharged. The Senate banking committee report which I referred to earlier recommended that there only be a five year wait before the discharge of student loans. I know the New Democratic Party would prefer the time period of two years.

The second issue regarding student loans is hardship. There is a provision to allow for the discharge of a student loan due to hardship. Bill C-55 allows a bankrupt person to apply to the court to obtain a discharge on the grounds of hardship five years after the person has ceased to be a full time or part time student. Five years in this case may be too long if we add in the additional issue of hardship, but that is certainly something the industry committee can look at more closely. It is a reality that all post-secondary education costs have risen since the Liberals have been in office.

● (1035)

While many individuals successfully finance their education and repay all their student loans on time, some Canadians are burdened by student loans to the point where they have difficulty providing for the basic necessities of life. Therefore, I think the so-called hardship clause should be examined in detail at committee.

Another issue that Bill C-55 raises is that of income trusts. This has become a very topical issue recently with the Minister of Finance, quite frankly in my view, making an absolutely unprecedented interference in the marketplace, in our investment community. This is disrupting the retirement nest eggs of thousands and thousands of Canadians. It is affecting the investment climate in perhaps the most negative way in recent years. I just cannot believe a finance minister would act so imprudently. It is an absolute disgrace.

We in the Conservative Party under our finance critic, the member for Medicine Hat, have argued that we need certainty in our investment community. We should also realize, though, that it is mainly middle class Canadians who have a lot of their retirement funds tied up in the stock markets. To cause markets to decline precipitously overnight because of the imprudent actions of the finance minister is unconscionable. I hope that decision will be reversed, but unfortunately, I do not think it will be unless there is a change of government.

The whole issue of income trusts is raised in the bill. My colleague, the member for Kelowna—Lake Country, the vice-chair of the Standing Committee on Industry will be addressing the whole issue of income trusts in his speech, how they are affected by the bill and what should be done. I do not know whether the government is intending to change how it will address income trusts with the recent actions by the finance minister, but that is something the government should address.

I want to conclude by saying that consumer insolvency has increased on average by 12.8% per year since 1968. Business bankruptcies are decreasing, which is good news. We do like the parts of the bill particularly that amend the bankruptcy legislation, which encourage restructuring of viable but financially troubled companies. Obviously, we would like to see it worked out rather than going to bankruptcy, if it is at all possible. A lot of the recommendations made to address the Bankruptcy Act that were in the Senate report in our view would lead to less regulation, less interference and would make it more efficient. Those initiatives that address that part of the act we certainly support.

We also recognize that we need better protection for wages. We are fully prepared to support that, but we obviously want the issue of where the government ties in, in terms of the creditors issue to be addressed at committee.

We do support the principles in the bill. We will be supporting the bill at second reading. At committee we will be asking all sorts of witnesses to come forward with their thoughts on the bill. We will be proposing some amendments. We hope other parties will approach the bill in the same reasonable, prudent manner that we have, and in the end we can address all of these issues in a very responsible manner.

● (1040)

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Madam Speaker, the member made some interesting comments about our tax system and the incentives to encourage businesses in our country to reinvest in their communities and themselves to create greater profitability and productivity.

The member mentioned income trusts and the incursion by the government into them. This is a system that is seen as bad public policy and it is not allowed in the U.S.

I would be curious to know the reasons why the member says this. I look at the case of northwestern British Columbia where, despite this government's lack of will when dealing with softwood lumber and despite sound government policy when it comes to our forestry sector, the major companies in the last four fiscal quarters have made record profits. These companies have never made as much profit before as in this past year. This is wonderful for my constituents in these communities.

If those companies were to then set up an income trust, which some of them are considering, they would no longer have to pay taxes on the profits they make. The profits would be immediately passed along to their shareholders as dividends, which they may or may not pay taxes on depending on their tax status.

Why does the member feel this is sound government policy, to continue to allow companies that achieve profitability to evade taxes? These companies are not reinvesting that profit into taxes which we all believe is important to keep the institutions of government running.

It seems to me at a surface level to be one of the largest tax evasion schemes the country has ever faced. I would appreciate it if the member would explain his party's position on income trusts.

This scheme also incurs a disincentive for those companies to reinvest in themselves. In their reinvestment phase, they would then have to declare that money as profit and they would be taxed on it. This is a scheme that is being used by some companies. Perhaps it will be prevented if the government has any foresight at all.

These companies are being given the opportunity to avoid those taxes by becoming an income trust. Therefore, they are providing a disincentive for that investment in productivity which we require if we are to compete on the global stage. Would the member clarify why he is in support of such a scheme?

● (1045)

Mr. James Rajotte: Madam Speaker, my colleague's question gives me the opportunity to explain. I know it is not related specifically to Bill C-55, but it is related to income trusts.

The member mentioned that the United States does not have income trusts. That is true. However, it also do not have double taxation on dividends. If double taxation of dividends were not done in Canada, then we would not need income trusts. Income trusts allow the company to pass on the profits to their investors. People say that is evading taxes. What it does is pass on profits to the investors and thereby companies do not pay the double taxation to the government.

It is interesting, but it is a fundamental difference between the New Democratic Party and the Conservative Party. If we look at productivity and competitiveness, I do not believe the path to productivity and competitiveness is by double taxing those people who are taking their hard earned dollars and investing it in companies in Canada. That is what investors are doing.

By double taxing companies, we are not increasing our productivity and competitiveness. We are in fact lessening our productivity and competitiveness by giving more resources to the government, by double taxing those people who are taking their own hard earned capital to invest in our companies in Canada. That is exactly the wrong path to go down.

If the finance minister wants to come forward and say that the government will stop double taxing investors who take their hard earned money and put it into companies in Canada, we in the Conservative Party would probably say that we should look at that. That is what the United States does and maybe that would be even a better way to go than the income trust angle.

If we want jobs to be created, whether it is in northwestern British Columbia, on the east coast or anywhere else in Canada, we need Canadians to use their excess capital to invest in companies here.

Our biggest problem in Canada with productivity and competitiveness today is a lack of access to capital by small and medium size companies. If we go to any research institution in any field across the country, talk to the head of the NRC, the ARC or whomever else, they will say that our number one issue in Canada is productivity and competitiveness.

The forestry sector has been hit by unfair trade practices by our colleagues. It has had to put up $5 million in duties. This sector has actually made profits because it has responded by becoming more efficient and more competitive. The forestry sector has not done this by evading taxes. I think, frankly, it has been by trying not to pay double taxation to the government and passing on some gains to investors. The investors can then use the surplus money to reinvest back into the communities across the country.

[*Translation*]

Mr. Robert Vincent (Shefford, BQ): Madam Speaker, in my opinion, Bill C-55 is a good bill that the unions and the workers have been awaiting impatiently for years. However, there is a problem with this bill. There is something missing and it needs to be pointed out. The minister said that the workers had vehicles and mortgages and that they needed these funds to pay for all that. So allowing them restitution of $3,000 in the event their employer declares bankruptcy would be a good thing.

There is another important aspect, and the member mentioned it earlier. He said that business owners were being treated unfairly. But so are the workers. Let me explain.

Collective agreements always contain a clause on severance pay in the event a business closes. Workers pay for this directly through payroll deductions. A collective agreement is the result of bargaining. A percentage of the envelope that the employer could give the workers as wages and wage increases is transferred into a severance pay fund. As a result, workers receive one week's salary per year of service.

This is not fair to workers. My question is for the member. Why are workers not able to recover all their money if a company declares bankruptcy? Why should workers have to pay the price for the bankruptcy by losing the money set aside in the event the company closed?

A worker with 20 years' seniority is entitled to 20 weeks' salary from the employer. This 20-week period allows workers to pay their bills until they find another job. Under this bill, yes, workers can recover part of their salary. However, there is a two-week waiting period for EI and, quite often, older workers are the ones affected. I will come back to this point.

With this bill, we should consider unionized workers who are entitled to this severance pay. They paid for it with their own money, directly from the increases they would have earned if they had not agreed to wage deferrals.

Should we put something directly in Bill C-55 so that these workers can recover their investment?

● (1050)

[*English*]

Mr. James Rajotte: Madam Speaker, I will do my best to address the question. Perhaps I misheard my hon. colleague, but I thought he said that under the bill up to $3,000 would be paid by the employer. Up to $3,000 actually is paid out of the wage earner protection program which would be paid out of government funds. Instead of the employees having to take their places in line to try to get their money from the company or from the creditors, they will be replaced in the line by the government. I do not know if my hon. colleague was confused on that issue.

In terms of the injustices, that is exactly what the bill is intended to address. The employee will not have to wait in line for months and months to get those unpaid wages addressed. As stated in the bill, they will be addressed very quickly, paid for out of the program by the government. It should tide the person over, whether it is finding a new job or accessing employment insurance if that is the only route available.

I am sorry if I did not quite completely understand the question, but I think the bill is very much intended to address the injustice that the hon. member mentioned.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Madam Speaker, the Bloc Québécois has been working together for a long time with the steelworkers' union, among others, on proposals to amend the Bankruptcy and Insolvency Act to ensure that employee wages and pension funds are the first debts in line to be reimbursed when companies go bankrupt. Why? Because the current situation is badly flawed.

Under the current legislation in Canada, employees who work all their lives for the same company can find themselves left with nothing if it goes bankrupt. Employees lose not only their wages for hours they actually worked but also all their contributions to the company pension plan. When the Bloc Québécois found this out, it decided to hound the government to ensure that the flaws in the current legislation were corrected and wages better protected.

In October 2003, for example, the Bloc Québécois voted in favour of a motion brought before the House by the NDP. This motion asked the government to amend the Bankruptcy and Insolvency Act to ensure that the wages and pension funds due to employees are the first debts in line to be repaid in case of bankruptcy. Unfortunately, the Liberal Party voted against this motion at that time and it was therefore defeated.

When on November 15, 2004 an NDP member introduced a bill to protect wages, which was similar to the government's current Bill C-55, the Bloc was an enthusiastic supporter. My colleague from Shefford even said in this House that if the NDP had not introduced such a bill, the Bloc would have. This is indicative of the Bloc's affinity for a bill like this, Bill C-55, which it finds satisfactory. I would not go so far as to say that it finds it fully satisfactory, but it considers it a step in the right direction. It is a little step, to be sure, but still in the right direction.

In our view, another milestone has been reached in the direction of respect for working people and their dignity. The social justice principles recognized and upheld here require employees to be paid for all the hours that they have worked. Workers' wages are the only income that they have, in contrast to big corporations and bankers, for example, who have mortgages with companies that go bankrupt. Workers' pension funds are sacred. People do not work their whole lives to be left as destitute as if they had not worked hard all that time. It does not make any sense.

The new wage protection mechanism is interesting, because, as we know, Bill C-55 creates the wage earner protection program. Under this program, the federal government assumes up to $3,000 of wages owed to workers if their employer goes bankrupt. Payments made under this program are taxable and are subject to any applicable deductions.This means that, regardless of what assets the employer has, workers will be able to receive most, if not all, of their unpaid wages.

The Minister of Industry feels that this amount of $3,000 would cover 97% of unpaid wage claims, but it remains to be seen what will happen with the remaining 3%. The same thing goes for the precedents the minister has referred to.

On the other hand, workers receiving payment under the WEPP will have to transfer to the federal government their right of claim under the Bankruptcy and Insolvency Act for an amount equivalent to the benefit they have received. The government will then seek to recover the amount paid out to the workers.

This appears to be an acceptable mechanism, and we are told there are precedents for it. We will need to see what those are. The minister was not very forthcoming about them just now. We need to see how this has worked in Australia and the United Kingdom, whether workers have indeed recovered what was owed to them, and whether indeed 97% of workers recovered all that was owed to them.

The government estimates the annual cost of the program at $32 million annually, a maximum of $50 million in particularly bad years with a lot of bankruptcies. This will mean more money paid out to workers, but since the federal government will be able to recover a portion of what it has paid out by virtue of having become the holder of the right of claim, it will be compensated in part for these payments.

With Bill C-55, the federal government would create a priority higher than guaranteed creditors for workers' claims of unpaid wages and vacation pay. Their claims would take precedence over current assets such as cash, up to the not insignificant amount of $2,000.

● (1055)

As was said earlier, the advantage is that workers will receive their money a lot faster than they would under the existing order in which creditors are paid. They would no longer have to wait for months and years; it would most likely be a matter of weeks. If this program does not run into the same kind of trouble as the gun control program, workers will be paid faster.

However, it seems that 3% of workers will not recover all the money owed to them. We will have to see to what extent this is indeed the case and what we can do to help these workers.

Members understand that since workers will have assigned their right to claim to the federal government, it will become the preferred creditor.

Let us look now at the pension protection scheme. Bill C-55 introduces a mechanism to protect the workers' pension plans.

Under Bill C-55, a court would be able to authorize a proposal for bankruptcy or for an arrangement only when proof has been made. This means that employee and employer contributions to the pension plan that had not been paid at the time of bankruptcy or receivership have been paid or that the court is satisfied that the contributions will be paid under the arrangement, or that the involved parties made an agreement.

In addition, regular pension contributions by employees and their employers that had not been not paid when bankruptcy or receivership was declared will have priority over secured creditors in cases where the employer could not avoid bankruptcy and liquidation of its assets.

This will not solve everything. Nonetheless, as mentioned earlier, it is small step in the right direction.

There also are retirees whose income will decrease, while others will lose almost all their income. Again, this will improve the situation slightly. What is more, it establishes the principle that workers must receive the benefits from the retirement fund they contributed to over the years.

I see that my time is running out. I want to speak specifically about student loan bankruptcy. Bill C-55 proposes amending the rules for student bankruptcy. Currently, the Bankruptcy Act stipulates that a person filing for bankruptcy cannot be discharged from a student loan if that person is still at school or finished school less than 10 years earlier.

Under Bill C-55, a person can be discharged from student loans, through bankruptcy, seven years after finishing school instead of ten. The bill also allows a court to discharge a bankrupt from student loans if that person stopped going to school five years prior and has excessive financial difficulties.

I must say that the Bloc Québécois has been long committed, but only formally in the 2004 election campaign, to abolishing the period during which a student cannot be discharged, through bankruptcy, of his or her student loans. To that end, the Bloc Québécois supported Bill C-236, introduced by the NDP, which proposed reducing the period to two years. Any change that leans toward abolishing this waiting period will get the Bloc's approval.

Allow us to say that this discrimination against former students is based on the prejudices some people have toward those who declare bankruptcy. Such prejudices includes thinking it is easy to declare bankruptcy, when it is common knowledge that a judge has to decide on the matter and deny any outrageous claims. Another prejudice suggests that students are more inclined than other social groups to try to get out of commitments like debt. However, there are no studies to prove that.

Basically, the change from ten to seven years is arbitrary. Why not six or two years, or nothing at all? You can expect the Bloc Québécois to propose an amendment to this section during study in committee.

Finally, this bill is far from perfect. In fact, as I said, it is a small step in the right direction. The Bloc Québécois is in favour of the principle of BIll C-55, even though it is fully aware that employees usually have no means of protecting themselves when the employer is in a precarious financial situation.

Employees do not have the same capacity as financial institutions to absorb a loss of income for hours worked. Their salary is their only source of income, unlike the banks and the mortgage creditors.

It is difficult for an employee to assess the risks of working for a given company. When an employer is in financial difficulty, its best staff members may decide to leave the firm to avoid losing income, thus further limiting the employer's ability to deal with the problem.

● (1100)

The Bloc Québécois is formally committed to correcting the current situation, which is inadequate. It is pleased to see the federal government recognizing that major changes to the Bankruptcy and Insolvency Act are necessary to ensure better protection for wages and pension funds.

However, while it shares workers' enthusiasm about the introduction of Bill C-55, the Bloc Québécois notes that many future improvements will be required to respond to the lack of protection for workers' salaries, severance pay, vacation pay and pension funds.

The bill also addresses a number of separate subjects, such as student bankruptcy. An amendment will be submitted in committee. The Bloc Québécois has committed to abolishing the waiting period during which students cannot be discharged from their debt by bankruptcy, and we will be reviewing this in committee.

And so, these are the topics Bloc Québécois intends to bring up for discussion when this bill is studied in committee.

[*English*]

Ms. Jean Crowder (Nanaimo—Cowichan, NDP): Madam Speaker, I want to thank my colleague from the Bloc for speaking in favour of some portions of this bill before the House.

The question I had for the member was specific to the student loan provisions and the discharge of student debt. I would like the member to clarify the Bloc's position on this. As we well know, student debt has skyrocketed over the last 10 to 15 years in Canada. In the province that I come from, students not only face very high tuition fees, but the cost of living in cities like Vancouver is extremely high. Students come out of a four year education with a debt load that prevents them from often participating fully in their community.

I would like the member to clarify her position around what she sees as reasonable in terms of discharging bankruptcy for student loans. I am not clear if she was saying there should be no waiting period or if there should be some sort of timeframe in there.

● (1105)

[*Translation*]

Mrs. Carole Lavallée: Madam Speaker, the amendment that the Bloc Québécois will put forward in committee aims essentially at abolishing the specified time period so people can discharge their student loans in the same way as any other debt.

The rationale for imposing this time period is not based on any studies that may have been done. It is based essentially on prejudice because some people think that bankruptcy is easy, even though we all know that a judge must render a decision on that. There are also other types of prejudice against students, or should I say former students. Indeed, after ten years they are no longer students, having been out of school for quite some time. Some believe that former students are more inclined to go bankrupt than people belonging to other social groups and that it is an easy way for them to free themselves from their student loans.

Nobody wants to do that. Bankruptcy is a difficult and very emotional process for those who go through it. It is not true that a former student will not hesitate to go bankrupt just to get rid of his or her student loans.

This is why we believe that the change from ten years to seven years is arbitrary. Why not six years? Or two? Or nothing? It is in that context that the Bloc will be proposing an amendment in committee.

Mr. Gérard Asselin (Manicouagan, BQ): Madam Speaker, first, I want to congratulate my colleague, the member for Saint-Bruno—Saint-Hubert, who is the Bloc Québécois labour critic. She gave an excellent speech. She has also done a great deal of research and hard work.

I think that her speech was a good reflection of the representations made to her by various labour organizations. The representatives of these labour organizations have been meeting with the Bloc Québécois members and parliamentarians so that bills such as this one can be debated in the House. Consequently, parliamentarians can work for and on behalf of not only Quebeckers, but all workers who pay EI premiums, earn wages and often have invested a great deal of money in pension funds.

When a company or business goes bankrupt, numerous challenges must be faced. Often, many workers not only lose their money and their pensions funds, but sometimes they are not eligible for EI. When new entrants to the labour market work for a company that declares bankruptcy, and they do not have the required number of weeks or hours of insurable employment, they fail to qualify for EI.

Another problem, when a company goes bankrupt and not enough notice is given, is that it is difficult to return certain workers to the labour force. Older workers are a case in point.

That is why, together with Human Resources Canada, the Bloc Québécois is trying to improve the employment insurance program through the POWA, the program for older worker adjustment. It is not easy to place individuals who worked for 25 or 30 years for a company that goes bankrupt.

It is tough for those people who find themselves without a job overnight, or those who had invested large amounts to secure their retirement. Unfortunately, many have all their eggs in the same basket and, when the company goes bankrupt, they lose everything. Very often, this causes insecurity in the family, due to their age and their chances of re-entering the labour market.

The financial institutions are often the first to get their money. They pay themselves first in the event of a bankruptcy. Then, the governments claim what they are owed and, finally, the suppliers. Often all the money set aside for the employee retirement fund is used up.

I have a question for my hon. colleague from Saint-Bruno—Saint-Hubert. Can we give workers the assurance that, with this bill, they can be sure to be among the first, even before governments and financial institutions, to get their money? Will they also be able to rely on a program, which could be developed with Human Resources Canada, to help them re-enter the labour force? Either training could be provided or older workers could have access to a program providing them with financial assistance until they return to work.

● (1110)

Mrs. Carole Lavallée: Madam Speaker, I will start by thanking my colleague from Manicouagan for his excellent question and its excellent link with POWA, the program for older worker adjustment.

Even if Bill C-55 provides a wage earner protection program, we do not yet know what will come of it. The minister has referred to precedents established in the United Kingdom and Australia. It will be necessary to go there and see for ourselves how it works in practice here, eventually, and whether workers do indeed get what they are owed.

There will still, however, be the problem of one segment of the working population: the ones aged 50 or 55 whose employer goes bankrupt and who will never get back what is owing to them and will never be able to bridge the time between their last pay cheque and their first pension cheque. These older workers need help. Some need retraining, but most need financial assistance to make it until pension age.

The connection made by my colleague from Manicouagan is a very interesting one. If it were possible, that could be part of Bill C-55. For the moment, this good bill needs complementing with POWA for older workers.

[*English*]

Mr. Pat Martin (Winnipeg Centre, NDP): Madam Speaker, I am grateful for the points brought forward by my colleague from the Bloc. In her opening comments she said that we were critical that Bill C-55 did nothing to protect workers' pensions in the event of a bankruptcy. In other words, if there were a massive shortfall in a pension of $20 million or $30 million, the employees of that bankrupt company would still be without their pensions at the end of the day. Could she elaborate on that point?

[*Translation*]

Mrs. Carole Lavallée: Madam Speaker, I am sorry, but I do not think I got what my NDP colleague was asking. I did not grasp his question very well. Could I ask him to repeat it? I am sorry, but I did not hear his question.

● (1115)

[*English*]

The Acting Speaker (Hon. Jean Augustine): The hon. member for Winnipeg Centre will get another opportunity to expand. At this point in time the clock has run out on the member for Saint-Bruno—Saint-Hubert. Resuming debate, the hon. member for Winnipeg Centre.

Mr. Pat Martin (Winnipeg Centre, NDP): Madam Speaker, the point I was making I will make within the context of my speech. As much as we welcome the introduction of Bill C-55 and as much as we are pleased to be dealing with the important issue of benefits for employees who are the victims of a bankruptcy, we are critical in that the bill would do nothing to protect those employees who may lose their pensions altogether in a bankruptcy. In other words, if there is a $50 million shortfall in the pension plan when the company goes bankrupt, nothing in the bill guarantees the pensions of those workers. That was the point I was making to my colleague from the Bloc.

I will comment on the bill in some systematic order because there are four key elements to it. I disagree with my colleague from the Conservative Party. This is not a complicated bill. It is quite straightforward. It finds its origins in the principle that in the event of a bankruptcy the rights of workers should be paramount, they should be first, not dead last in order of priority as per the existing bankruptcy laws.

I would ask if there might be unanimous consent in the House to allow me to split my time with colleague from Hamilton Centre.

The Acting Speaker (Hon. Jean Augustine): Does the hon. member have unanimous consent to split his time?

Some hon. members: Agreed.

Mr. Pat Martin: Madam Speaker, the current bankruptcy laws were clearly written by the monied class. Big money has controlled things in Ottawa for so long that it is no surprise that all the laws are structured in such a way as to look after the interests of big money. That is the case in the current bankruptcy laws. Employees, workers, have been left hung out to dry in the event of bankruptcies in alarming numbers.

There are approximately 10,000 commercial bankruptcies per year in Canada, with over 100,000 employees owed back wages, benefits and pension contributions. It is a huge problem. Some of the estimates are as much as $2 billion per year are owed to employees due to bankruptcies. Imagine the impact of that.

The government finally has listened to the years of pleas from members of various parties to do something about this. I personally had a private member's bill that called upon the government to address the issue of bankruptcy.

One of the key elements in Bill C-55 is the wage earner protection program. For the record and history books, this is the manifestation of a commitment negotiated with the government by the NDP in Bill C-48, or what we call the NDP/Liberal budget of 2005. The Liberal government is living up to the commitment made at the bargaining table with our leader, the member for Toronto—Danforth. We find ourselves with the wage earner program.

Under this proposal, an employee can seek restitution for up to $3,000 for back wages left owing. The government would then seek compensation from the trustee of the bankruptcy, wait in line and be reimbursed. It proposes as much as $2,000. It is an idea that we can agree to in concept. My colleague from Hamilton Centre may be able to expand on it. This was an NDP idea that was put in place in the province of Ontario by the NDP government in the early 1990's.

My problem with it is the figure is too low. We do not believe a $3,000 compensation would compensate as many affected workers as the Minister of Labour would have us believe. Partly, it should not just be back wages and holiday pay. It should also include severance pay or termination pay which may be included in a person's terms and conditions of employment. It also should include commissions for salespeople who may work in retail sales who get their commissions at the end of every month. That could amount to many thousands of dollars.

We believe that threshold limit of $3,000 is not adequate and that the employees should be able to seek compensation for wages, holiday pay, termination pay, severance pay and commission for salespeople.

We also are critical that there is a three month exemption. If someone has worked for the company for less than three months, that employee is not eligible for this program. I do not see the logic in that. In fact someone who has only worked for less than three months is more vulnerable than a person who has 20 years of service if there are two weeks back wages owing. That person may have been catching up on their personal finances. We are critical of both those issues and will be moving amendments to that effect.

The second element of the bill has to do with student loans. My colleague from the Bloc has pretty much reflected our criticisms of the proposed amendment to the student loan provisions. Let us be clear. The 10 year limit that students have to wait before they can declare personal bankruptcy is like a life sentence. This is crazy. Why should they be treated any differently than any other Canadian?

This came into effect only when the Government of Canada off-loaded the student loan system to the banks. When it privatized and contracted out the student loan program, the banks, in assuming the responsibility, demanded that they did not want kids to get out from under their debt for 10 years. That is baloney. The NDP supports the idea, especially in the cases of hardship, that the discharge in the event of student loan debt should be no different from ordinary Canadians. We will be negotiating that down with the ruling party.

● (1120)

One of the most important terms of this new bill is the Companies' Creditors Arrangement Act amendments. Under the current rules, and we have checked this out and had it confirmed recently, a judge may unilaterally and arbitrarily alter the terms and conditions of a collective agreement of the employees. When a company goes under the CCAA and is seeking to avoid bankruptcy, a judge may alter the creditors' arrangements or collective agreements unilaterally. This is fundamentally wrong. We cannot and will not abide by that.

The amendment put forward by the federal government states that a judge may intervene to the point that he or she may direct the parties, labour and management, to sit down at the bargaining table and try to negotiate amendments to the collective agreement, but the judge may not unilaterally impose changes to the collective agreement. This is a step forward, providing we can be abundantly sure that the default position will be the status quo. In other words, if the two parties at the bargaining table reach an impasse, the default position will be to revert back to the collective agreement which will stand in full force and effect as it is. Providing that is the understanding, we will support element three of the bill.

The final element of the bill we also support, and I will leave more details of this to my colleague from Hamilton Centre. It deals with personal bankruptcies, in this case for very wealthy people making $200,000 a year or more, which very few do. Usually only heads of crown corporations like David Dingwall make more than $200,000 a year. They would not be allowed to have their taxes discharged in the event of bankruptcy for a period of five years, during which time they would have to try to negotiate a payback period. In other words, the people of Canada have a chance to be made whole if these high income earners try to welsh out on the back taxes they owe to Canada.

I believe this traces its origins back to the Radwanski scandal. George Radwanski, the former privacy commissioner, owed $650,000 in back taxes and it was forgiven 24 hours before he started his job as a $230,000 a year privacy commissioner. There was no payback whatsoever to Canadians. That could not happen under the provisions of this new bill. He would have had to sit down and negotiate a five year payback period. In that scenario, making $230,000 a year as a privacy commissioner, he could have paid back $100,000 a year to the people of Canada and still earned a good salary as privacy commissioner. I support element four of Bill C-55.

We will support Bill C-55 because it is better than the status quo. It gives some relief to wage earners who are affected by bankruptcy. There are some good elements to it. We will be fighting for amendments at committee.

● (1125)

[*Translation*]

Mr. Gérard Asselin (Manicouagan, BQ): Madam Speaker, I would like to fully understand Bill C-55. I want to be sure that the workers in a company are well protected.

There are workers who have been employed by a company and have contributed to it for years. They made a choice during collective agreement negotiations to earn a bit less in wages in order to put a bit more money into their retirement fund. These people made a choice in the present but for the future. I would like to be sure that Bill C-55 does a good job of protecting these workers.

If someone invests in a pension fund for years, it should be exclusive to that person. It is obvious that if the employees' and employer's retirement fund is in the form of a consolidated fund within the company, if the company should ever go bankrupt, everything goes down.

It should be said that the government itself is hardly setting an example with employment insurance. It appropriates the insurance paid by employees and employers and puts the surpluses into a consolidated fund that it uses for its own purposes and to make itself look like a good manager. It is not setting a good example for companies.

Companies should establish a separate fund, reserved and untouchable, into which the employees' contributions to their pension fund would be paid as well as the employer's.

We never hope that a company goes bankrupt, but unfortunately this happens sometimes when assets and liabilities get out of line and the company finds itself with its back to the wall. It has no other choice than to declare bankruptcy. When this happens, the retirement fund that employees have negotiated should be untouchable. The employer's and employees' contributions should be fully reimbursed immediately when a company goes bankrupt. Employees can then reinvest this money in a particular fund of their choosing, for example an RRSP.

The current situation is unacceptable, in my view, for employees who made a choice when their collective agreements were being negotiated to sacrifice some of their wages in order to put the money into their retirement fund. It is unfortunate that when a company goes bankrupt, people can lose everything and find themselves on the verge of bankruptcy, just like the company.

Does the member agree with me that Bill C-55 should force companies to refrain from meddling with retirement funds and ensure that these funds are reserved exclusively for the people who contributed to them?

[*English*]

Mr. Pat Martin: Madam Speaker, I thank my colleague from the Bloc for making a very critical point. This bill would not protect pensions in Canada.

The NDP's original position was that a bill should come forward that does in fact protect pension shortfalls. This is not it. There will have to be another piece of legislation sometime soon.

I can speak briefly to one recent example in the Province of New Brunswick. The Nackawic mill recently went bankrupt. The employer had been dipping into the company pension plan for the last year. In other words, it was keeping the company running by the company pension plan; it was spending it. When the company finally went bankrupt, the pension plan was reduced by $30 million. There are employees at that mill now with 25 years' service and not one penny of pension. The only pension is for those with 25 years plus. It is a terrible, tragic issue.

There are enough assets in the bankrupt company that it could have reimbursed that pension plan, but the employees rank at the bottom of the list, not top of the list. In fact, the CEO of that company structured it in such a way that he, personally, is at the top of the list. He will be made whole; the employees will have nothing.

Clearly, this bill would not resolve issues where the company has been robbing from the employees' pension plan. There should be legislation not allowing employers to dip into pension plans because those are the employees' wages deferred and being held in trust for their exclusive use. It is not the company's money and should never be. However, this bill falls short on that.

● (1130)

Mr. David Christopherson (Hamilton Centre, NDP): Madam Speaker, I want to thank my colleague from Winnipeg Centre for the leadership he has shown on this issue and on Bill C-281, the workers first bill, which does actually speak to the issue of protecting pensions in a real and meaningful way.

I want to break out a couple of the pieces that my colleague has already raised and dissect them a little more. First, I would like to join with my colleague in setting the record straight. I was reading yesterday's *Hansard* where the minister said in his opening comments, referring to Bill C-55 and wage protection, "This type of program is not radical or new, but it is for our country".

On a technicality, on a federal basis it is, but within our nation, within the country, my friend from Winnipeg Centre is absolutely right. The Bob Rae government, the first NDP government in Ontario, brought in as its very first bill an employee wage protection plan that did exactly what Bill C-55 speaks about. In fact, it went a little further. Let us understand that the NDP has a track record of taking commitments on these issues, putting them into legislation and making them real, and doing it long before other parties in this place have seen it as a priority and enacted it.

What is important in this story, though, in addition to setting the record straight as to whether or not this is ground breaking legislation, is to understand that in the Province of Ontario right now, as a I stand in this place, that law has gone. That protection for workers has gone. That law was ripped out and that protection does not exist in Ontario right now. Why? Because the Conservative government of Mike Harris eliminated it and took away those rights. Let us understand that when it comes to workers' rights, really, at the end of the day, we are either with them or we are against them. It is clear where Harris was and where the NDP and Bob Rae were. It is good that this is happening. Parts of the bill are important and do provide protection, but it is far from ground breaking in the context of Canada as a nation.

Again, the bill has some good elements in it. There is no question about that. It needs serious work in committee and we are hoping we will get the commitment from all the other parties. Certainly, today, it sounds like our colleagues in the Bloc are prepared to roll up their sleeves and make the amendments necessary to give effect to what Bill C-55 purports to do, but without that work, the bill will fall short. However, we will support it. There are some good things in the bill and we will make it better, but it does not protect pensions.

I am emphasizing the comments of my colleague from Winnipeg Centre that it does not protect pensions. It will take Bill C-281, the workers first bill or one like it to do that. Let us remember that in the case of a bankruptcy, again articulated by my friend, under the currently law, if our pensions are not totally funded, we are at the bottom of the list. The banks, the creditors and the government come first. Workers are at the bottom.

It is interesting that the minister said in his comments yesterday: "—protection of workers whose employers undergo restructuring and become bankrupt. I am very passionate about this topic". Great. Let us see some passion behind Bill C-281 and make some real changes that provide real protection for workers. That is the kind of passion we want to see from the Minister of Labour.

In the last couple of moments I want to deal with section 33. My colleague has talked about that. The minister made some reference to it where he said:

> Canadian workers suffer lost wages, reduced pension benefits and uncertainty that their collective agreements may be unilaterally changed by a court.

● (1135)

The working assumption right now is that federal judges do have the power. That is the current wording. That is somewhat unclear and the first thing that the committee has to do is establish whether or not judges currently have that power. If that takes us into some legal battle, so be it. However, we cannot adequately deal with section 33 until there is an absolute determination as to whether or not, under existing legislation in its entirety, a judge is allowed the power to step in, in the case of bankruptcies and restructuring, and unilaterally order that collective agreements be changed. Let me say parenthetically that they are never changed to the benefit of workers, they are always changed to reduce the benefits that are in those collective agreements. That is the worry.

If they do have that power now, then subsections 33(1) and 33(2) take us two-thirds of the way, but there needs to be another amendment, an amendment that we would call the local 1005 steelworkers amendment. In the question and answer part of the package the minister released, there is the kind of protection that my friend from Winnipeg Centre spoke of. It says that a judge, upon application of the employer, can give a court order that negotiations can begin and it forces the two parties to sit down.

In the context of judges having unilateral power, if that is now curtailed to only direct an order that there be a negotiation at a table, then that is a good thing because it would then be more restrictive. It is taking away the authority and putting it into bargaining. What is missing is what is included in the questions and answers. It is missing in the legislation and it asks, what happens if they cannot agree to any concessions?

The questions and answers part of the package put out by the minister said that the agreement would then stand pat as it is. Every word, every comma and the expiry date, and that package, the collective agreement as it was, then goes in as part of the proposal that is put forward to the creditors as to whether or not that is acceptable. It may help the proposal float. It may sink it but nonetheless in law it would establish that judges will not unilaterally change it and that one cannot be forced to make changes at the bargaining table.

The employer representatives begin by saying their niceties, then the other side looks at them and says, we have no interest in changing anything in our collective agreement right now and we will meet you at the end of the expiry date and until then we do not need to talk about this collective agreement in terms of amendments any further. Period. End of meeting. The contract would stay in place. The powers of the federal judges would have been curtailed and the labour movement would have maintained the rights that it currently has to collectively bargain on behalf of its employees without a judge or anybody else unilaterally changing that.

If it is determined, however, that judges do not have that power right now and that it becomes the accepted interpretation by all, that they do not have it, then we want section 33 out of there because it means that we are now, through Bill C-55, giving judges the power to intervene in the collective bargaining process in a way that they currently do not have the power to do. We are not interested in amending section 33 with a new subsection 33(3) in that case. We want and will demand that the entire section 33 be removed. Make no mistake. This issue will be a major determinant as to whether or not the bill meets the test.

I have not heard from the minister. The minister said in his language that there is uncertainty. There is and that is why we want the uncertainty removed. It should be replaced by clarity, so that we know if judges have that power or not. Depending on the definitive answer to that, what will happen with section 33 will then make itself apparent in a way to which I have already spoken.

Bill C-55, as imperfect as it is, contains some benefits and is here for two reasons. One of them is not because the Liberals care that much about workers. The other is because the NDP through the member for Winnipeg Centre introduced Bill C-281 in terms of protecting pensions and putting them at the top of the creditors list, and the government was on the dime. It was on the spot and it had to do something.

● (1140)

To date, the government has not told us it is prepared to make that legislative change, although on the campaign trail the Liberals were all full of protection for workers and pensions. It was so motherhood and apple pie one would be shocked to believe it had not already become the law.

The second reason Bill C-55 is here is that it was ordered and demanded in the NDP budget amendment Bill C-48.

Those are the reasons it is here. The NDP drove this bill to be here. We will work with colleagues in the House to make this bill as good as it should be. We will continue to fight for Bill C-281. That is not going off the radar screen just because Bill C-55 is here. Those pensions will be protected.

Mr. Alan Tonks (York South—Weston, Lib.): Madam Speaker, I have a huge amount of respect for the member, in particular his experience at the provincial level. The subject matter in terms of the protection of pensions in bankruptcy and so on is extremely important. I congratulate the member for his intense presentation on that.

My question has to do with jurisdiction. I understand how the architecture of Bill C-55 concentrates on the issue of pension protection in bankruptcy, but in terms of the regulators and regulations there is as much a provincial role with respect to this issue. I wonder if there is a two-pronged response that could be made in addition to the contents of this bill.

Could the member please elaborate on what additional initiatives should be taken with respect to provincial jurisdiction? I know he has a great deal of background in that particular area.

Mr. David Christopherson: Madam Speaker, there is a duality of responsibility. The reason the pension protection which normally is regulated at the provincial level ends up here is that the bankruptcy legislation is federal. Oftentimes the provinces say, "We do not need to do anything with the pensions beyond just monitoring, regulating, making sure the payments are being made and providing an accounting of accounts, et cetera. The real legislation has to be changed at the federal level, the bankruptcy level".

Quite frankly, the labour movement and workers have been chasing their tails and have been sent around in a spin. That is why we are creating a beachhead on this issue and saying that once and for all, in the case of a bankruptcy, let us make sure that pensions are the top priority. It is that straight up.

Relating to that, and this is important because I know it is easy to mislead folks on this one, in Ontario the Bob Rae government brought in a bill that was known as too big to fail, meaning that the super large corporations like General Motors and Algoma are not going to fail, and upon application would be allowed to defer some pension payments.

I am glad I have a chance to clarify this between federal and provincial. Under that legislation a corporation had to make an actual written proposal. Within that proposal it had to show how much money it was going to defer, how long it was going to take to catch up and by what date will it not only have kept current accounts going in the latter years of the plan but by what date will it give an absolute 100% catch-up on that. It was meant to be an interim measure.

When we were in government a couple of proposals were put in front of us under our structural legislation and we approved them. To the best of my knowledge every one of those proposals did exactly what they purported to do, which was to provide a little cash flow in the short term but over the medium term the money was entirely paid back and those funds are now where they should be.

What happened in the case of Stelco, which unfortunately is the poster child for people getting screwed out of their pensions, was that a proposal was made by Stelco after the Rae government had been defeated and Mike Harris had taken over. Mike Harris approved the Stelco plan and there was nothing in it about when the money would be paid back. There was no time period for catch-up. There was nothing. It was merely Stelco asking if it could avoid paying its pension payments for a while under a certain clause and the Mike Harris government very nicely rubber stamped it and said yes. A few years later, bingo, we are into this jackpot.

The Conservatives to this day still blame Bob Rae for bringing in the structural legislation. That legislation did what it was supposed to do. It was the government of the day that did not do its job to protect those pensions and workers. That is why we are here today, to fix at the federal level what cannot be fixed at the provincial level.

● (1145)

Hon. Jerry Pickard (Parliamentary Secretary to the Minister of Industry, Lib.): Madam Speaker, it is my honour and privilege to speak to the second reading of Bill C-55, 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.

The passage of the bill will have real effects on the economy and on individual Canadians. It will affect entrepreneurs, large and small creditors, lending institutions, consumers, workers and students. Approximately 100,000 personal bankruptcies and 10,000 business bankruptcies occur each year, affecting more than $11 billion of debts and redeployment of $4.5 billion of assets.

Bill C-55 will ensure the Canadian insolvency system meets the needs of the Canadian marketplace as well as contributes to the socio-economic objectives of helping Canadians in financial distress.

Canada's insolvency system centres around two main statutes, the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.

Allow me to explain briefly what each statute does and how they interconnect. The Bankruptcy and Insolvency Act, or BIA, provides the legislative basis for dealing with both personal and commercial insolvency issues. Under the BIA there are two options available. When an individual or company declares bankruptcy, the act provides for the liquidation of bankrupt assets by the trustee and the distribution of proceeds in a fair and orderly way to the creditors.

Alternatively, the act provides a means for persons or companies to avoid bankruptcy by negotiating a settlement with their creditors. It is called the proposal. Under the act the use of proposals has grown considerably in recent years and they now account for 15% of all filings by individuals and 25% of corporate filings under the BIA.

The Companies' Creditors Arrangement Act, or CCAA, applies only to corporate insolvencies involving debts over $5 million. Its purpose is to establish a framework to govern the restructuring of companies. The CCAA provides for a court driven process whereby a company obtains a court order to prevent its creditors from taking action against negotiating an arrangement with its creditors. The use of the CCAA has greatly expanded over the past decade, and most restructuring of large insolvent companies is now handled under the CCAA.

There is a broad consensus among stakeholders that reforms to the insolvency legislation are needed. Bill C-55 has four primary objectives.

First, as the Minister of Labour and Housing has outlined, Bill C-55 greatly enhances the protection of workers where their employer goes bankrupt or undergoes a restructuring process.

Second, it seeks to further encourage restructuring as an alternative to bankruptcy. Restructuring produces better results for creditors, saves jobs and enhances competitiveness.

Third, the bill is intended to make the bankruptcy system fairer and to reduce the scope for abuse. Bankruptcy law is about sharing the burden. Hence it is essential that we consider fair and equitable agreements by all parties.

Fourth, the administration of the system will be improved as many provisions in both the BIA and CCAA need to be clarified and modernized in order to ensure a more effective and predictable insolvency system.

Let me offer specific examples on how Bill C-55 is going to improve our insolvency system. To foster the use of reorganization as an alternative to bankruptcy, the CCAA will be substantially rewritten providing guidance and certainty where none previously existed and codifying existing practice while still preserving the flexibility that has made the CCAA such a successful restructuring vehicle.

● (1150)

Several new rules will ensure greater transparency in the process and a better ability for the active parties to defend their interests. This includes rules on interim financing; the termination of assets of contracts; governance arrangements of the debtor company, including the role of the monitor who will need to be the trustee; the sales of assets outside the ordinary course of business; and the application of regulatory measures.

Finally, this bill will greatly improve the administration of Canada's insolvency system through a number of changes affecting the role and power of trustees, including when they act as monitors in CCAA cases and as receivers on behalf of secured creditors. The supervisory role of the Office of the Superintendent of Bankruptcy is clarified and also includes the establishment of a central registry for the CCAA cases.

It is widely accepted that insolvency rules that govern personal insolvency play an important socio-economic role. They permit honest but unfortunate individuals who experience significant financial difficulty to discharge their debts, obtain a fresh start and thereby have the best possible chance to restore their financial situation.

At the same time, a well functioning insolvency system strikes the appropriate balance among competing interests in circumstances in which by definition there is not enough money to go around. Accordingly, it is important that the system be designed in such a way that it functions effectively and efficiently and provides the right incentives so that it deters potential abuses.

Bill C-55 accomplishes these objectives. It does so through tailored improvements to the Bankruptcy and Insolvency Act. By way of background, the proposed changes to the Bankruptcy and Insolvency Act which impact on individuals were extensively examined by the personal insolvency task force, the PITF, during the period of 2000 to 2002. The PITF was an independent panel established by the Office of the Superintendent of Bankruptcy with membership from all principal stakeholder groups, including creditors, trustees, consumer credit counsellors, lawyers, judiciary and academics.

The PITF released its report in August 2002. The report served as the main point of reference for representations that were made before the Senate Standing Committee on Banking, Trade and Commerce, which conducted its own review of Canada's insolvency legislation in 2003. That is to say that the consumer insolvency issues addressed in Bill C-55 have been the subject matter of extensive debate and consideration by both the PITF and the Senate committee.

In the area of consumer bankruptcy, one of the key challenges is the growing number of cases. Consumer bankruptcies have significantly increased over the past decades, from 1,500 in 1967 to some 84,500 cases last year. The number of insolvencies is tied to many factors, including challenges in consumer lending practices, higher levels of personal indebtedness, and a more tolerant attitude toward bankruptcy.

Since 1998, however, the annual average growth in consumer bankruptcies has decreased to approximately 2% per year, compared to 12% for the preceding three decades.

During the same period, the number of consumer proposals has more than doubled and now represent approximately 16% of all filings. This reform will continue to encourage the use of consumer proposals which offer the debtor an alternative to bankruptcy and typically result in higher recovery by creditors. For instance, the threshold for a consumer proposal has been increased from $75,000 to $250,000, thereby allowing more individuals to choose to make a proposal rather than file for bankruptcy.

Among the significant changes introduced to the consumer insolvency system by Bill C-55 is a provision to curb the potential for strategic behaviour by individuals seeking to extinguish large income tax debts. The bill eliminates the eligibility for automatic discharge for those debtors with personal income tax debts exceeding $200,000, where it represents 75% or more of unsecured debts. Instead, these individuals have to seek a court order for discharge and the court would be able to fix conditions relating to the discharge.

● (1155)

In keeping with the principle that those individuals filing for bankruptcy who have the financial means to repay a portion of their debts ought to do so, Bill C-55 provides for amendments to existing surplus income provisions. Under the proposed regime, first time bankrupts with surplus incomes will be required to pay a portion of their surplus income to their creditors for a period of 21 months, an increase of approximately 12 months to the present situation.

Reform of consumer insolvency provisions is also aimed at making the current system fairer for individuals. This includes the elimination of inequitable treatment of retirement savings plans and improved treatment of student loans and bankruptcies.

Under the existing laws, some retirement savings plans, namely, those associated with life insurance policies and registered pension plans, are generally exempt from seizure in the bankruptcy. Other types of registered retirement savings plans, on the other hand, such as those held by banks, brokerages or in self-directed funds, are generally not exempt from seizure in bankruptcy. The difference in treatment of various retirement savings plans seems to conflict with the public policy goal of encouraging Canadians generally to save for retirement.

Under Bill C-55, the registered retirement savings plans, regardless of whether the savings are a part of the employer sponsored pension plan or whether they are held in a life insurance savings plan, will enjoy the same protection from seizure and bankruptcy.

The bill contemplates that certain requirements must be met in order to ensure the public policy goal is fulfilled and to avoid the incentive for strategic behaviour. Specifically, contributions made within 12 months of bankruptcy and the amounts in excess of the cap would be available to creditors. Furthermore, there is a requirement that the savings be locked in until retirement.

In respect to student loans, the bill proposes that the waiting period before which a student loan debt may be discharged in bankruptcy will be reduced from 10 years to seven years. Furthermore, the bill would reduce the period before which the application may be made to the court to have a student loan debt discharged on the basis of undue financial hardship. That would be reduced from 10 years to five years.

One of the functions of bankruptcy law is to define which parts of the bankrupt property are available to be divided among creditors and which parts will remain under their control. In recent years a series of court decisions has cast doubt on traditional interpretations of which parts of the bankrupt property are available to creditors. The decisions reveal ambiguities in the wording and legislation. These are clarified through changes by the proposed bill.

In addition, proposed changes to provisions which address the way in which the Canadian insolvency system is administered are designated to improve the integrity of the system as a whole. A number of the procedural changes to the consumer insolvency provisions will enable the process to be streamlined along the lines recommended by the PITF. It is anticipated that these changes will result in a system which is better able to respond to the needs of individual debtors and their creditors.

In the Speech from the Throne, as well as the budget, the government clearly staked out its commitment to encourage entrepreneurship and risk taking. It has committed itself to creating a society and a business climate where educated and skilled people want to live and work, as well as a country that is the best place to do business while providing effective safety nets for individuals in financial difficulty.

Bill C-55 is a significant step to ensure that we respect Canada's insolvency laws, that the framework is right, that the rules are fair and equitable and that the regulatory structure is smart and responds to the needs of the marketplace. I am confident that the measures proposed in this bill will have broad support among Canadians. I urge all members of the House to support this important legislation.

● (1200)

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Madam Speaker, I have a quick question for the member. He talked at great length about alleviating the pressure upon students, particularly those who find themselves in the unfortunate circumstance of having to declare bankruptcy.

We have this extraordinary situation in Canada whereby students enter a rarefied class not accessed by anybody else in the country who declares bankruptcy, that of being unable to move beyond that situation for a period of 10 years, which I find deplorable. It is not a class that anyone would want to be in.

There is a point that causes me some confusion. I was at a University of Ottawa gathering last night. Fifty or so students got together to talk about politics and it was a very interesting exchange. There is one thing they find frustrating when they hear the government talk about its commitment to students and its appreciation of the great energy, effort and contribution that students make to our society and our economy as a whole. Why has that same government witnessed over the past 10 years an average increase of $1,000 every year in the average debt that students are leaving university and college with?

On the one hand the students hear the words, the rhetoric and the ideas about supporting our students, yet on the other hand they are watching their fellow students and themselves accumulate more and more debt, thereby in effect hamstringing their ability to enter successfully into the marketplace and to take further risks and challenges such as opening new businesses.

If they have not already completely lost faith, they have started to lose faith with the words on the one hand and the reality they are facing on the other. That reality is one of increased tuition costs and what I would suggest is a dramatic rise in the amount of debt burden students are leaving post-secondary education with, a burden that is encumbering their ability to take out further loans to buy a car or purchase a house and those types of considerations.

Having gone through school and having acquired student loans, I can speak from personal experience. As for the idea of paying back those banks in the future in good faith because the loans were taken out, it is difficult to hear the suggestion that I should be taking on further debt in acquiring a house and cars, thereby stimulating the economy, or in opening my own business. I eventually was able to open my own business, but only after a lag period, which was unfortunate.

From what the hon. member said today, how can I take the message back to those students and say that we must believe beyond the rhetoric and that this government is actually interested in lowering the debt burden? Let us talk about prior to the students actually having to declare bankruptcy. How can I take back that message about lowering the debt burden that students in Canada are leaving with while under the auspices of his government in the last 10 years we have watched a dramatic rise in the debt our students are having to carry?

Hon. Jerry Pickard: Madam Speaker, the hon. member's question is very significant. When we stop and think about student debt increasing, that is a reality, and certainly I do not think anybody here believes that government should control the costs of education outright totally, but I do believe that the costs of education have substantially gone up over the last 20 years.

When I went to school, certainly we had student debt and we had to pay for bills that we accumulated as students. Some of us were fortunate enough to have summer jobs and earn enough money to pay off the debts and some families were able to help students go through school, but it has always been the case that a student is at the lower end of income in our society.

I think the fact is that each year of school in the main adds a tremendous amount to students' incomes. As they become better educated and better able to enter the workforce, their potential for making dollars is extremely high compared to that of a lot of other Canadians who do not have the opportunity to go to school.

I think it is critical to understand what we as a government have control over. What we are talking about in this bill today is the aspect of the Insolvency Act and how it affects students who find it difficult after they have graduated, for whatever reason. Possibly they could not get a job in the field for which they had been trained or possibly other things intervened. Possibly circumstances in their lives made it impossible for them to make the money to pay back the loans. As a result, there are a lot of filings by students through the Bankruptcy Act.

What we as a government are looking at very carefully is where that maximum is: the number of years that a student has tried to pay back the loan and the ability of that student to pay back the loan. All the information comes together to give the direction that the student cannot afford to pay the loan back. There is a seven year time period in which we are going to allow the student to file bankruptcy at an earlier stage in order to dispense that debt, but in fact that is not the major portion of people who go to school. People graduate and are able to pay off those debts.

I remember one person who spoke with me when I was quite young; it was suggested that sometimes our society may be a little upside down. Young students should get paid high wages and as we get older the wages would be reduced somewhat. Then their houses would be paid for, their new family would be covered and their kids' education paid for and all of that. It was suggested that maybe when we start out our incomes should be higher and then go down. That goes counter to what our society does and the value placed upon it.

We have to remember, though, that those students who graduate do have the potential of earning a great number of dollars in our society. The better educated have the benefits and ability to make higher payments and are able to pay back those student loans. Where it becomes a crisis situation for students is what we are trying to ease this by this legislation. Quite frankly, I think that will be helpful to the students.

● (1205)

Mr. Jeff Watson (Essex, CPC): Madam Speaker, I appreciate the opportunity to speak to Bill C-55. It has taken two years from the time of the report to get wage earner protection legislation before this House, but Bill C-55 is not sufficient in scope. It leaves out an important component that I wish were being discussed here today. I am going to get to a question very shortly. What is left out is unfunded pension liability in situations of bankruptcy protection.

General Chemical Canada is in my riding. We can argue about whether that was a planned bankruptcy or not. I have some suspicions about that. There was a serious unfunded liability for pensions left over in this situation. Bill C-55 addresses only the wage protection that employees would get in a situation like that, but there is this other important component that is not being dealt with.

We found out in the situation with General Chemical Canada that there was no real proper monitoring of the pension fund and there is really no mechanism available to help workers who are not going to get full pension at the end of their careers. I understand that this legislation will not help the employees of General Chemical Canada because there is no retroactivity here, but we want to avoid situations like these in the future.

I have a simple question for the parliamentary secretary. Why is the unfunded pension liability protection for workers not included? Why did the government not bring it forward at this time as part of dealing not only with wage earner protection but with the other component that is important to workers in cases of bankruptcy protection? Why is the government continuing to leave workers twisting in the wind on this one?

Hon. Jerry Pickard: Madam Speaker, in the case of insolvency or bankruptcy, a number of assets need to be distributed among those who have priorities and have put out money. In a bankruptcy situation, everyone must realize that those people who put up the money for that business, the financial authorities and everyone else who was willing to risk their money and support that business, we have to strike a balance between that and the debt side. If we do not strike that balance, I know, and I think every person in the country knows, that some of the pension plans could be multi-million dollar assets. If we were to put that as a super priority, would the normal financial institutions that lend the money to get the businesses in operation retract money in Canada?

Would those investors, who have to invest to make sure corporate interests go forward, be investing in Canada, which would have some very specific laws about bankruptcy, or would they invest in Michigan? Would they invest in the United States? Would they invest in Europe? Would they invest in other areas where they know they have an opportunity of getting some of that money back if a bankruptcy were called?

The difficulty we have is striking that balance. Although I would love to see a policy where every person who has a claim on a pension that may not be fully paid would get every penny of it, in a bankruptcy situation we know that cannot be possible, as well as all the creditors get all their money and the investors get their money. As a result there has to be a reasonable compromise struck.

It is important to realize that under the bill we will be pressing very hard for the corporations to pay the unfunded, unpaid pension liabilities. They will have to be put into the fund. Corporations will not be able to slide by not putting the collected money into the pension plan. However, at the same time, if we put the pensioners above the lenders who are putting in money, no moneys will be invested in Canada. That would be tragic for all jobs in Canada and everyone has to realize that.

● (1210)

Mr. Ed Komarnicki (Souris—Moose Mountain, CPC): Madam Speaker, it is easy for the government to say that it is sympathetic with the employees who have lost vast sums of money in their pensions, in fact everything they may have saved for the future is wiped out in a bankruptcy. I have to wonder why the government would not address that situation by sister or companion legislation to the worker protection. The worker protection is one segment of it and that segment was added, along with others, into the bankruptcy legislation and the legislation relating to pension protection could just as well have been added to it and dealt with so that this problem does not arise.

How is it that we can have $1 million short in the pension fund or better? How does that happen? How does that arise? Why is there no legislation? This problem is not new. It has existed for a number of years. It may require some tightening up of the pension legislation that would deal with things like ensuring that it is properly inspected and that there are proper audits on a quarterly or regular basis to ensure that it cannot be in a position where it is underfunded to such a significant degree.

I would say that a good start is to ensure that happens, to ensure when there is a collective bargaining agreement and that there are some additions to be made for the pension benefits of a fund that those are put in practice in a realistic manner so that the employees can bank on it or count on it and there is someone policing it. It would not have been so difficult for the government to have added some specific companion pension legislation that would really have protected the worker.

The bill that we see here that has included a segment of worker protection was born or came out of the NDP budget bill. When $100 million was assigned toward worker protection, it was a good start, but it was a government knee-jerk reaction and the bill was put together in haste in an attempt to fulfill that promise. In putting it together in haste to attempt to fulfill the promise, the most the Liberals think they will expend is $30 million to $50 million when they ought to have spent at least $100 million.

That amount is really an insignificant amount when we look at what the government has done to workers. It has taken $45 billion out of moneys that have been contributed by workers and by employers and placed it in general revenues. It was used for general expenses of the country when the moneys have come from workers and employers. Instead, the government has given them, as I said before, one-quarter of one-quarter of 1% of what it had taken and the Liberals said they had done something.

It is a meagre first step and I would expect that the government would review that part of the employer-employee legislation when the bill goes to committee. We are essentially supporting the bill because the workers need some protection and it is a good first step, but when the Liberals previously indicated that they must have balance and that they cannot put liabilities such as the pension liabilities ahead of other secured creditors, how is it that in this particular case they have placed the amount that they pretend to pay to the workers in a super priority status to the extent of $3,000 ahead of secured creditors?

We look at the Liberals' promise to the NDP to give them $100 million. When we break it down, at most it is $30 million to $50 million. Of that $30 million to $50 million, they stand to recover more of that through the super priority status that they have given to themselves.

I agree that the worker needs to have access to whatever money is available on a quick and immediate basis and, to that extent, I think it is feature that we have proposed. In fact in our subcommittee, the Conservative Party were first out of the gate to suggest that there should be a worker protection fund that is funded properly and is easily accessible by the worker to meet the immediate needs of the worker.

However, when we look at this particular case, the Liberals have said that the worker has the option, limited to the extent of $2,000 and $1,000 for disbursements, a total of $3,000, to claim from this fund, and then they must assign their interest in the assets to the Government of Canada, essentially, to pursue the particular assets of the business. The assets they are talking about are accounts receivable that have come by work in progress, inventory or cash on hand.

Eventually, those kinds of assets are not ones that will take years and years to follow. It will take some time but we will have an assurance of some collection where the government will get that back.

● (1215)

The Liberals are not really giving very much to us or to the worker but in its knee-jerk reaction it has probably harmed workers into the future and small business without intending to harm them because they have not looked at the big picture.

They say that our secured transaction in this country works on the basis that when people lend money they want security on their assets and if a business does go bankrupt or bad they can get those assets or that money back. Small businesses, medium sized businesses and large businesses, particularly those that are labour intensive, as our country is in a large measure, need start up funds to start a business. Any business that has 10, 50 or 100 employees, we can rest assured it will be producing a product or goods that will take it 90 to 120 days to get paid and it will build up receivables. However the company needs to start, it needs to have employees and it needs to pay them so it goes to a financial institution and asks for a line of credit.

What do we suppose the bank uses for security for the granting of a line of credit? It uses cash, accounts receivable and inventory, the very things that the government is attempting to take away as secured assets and really take away from small business in order to obtain financing.

It does not take a rocket scientist to figure out that if a small businessman goes into the bank to obtain an operating line of credit the first question the bank will ask him now under this legislation is how many employees he has or intends to have. If he says 10 employees at $3,000, that is $30,000 right off the bat that will come off his operating line of credit which is perhaps what a small business needs to stay in business or to start up in the first place. If a businessman has a business with 50 employees times $3,000, that is $150,000 on a cash operation taken without blinking an eye.

What the government has said it will do is take this burden that the workers have to face and place it on, as it says, the bank or secured creditors, but it is not really placing it on the bank or the secured creditors. It is placing it on small business because the banks will certainly protect themselves and will not lend the money. However the small businessman will not be able to start up or even operate a business. Anyone with 100 employees is talking about $300,000 taken out of operation. That is the very kind of dollars that are needed for a business to operate.

I think this particular solution is half-baked, knee-jerked at the expense of small business and the employers and in the end will hurt workers. Surely that is not what we want to achieve.

Our particular submission was, yes, we do need a worker protection fund. Workers do need to be protected but the fund needs to be exactly what it is. It does not need to distribute the burden on those involved in business. It needs to come from either an insurance fund, to which employers and employees contribute, or from general revenues to cover the problem. We need to police it so that the problem does not escalate or happen in the first place. However we do not want to create a bigger problem by half solving another problem, which is what I believe the government has done by the way it has proceeded with this particular measure.

It has been our party's position that we need to strongly look at arriving at a situation where employees can access and be covered for what they have lost. I think there is nothing more important than ensuring that those workers who have invested their energy, their time and who have already performed the labour get paid.

Many of the workers have families, mortgages, car payments and things that are required on an immediate basis. It is on a week to week or bi-weekly or at least monthly basis that they need to have those funds. They cannot go through the protracted legal process of a bankruptcy and wait months and months and sometimes years to get their cash. They need to have easy access.

We support in principle the fact that there needs to be a worker protection fund, that workers need to have easy access to it, but at the same time we do not support the fact that there is a partial super priority status that is placed on secured creditors and ahead of secured creditors, That will simply spell disaster and take many dollars out of our economic business.

● (1220)

In our labour intensive operations, there are companies operating with an operating line of credit. We know the percentage that goes bankrupt will need $30 million to $50 million a year, but the percentage of companies that go bankrupt are very small compared to the number of small businesses that operate across the country. In my community of Estevan, Saskatchewan very few will go bankrupt, but there are many companies. Each of those companies will pay the price for that $30 million or $50 million because they will be unable to get their operating lines of credit.

When we look at the cumulative effect, $300 million in 10 years is into the billions because of the vastness of the operations in Canada. Billions of dollars taken out of our economy from businesses that are able to operate is a travesty on account of a $30 million to $50 million investment. The government needs to rethink its position and the committee needs to look at this aspect very closely before the harm done far outweighs the benefit we are attempting to achieve.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Mr. Speaker, I want to thank the hon. member from the Conservative Party for his presentation. However, I would like him to explain his take on the section of bill dealing with bankruptcy related to student debt.

As you know, the Bloc Québécois has long been committed to abolishing the period of eligibility before a former student can be discharged of his or her debt through bankruptcy. We believe there is a lot of prejudice on this matter. We believe that people think it is easy to declare bankruptcy. However, everyone knows that a judge has the final say. There are others who think that students are more likely to declare bankruptcy in order to be discharged of their student debt, but there is no study to prove it.

Furthermore, they think that changing the eligibility period from 10 years to 7, as proposed in Bill C-55, is completely arbitrary. People do not understand the reason for 7 years. Why not 6, or 3, or any other number? Why not nothing at all?

I would like my colleague from the Conservative Party to share his opinion on student debt.

● (1225)

[*English*]

Mr. Ed Komarnicki: Mr. Speaker, there is no doubt that we as a country are piling debt on our young people to such a degree that it becomes an impediment to many of them who want to advance. Many of them for reasons, perhaps beyond their own control, are facing bankruptcy. It is unfortunate we have brought them to that. I have a family. I know what it costs to go to school and what it takes to obtain an education.

I am well aware of the fact that there are hardship cases. I agree with my colleague that the periods of 10 years or 7 years are arbitrary. The big issue is the hardship of ensuring that is the case, but even then, why 7 years? Why not 5 years or a shorter period? I am not opposed to seeing that period of time reduced, providing the student can show a hardship case and proper parameters are set so there is no abuse of the system.

Because we have created such a vast indebtedness and because students must rely on loans to the degree they do, we have to be careful that it does not become too easy for them to go to university, get an education and then declare bankruptcy. There must be some preconditions to how that happens. I realize that 10 years, or 7 years or 5 years is a long time. I would be in favour of reducing the period, but at the same time ensuring that the case is legitimate, is compassionate and requires intervention to the degree a bankruptcy would.

[*Translation*]

Mr. Gérard Asselin (Manicouagan, BQ): Mr. Speaker, this morning, the Minister of Labour and Housing explained the principle of Bill C-55. It seems as though they are merely paying lip service to this bill. They say that it will be passed and that it is a step forward. Obviously, any effort to improve working conditions, job security and the state of affairs after a bankruptcy is a step forward.

When such a bill is before the House, the Bloc Québécois can assure the government of its full cooperation so that all the necessary changes can be made in committee in order to make this a viable, useful and effective bill.

There is talk of this being a step forward, but it may be the smallest of steps. What is needed is a big step or even a leap forward. Already, Parliament is decades behind when it comes to working conditions in the event of a bankruptcy. We are talking about protecting wages, pension plans and students declaring bankruptcy.

Like the NDP, the Bloc Québécois has already assured the government of its full cooperation and willingness to improve Bill C-55 in committee.

I want to ask the Conservative member the following question. Does the Conservative Party believe that this bill is satisfactory? Does it intend to introduce improvements and amendments in committee in order to ensure that this is a viable and useful bill?

[*English*]

Mr. Ed Komarnicki: Mr. Speaker, there is no question that I would go on the record and say it is a good first step. In some ways we need to learn how to walk before we can run. We are headed in the right direction. My disappointment is it does not have any sister or companion legislation to deal with unfunded pensions.

My major concern, and it will require some vast consultation in committee, is to deal with the partial super priority status. We have reports throughout saying that super priority status is a bad way to go. To say that we will go with a half a super priority status is still a bad way to go.

The fundamental principles are wrong. It needs to be changed. I will be very vigorously defending and promoting a change to that aspect. It is something that will do an injustice to workers and business. More important, it will do harm to our economy, and it does not need to that. We are able to fund it without imposing it on every businessman across the country, and there are many of them. We are talking about millions of dollars. We cannot hastily say that we will approve the bill because it has some good segments. It has some bad stuff that needs to come out and we will speaking vigorously to that.

● (1230)

Mr. Werner Schmidt (Kelowna—Lake Country, CPC): Mr. Speaker, it is an honour for me to enter into the debate on Bill C-55. My colleagues have been lucid on a number of aspects of the bill which are very significant, and I concur with their positions.

I will limit my remarks to one particular aspect of the bill which has to do with the inclusion of income trusts, one aspect that is covered by the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act. The issue has to do with an element that is relatively new. It has become very significant and is the subject of rather significant controversy in Canada today.

What are income trusts, which I think have been surreptitiously inserted into the act as just a tiny amendment? In the first act, in the BIA, it suggests that a person now be defined as including an income trust. The CCAA, which is the Companies' Creditors Arrangement Act, defines an income trust as a unit holder and the trust itself is traded on a recognized stock market and covered under the provisions of the act.

What are these instruments? They are complex and sophisticated financial entities. By the underlying asset or group of assets, most of the income these assets generate is distributed to unit holders. They are kind of the equivalent of a shareholder yet they are not. They are unit holders and they are very different.

An income trust is formed when an operating entity creates a trust instead of offering its securities directly to the public. The proceeds from the sale of the units are used to purchase the common shares and high yield debt of the operating entity. It is important for us to recognize that they buy the equity and high yield debt of the operating entity. The combination of the trust's equity and debt holdings allows the income to flow through to unit holders, usually tax free.

There are essentially three types of income trusts: business income trusts, energy trusts and REITs.

The business income trust typically acquires all or substantially all of the issued equity and debt of an operating entity. Under a common business income trust structure, the trust earns income primarily from interest payments received on the debt of the operating entity. Business income trusts are used in many sectors such as manufacturing, food distribution and power generation and distribution.

Energy trusts are quite different. They earn royalty income from resource properties through a royalty interest or earn primarily interest income through the holding of equity and debt of the operating entity.

The third class are REITs, real estate income trusts. These generally acquire income producing real property under an income through leasing the property to an operating entity or they earn primarily interest income through the holding of equity debt of an operating entity.

Business income trusts are particularly useful for mature businesses that are not seeking additional capital because it increases their ability to distribute earnings. As the popularity of income trusts increases, more and more businesses are contemplating converting all or part of their operations to income trusts. The most recent was speculation of a Canadian bank to convert part of its business into an income trust. That among other matters brought a knee-jerk reaction from the Minister of Finance. It sent a shiver through Canada's capital markets and caused a deluge of anger from seniors across the country.

There are two different issues here, but nevertheless the one instance has to do with income trusts and their recognition and the other one has to do with the tax structure and how to deal with taxes. I will not deal with the tax structure. That is for another time.

In the context of Bill C-55, we also must note that while banks are not covered by the Bankruptcy and Insolvency Act or the CCAA, the Companies' Creditors Arrangement Act, an income trust, if the bill is passed in its present form, will put a bank's income trust, if it experiences financial difficulty, under the provisions of the BIA and the CCAA. On the one hand we have the bank never covered by the BIA. On the other hand if it forms an income trust, the part that is in the income trust will be covered by the bankruptcy act.

● (1235)

No one knows what the implications of such an event would be at this time. To pass a law without at least some consideration of possible implications would, in my opinion, not only be shortsighted but indeed irresponsible.

Let us now remind ourselves that income trusts, business, energy or REITs, typically acquire all or substantially all of the issued equity and debt of an operating entity. Since the income trusts hold debt, let us examine this debt, in a very preliminary way admittedly because we do not have time to get into all the details.

There are at least two classes of debt. The equity that is treated as debt by the income trust is non-arm's-length, private market debt that pays a coupon determined by the operating company's management. Although this debt is covered by a debt indenture, the debt generally does not carry the covenants or protection of a public market debt. It is subordinated to other claims on the operating company and should be viewed as equity for all purposes except tax purposes.

The debt held by the income trust is distinct from third party arm's-length debt issued by the operating company. Third party creditors that lend to an operating company owned by an income trust are in the same position as creditors to a corporation. Interest payments on bank loans or fixed income debt are paid out of pre-tax income. This debt pays a market rate of interest and has the same covenants as other bank loans and public market issues. Most important, the third party debt issued by the operating company has a superior claim on the assets of the operating company. When calculating the leverage of the operating company, however, only the third party debt is considered because the debt held by the income trust is treated as equity.

It is now evident that the inclusion of income trusts under the provisions of the BIA and CCAA is not a simple matter. It has been the subject of some study for years. It is becoming increasingly important as the popularity of income trusts increases. In fact, recently one of these income trusts declared bankruptcy in Ontario although there is no provision under the existing Bankruptcy and Insolvency Act for it to do so.

As the popularity of income trusts increases, the number of structures increases the probability of business failures in this area. We do not like to talk about this very much because after all we do not like to talk about business failures and it is much better to talk about successful business enterprises.

We need to recognize that if we are going to be dealing with this we have to be very careful to prepare ourselves for this. One might ask how important this is as a sector of the Canadian economy. In 2000 the market capitalization of income trusts was about $18 billion. In 2004 it rose to $118.7 billion. There are some reports, depending on which one is looked at, it is approaching $180 billion. That is a very significant market capitalization.

We have seen that these income trusts are sophisticated financial instruments. They own equity in operating entities, debts of operating entities and may indeed incur debts as income trusts in themselves.

The amendments apply only to income trusts, the units of which are traded on a registered stock market and are subject to the rules and regulations of security commissions. Those are the ones we are dealing with. There may be other income trusts that are not registered but those are not the ones covered by this act.

Whether those rules and regulations would be adequate in the case of a financially troubled income trust to determine asset value remains to be determined, particularly in cases where an income trust might hold less than 50% interest in an operating entity. The income trust might find it difficult to get direct access to that operating entity's financial information because it does not have a controlling interest.

While I am not prepared to oppose the inclusion of income trusts in the BIA and CCAA as being proposed to us now, I need to be assured that investors and creditors will be adequately protected if this bill is passed.

Hon. Hedy Fry (Parliamentary Secretary to the Minister of Citizenship and Immigration, Lib.): Mr. Speaker, I am pleased to express my support for Bill C-55, which proposes a comprehensive set of reforms to Canada's insolvency system.

Bankruptcy is not a pleasant subject. No one enjoys the thought of financial hardship or the pain that goes along with it, but we must not forget that bankruptcy is a fact of life in a dynamic and evolving market economy.

Entrepreneurs need to borrow money to bring their ideas to the marketplace. Firms issue debt obligations to finance their investments and to create working capital. Consumers use credit to buy homes and goods and services that they need.

Borrowers must have a way to escape debt when it becomes insurmountable, but the rules must be fair so that creditors can assess their risk. An economy without bankruptcies would be an economy without credit markets. Entrepreneurship would be stifled, corporate expansion would be halted, and financially troubled individuals would be sentenced to live their lives under the weight of unmanageable debt.

By facilitating a fresh start, insolvency law promotes innovation and helps to push the economy on to new levels of productivity and competitiveness.

The reforms in this bill have four major elements. These elements are: one, to encourage restructuring of viable businesses; two, to improve protection for workers in bankruptcy as preferred creditors; three, to introduce an exemption for RRSPs and to lower the period of discharge for student loans to seven years, while tightening at the same time the rules for debtors with surplus income and with large income tax debt; and four, certain technical amendments to improve the administration of the insolvency system.

Before we go any further, let us look at some of the numbers. Last year over 100,000 individuals used the Bankruptcy and Insolvency Act. This accounted for over $11 billion in liabilities and resulted in $4 billion being redeployed into the economy. There were more than 50 corporate restructurings during that time period under the Companies' Creditors Arrangement Act. One of the largest was an $8 billion debt. That is right, $8 billion in liabilities in one case only.

The reforms in this bill will ensure that there is greater transparency in the process and a better ability for parties to defend their interests. Perhaps more important, it will promote fairness and efficiency in the marketplace so that more of the debt is recovered so that it can be plowed back into the system.

Today in individual cases there are now four bankruptcies for every thousand Canadians over 16 years of age. A similar growth has been observed in other countries. On the business side the growth in the number of bankruptcies has been much smaller in Canada. In fact, since our peak in the mid-1990s, the number of bankruptcies has decreased significantly. Canada used to have a business bankruptcy rate very much higher than that of the United States, but now we are actually noting that we have the same basic bankruptcy rate, which is four per thousand business establishments.

There is one other trend that is worth noting. In recent years more and more businesses and individuals are taking the opportunity to restructure their debt by something called a proposal. A proposal and restructuring in general allows a debtor to avoid bankruptcy while paying the creditor less than the full value of the debt. More than that, the creditor is receiving money it would never have received if the person had gone bankrupt. It is a better outcome for both and it is a very important part of the changes in this bill.

Since 1992 the number of restructurings has considerably increased because people are finding it is a win-win situation. A key goal of Bill C-55 is to improve that even more and to help people to restructure.

Before I go any further, I want to talk about how we got to this point. There was an extensive consultative process in 2001 and 2002 to identify issues and options to reform the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act. This consultation process produced the report on the operation and administration of the Bankruptcy and Insolvency Act and Companies' Creditors Arrangement Act which was tabled in Parliament in late 2002. Meanwhile in a parallel process the Office of the Superintendent of Bankruptcy appointed a personal insolvency task force to give some solutions to the problem.

● (1240)

In 2003 the Senate Standing Committee on Banking, Trade and Commerce conducted public hearings, reviewed more than 40 submissions and came up with a report entitled "Debtors and Creditors Sharing the Burden". This report was published in November 2004 and contained detailed recommendations.

The consultation process was very extensive. In other words, nobody made this up. Everyone tried to find out some of the best answers. This included hearing from stakeholders from a broad spectrum of interests such as insolvency practitioners, representatives of financial institutions, the legal community, labour and business, consumer associations, students and members of the academic community. They all brought forward very flexible and creative solutions.

The bill in front of us is a culmination of all of that input. The proposals are basically four in nature. They are comprehensive, well informed and based on sound research. I believe they will ensure that Canada has a world class insolvency law that will support our dynamic economy, protect jobs, and ensure that Canada remains a good place to invest, to do business and to live.

Bill C-55 will provide better protection for workers through the creation of the wage earner protection program. There is the superpriority for wage provisions relating to collective agreements as we saw in the bill.

The novelty of this bill is it will do all of this while minimizing as much as possible any adverse effect on access to capital. We do not want to stymie access to capital. The impact on lenders has been minimized while not over-burdening taxpayers.

Most of the OECD countries have taken measures to protect employees in case of the bankruptcy of their employer. In Canada we have debated this issue for almost 25 years. Bill C-55 represents a major breakthrough and is indicative of the economic policy leadership of the government.

The bill will also make Canada more attractive to international investors by adopting the United Nations Commission on International Trade Laws model law on cross-border insolvency. Corporate insolvencies are more often stretching across borders as we well know. The adoption of the model law would make it easier for creditors to assess their risks in various jurisdictions and to avoid the necessity of duplicating proceedings in different jurisdictions. It would create a better ability for people to assess where they want to go and how they want to borrow and who wants to lend them money. The model law is being adopted by our major trading partners, including the United States and Japan, and we must follow suit.

This is an important piece of legislation. I urge all members of the House to support it.

● (1245)

[*Translation*]

Mr. Louis Plamondon (Bas-Richelieu—Nicolet—Bécancour, BQ): Mr. Speaker, I would like to ask a question of the hon. member who has just spoken. Naturally the bill is a step forward. However I would like to know if she believes that it should be retroactive.

We are enacting this bill because many workers have been wronged in recent years. There has been the phenomenon of globalization and the transfer of many economic activities to China. Would it not therefore be reasonable to amend the bill so as to make it retroactive? That is my first question.

Second, those who are often forgotten about when there is a bankruptcy are the people who are already retired. For example, in my riding there are the workers of Aciers inoxydables Atlas. The company closed down in June, but there was a shortfall of $15 million in the pension fund. That means that the income of a pensioner who had been receiving $2,000 per month for ten years suddenly fell to $1,300 per month. Someone who was receiving $1,000 now receives $600 or $700. So that is a loss of income for these people who are now 72 or 75 years old and have been drawing this income for some 15 years, that is, since they retired. So they find themselves caught short because there is a temporary deficit in the pension fund.

Of course, this is a matter of provincial jurisdiction. The case of which I am speaking is the responsibility of the Régie des rentes du Québec. However, would it not be advisable to have a federal-provincial agreement, perhaps at least a transfer of federal funds to the provinces, so that we can support or bail out these pension funds? For example, the $15 million pension fund could be divided between the federal and provincial governments, under a specific agreement. That way, workers who have toiled all their lives, for 25 or 30 years, could regain the level of pension they enjoyed for years, particularly since they are in no way responsible for this closure. I am talking about Aciers inoxydables Atlas of Tracy, the head office of which has not yet declared bankruptcy.

Those are my two questions: first, do you think the government should be thinking about pension funds, and second, should it be thinking about making this bill retroactive?

● (1250)

[*English*]

Hon. Hedy Fry: Mr. Speaker, quite often the whole concept of retroactivity sometimes imbalances what in fact we are trying to do with a particular piece of legislation or a particular piece of policy. If we are looking at helping to get a win-win situation, in many instances with restructuring, if we go back in time enough, then we create a complete imbalance in the kind of funds that would be available to do that.

With regard to pension protection, it is difficult for this bill to deal with pensions on a whole because there is a better pension regulatory area for us to deal with that under the relevant pension regulatory system. However, there is some ability in this bill, if a person declaring bankruptcy has not been putting the appropriate money and has an arrears in placing money into a pension, for this to take precedent over payouts to creditors. The bill does take care of some of it, but it is not really the appropriate vehicle to deal with that kind of pension reform.

Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.): Mr. Speaker, I listened attentively to her speech. She is obviously well-versed and very knowledgeable in this subject matter, as I am sure the entire House has realized. Could she tell us who has been demanding the changes to the insolvency provisions that we now enjoy? This piece of legislation will have a major impact. Perhaps she could indicate to the House who is looking to have changes in that regard, so that all members will understand where the government is coming from with some of these proposed changes.

Hon. Hedy Fry: Mr. Speaker, this whole review process was a result of wide cross-country consultations undertaken in 2001 and 2002. It also reflects input received from, as I said earlier, a broad spectrum of stakeholders, including business, financial institutions, the legal community, et cetera, people who are well-versed in the understanding of insolvency laws, as well as labour groups, students, consumer associations and, of course, academic groups. The Senate committee on banking also tabled a report in 2003. It is a combination of many years of work, listening to a broad spectrum of stakeholders, and I think it has achieved the right balance.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Mr. Speaker, I want to thank the member for Vancouver Centre for her comments. I want to ask her a question about student loans. She did not mention this subject once. Yet, student debt is a very significant part of this bill. The government is prepared to reduce the waiting period from ten years to seven years, so that former students can discharge their student loan debts in bankruptcy.

The Bloc Québécois committed long ago to totally eliminating this waiting period. In reality, having a waiting period for student loan debts makes no sense. First of all, it is based on prejudicial belief that declaring bankruptcy is easy, that anyone can do it and that students are immature enough to decide to finance their education with loans and then say, "No problem, I will just declare bankruptcy and get out of debt".

Very few students would even think such a thing. A judge could dismiss an application based on such nonsense. In fact, we know that, in the event of a bankruptcy, a judge must rule whether to allow or dismiss an application.

Furthermore, we are wondering why the change from ten years to seven years? Why not five years or three years, or even zero years while we are at it? I want the member on the government side to tell us what she thinks about this.

● (1255)

[*English*]

Hon. Hedy Fry: Mr. Speaker, over the period of the last five to six years the government has addressed some of the issues with regard to student loans from various perspectives. One of them was obviously to look at whether students were able to pay off loans if they did not have a job after they had finished university or school. We also looked at how they would be able to be forgiven their debt or not have to pay any interest and eventually, if this kept continuing and they did not make enough money or did not have enough of an income, to have the principal of the loan actually forgiven over a period of time. We address some of those issues in this bill by bringing down that timeline to seven years.

We have been working with students with regard to student loans. We have listened to them and there is no one place where we can resolve this problem. In this particular amendment we can bring the timeline down. We did it in other areas within the budget. We will continue to address the area of student loans in many other ways, not only by assisting students to pay off their loans but by decreasing the number of students who have to borrow. We will create structures, as we have done in past budgets, to allow for students who are disadvantaged economically to be able to get grants, and for disabled students or single parents with children to have access to grants for post-doctoral studies.

There is more than one way to skin that cat. The government has been well aware of that and has been looking at all avenues to assist students.

[*Translation*]

Mr. Robert Vincent (Shefford, BQ): Mr. Speaker, I would like to inform you that I will be sharing my time with the hon. member for Verchères—Les Patriotes.

Bill C-55 is a step in the right direction and the Bloc Québécois supports it. An increasing number of workers can be protected and this bill sets out to do just that, but it can go even further. Allow me to explain.

The bill addresses the matter of wages, but it could also address severance pay, which is money set aside by workers under the conditions of a collective agreement for them to recover should the company they work for shut down. For example, under the usual provisions of a collective agreement an employee gets one week's wages for every year of service. Thus, the $3,000 in wages that workers could lose if the company goes bankrupt, is paid by the government. That is good. It is great. However, more should be done.

Workers are often last on the list. The companies and everyone else are put first and the workers come last. However, they are the economic drivers of the country. Although there are 100,000 industries, if there is no one to work in them, the economic market fails. These workers are important for our society.

In my opinion, severance pay should be an integral part of the bill. I heard the minister say that $30 million was not a lot of money. If not, then we could include the severance pay these workers are entitled to since they contributed to it. This is something that could be discussed in committee.

Workers are becoming the poorest in our society. Take for example the price of gas, which has increased significantly. When workers negotiate their collective agreement they usually get a wage increase of 2% or 3% and the employer already finds that to be a lot. However, a 2% increase on weekly earnings of $400 is an increase of $8 a week. To fill a tank of gas to go to work at the factory currently costs $10 or $15 more a week. The worker is, in effect, already losing ground. In other words, he is already poorer than he was before getting a raise.

This goes beyond the price of gas. We must also look at the price of oil. When it comes time to heat our homes, the price will have increased, which will further cut into our purchasing power.

The minister was saying yesterday, in the first five minutes of his speech, that this money could be put towards the mortgage, the car or consumer goods. We all know that the price of consumer goods will go up again because of the price of gas. Ultimately, the consumer is the one who will be footing the bill. It is not the industry that will suffer the consequences of rising gas prices, but the consumer. Once again, workers are the ones who end up paying.

I will paint a picture of the workers' situation, because it is important. We often talk about businesses, but workers are always caught in a vicious circle where they always have to pay.

For example, in terms of taxes, if a worker owes taxes to the government, the tax authorities will come after him. They are the first ones to try to recover their money. If the worker owes $100 or $200, the tax authorities will certainly harass him until they recover the whole amount. At the end of the year, when the worker files his income tax return, the government will definitely take what is owed to it before giving anything back to the worker. The worker always has to pay.

Let us draw a parallel with Mr. Coffin, who took $1.5 million from the government. He gave back $1 million, which means that he still owes $500,000. I do not think that the government will try to recover that money.

● (1300)

But when a worker owes even a small amount of money, they go after him right away. He gets one letter after another, and repeated phone calls. He is basically harassed.

We have a two-tier justice system, where workers are treated one way and wealthier people are treated differently, with the workers consistently being exploited.

With respect to bankruptcies, $3,000 is nice. But, when a company goes bankrupt, some of the workers who lose their jobs are older; they are over 55. They did not expect the company to go bankrupt; they thought they could work there until retirement, but things turned out differently. The workers are usually the last to know, of course. Employers tend to keep their financial difficulties and the prospect of bankruptcy to themselves. They do not share that kind of information with the workers. Very often, employers fail to pay their employees, and they help themselves to the employees' pension fund to continue their operations. If there is any money left, the workers might get a few dollars, but that is not likely, because the workers always come last.

We are asking that workers over 55 whose company goes bankrupt have access to the Program for older worker adjustment, or POWA. For those affected by plant closures, by reason of bankruptcy or any other reason, this program would bridge the gap until they reach the age of 65. At least, these workers would be protected. We must never forget that they are the country's economic engine. We tend to forget that. There is much talk about companies, but without workers, there are no companies.

As I said earlier, I am using parallels because what matters to me is the workers. I am committed to worker protection. The CBC is a fine example. Over the past six years, there has not been a single year when there was not some problem with collective bargaining at the CBC: there has been three lockouts and three strikes.

Those who negotiate these collective agreements never manage to reach agreement with the workers. This year, it is a matter of job security. That is what the CBC workers are fighting for. Job security is important these days. Workers need it to pay their mortgages, pay for their cars and provide for their families. It is hard to work without that security. A person gets up and goes to work every day, but never knows what day they may be told their services are no longer needed. With some degree of job security, people can live decently and make plans for the future. They cannot do that when there is no security.

Why would an employer have temporary workers rather than permanent ones? The answer to that is simple. Then it can assign its workers exactly as it pleases, any way at all. We are told that is the best way to run a company. Perhaps it is, from the company's point of view, but it is bad management as far as workers are concerned. They attach a great deal of importance to having a permanent job.

Perhaps this program should have another name, something like "protection of workers' money". It ought to cover all the money workers stand to lose if a plant closes because of bankruptcy. That is important. These people need all that money in order to continue to live decently.

When some plants close down, their workers start off on EI, then move to welfare, and finally end up selling their homes and having nothing, although they may have worked for 30 years.

● (1305)

This is, therefore, a valuable and good bill. I feel that $3,000 is a step in the right direction, but I do think that the government could do more for workers who are, as I have said, the ones who drive the economy.

Mr. Gérard Asselin (Manicouagan, BQ): Mr. Speaker, I would like to congratulate the member for Shefford on his fine speech. He took the time to prepare well so that he could speak on behalf and in the name of working people. He concluded by saying that this is a good bill. It is good, but not excellent.

There is a stage that it must still go through, namely consideration by the parliamentary committee where the opposition parties will present amendments. We will see how much goodwill the minister has after the Bloc Québécois makes amendments to improve the situation of employees in bankruptcy cases.

It was said that this is a step forward and that the minister introduced this bill. The department that created this loosely knit Bill C-55 has dropped a few stitches. We are going to fix that and make a few amendments in committee. Then we will see how much good faith the government has. My colleague in the Liberal Party just said that they consulted widely and listened. However, this bill does not correspond exactly with what workers want in case of bankruptcy.

Wages should be protected. Some people have sacrificed weeks and even months of wages and found themselves facing bankruptcy. Their wages were completely lost. An employee's pension fund should be protected, that is to say, the part paid by the employee and the employer. This is something that they negotiated in collective agreements.

We should ensure that people have immediate access to employment insurance, with no waiting period. We should also make sure that POWA, the program for older worker adjustment, applies right away insofar as training or temporary assistance is concerned while people wait for their pension entitlement. One hundred percent of everything these people have invested over many years in the company pension fund must go in. It must be placed in a specific fund, a guaranteed fund, and paid out at 100%.

I would like to ask the member for Shefford my question. I see that 10 minutes are not enough in view of all his knowledge, research and dedication to working people. The member for Shefford could easily have given us a 40-minute presentation. But he was allowed only ten minutes. I would like him to explain the essence of the amendments he wants to make in order to fix Bill C-55 and make it a real bill for the working people of Quebec.

● (1310)

Mr. Robert Vincent: Mr. Speaker, I thank the member for his question. I will expand on my remarks. I say that all wages and all other sums owed to workers must be protected in case of a bankruptcy for which they are not responsible. Managing the business is the employer's job, and the workers are dependent on the way that job is done. When bankruptcy comes, there is nothing they can do about it. However, they should not have to pay for it.

As I mentioned earlier, many collective agreements provide for severance pay, which is one week's pay for each year of service. Why would workers, who paid directly for that, give that money back to the employer? I do not think that this is what we are trying to achieve here. The government wants to protect workers and their money. The employer's role is to manage the business. If the business is poorly managed, workers should not have to pay because the employer did not do a good job. That is why, in committee, we should take a close look at all the financial aspects and all the money that the workers stand to lose. They should not lose any money at all.

Mr. Stéphane Bergeron (Verchères—Les Patriotes, BQ): Mr. Speaker, to begin with, if you would permit me, I would like to warmly thank my colleague from Shefford. I thank him for his concern in permitting me to express myself today on this bill. I also thank him for being so flexible, for at first I was supposed to speak ahead of him, but gradually we reorganized things. So very great thanks to my colleague from Shefford.

It is with some emotion that I take the floor today on Bill C-55, an Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangements Act and to make consequential amendments to other Acts. Not only is this bill important to me, but this is probably one of the last speeches I will give in this House. I therefore ask the indulgence of the Speaker and my colleagues should I ever digress.

We must be very aware of the fact that when there are brutal closures or bankruptcies of companies, the fate of the workers is often tragic. Their families have to suffer the consequences of this as well.

Thus far, these employees do not rank very high in priority among the creditors when the time comes to wind up a company's remaining assets. So, as was mentioned earlier, we find wages and severance allowances unpaid, and, sometimes, pensions lost or heavily mortgaged. After working all their lives for one firm, often these people find themselves without resources, without a pension fund, and often with a reduced likelihood of returning to the labour market.

It is imperative that this Parliament consider the tragic situation of these employees who are the victims of brutal corporate closures or bankruptcies. It is high time that we did so.

A number of my constituents experienced such a situation when the Aciers Atlas plant closed in Sorel-Tracy. In fact, the Aciers Atlas retired steelworkers' association contacted me to ask Parliament to pass legislation to deal with this problem. That people should be lobbying for this is nothing new. The Steelworkers have been pressuring parliamentarians for months to look into this glaring problem. This was due in large part to the worrying situation of a number of steel plants, particularly in the Hamilton region.

After that, our colleague from Winnipeg Centre introduced Bill C-281, a bill we supported 100%. We must admit we even helped our colleague prepare the bill.

Obviously, we are extremely pleased to see the government step in with Bill C-55. In this way, we are assured that the existing legal framework will be improved in order to protect workers and ensure that they are among the preferred creditors when a company is dissolved.

As was said earlier, we support the principle of Bill C-55, but it still contains a number of irritants and gaps, particularly with regard to the concept of secured creditor. The Government of Quebec should be consulted as to how this new legislation may work with the provisions of the Civil Code.

A few moments ago, my colleague from Saint-Bruno—Saint-Hubert spoke quite pertinently about the waiting period that students face before being allowed to discharge their student loans through bankruptcy. This is another area of concern with regard to Bill C-55, as is the issue of penalizing individuals receiving EI benefits, who may be taxed on the benefits they receive when a company is dissolved.

We will have to ensure that a number of amendments and improvements are made to the bill in later stages, so that it is able to truly respond to the very legitimate expectations of workers and pensioners of companies that may one day close.

As I said earlier, I am very happy to speak on this issue. It is clear just how important it is to me.

● (1315)

As I said, I will be leaving this place soon for another arena where I hope I will be able to continue to serve and to meet new challenges.

I would like to take the few minutes I have left to thank all my present and former colleagues in this House. It has been a great privilege and honour for me to be able to sit in this House and be surrounded by extraordinary people here to represent their constituents in Canada and in Quebec.

I would like also to say goodbye to everyone here, House staff, clerks, security personnel and so on. I have particularly fond memories of the late Major General Cloutier, with whom I worked closely during my time as chief whip for the Bloc Québécois.

I also want to acknowledge and thank the legal advisors, and in particular Diane Davidson, an extraordinary woman now working with Elections Canada. These legal experts provide such devoted services to parliamentarians. Then there are the maintenance staff, the support staff, the food services people, the mail room employees, the pages, the researchers and Library staff, in short, all personnel of the House, past and present, who make it possible for us to do as worthy and efficient a job as possible of serving our fellow citizens.

I wish to mention the efficient, competent and devoted staff of the Bloc Québécois in general, and in particular the ones who have worked with me since 1993, who have made it possible for me to do this exciting job of representing the people of Verchères and Verchères—Les-Patriotes in the House of Commons. Words are not enough to express my great appreciation for their devotion, which has made it possible for me, I hope, to do my job as effectively and appropriately as possible.

And then there are the countless volunteers who have worked in the federal riding of Verchères and later Verchères—Les-Patriotes, the ones who have made it possible for me to be here for four terms, a total of some 12 years.

I wish to pay particular tribute to my family, my wife Johanne and my daughter Audrée-Anne. Without them, I could never have fulfilled this mission for the past 12 years.

Lastly, Mr. Speaker, I would be remiss if I did not express my equally warm and heartfelt thanks to the people of the federal riding of Verchères and Verchères—Les-Patriotes, who have showed their faith in me in four elections, who invested in me and reiterated their confidence in me. There is no way I can fully express my gratitude for the touching support they have manifested in me on four occasions, starting in 1993.

I thank them for allowing me to go through the exciting adventure of representing them in the House of Commons. I hope I always lived up to their expectations.

● (1320)

[*English*]

Mr. Pat Martin (Winnipeg Centre, NDP): Mr. Speaker, prior to asking a question about the specific bill that we are debating, let me simply say that when someone of such long tenure and long standing respect in the House of Commons chooses to leave and announces that in this place, it is almost like losing a member of one's family.

I can remember the day I first met the member for Verchères—Les Patriotes and how gracious he was to me as a newcomer in the House of Commons. I met him at the opening cocktail party to welcome newly elected members of Parliament and he at the time was the whip for the Bloc Québécois. He was gracious, friendly and welcomed me into what became that very unique relationship that we enjoy as members of Parliament. I am really quite moved by his announcement today that he will not be seeking re-election and will be leaving this place. I can speak for the members of our caucus and say that we will miss him. We will miss the dignity and the respect that he brings to this House.

In regard to the bill, I know the Bloc Québécois shares the view of the NDP that the bill does not really address the big issue of huge underfunded pension plans. I would like the member to expand on his views. Does he share with us the view that it is fundamentally wrong for a company to be able to continue operating by scooping from the company pension plan and therefore leaving a shortfall when the company does collapse?

[*Translation*]

Mr. Stéphane Bergeron: Mr. Speaker, I want to thank my colleague for his kind words. Many of my colleagues expressed their good wishes as soon as I took my seat. I like to think that the hon. member represents the view of many of our colleagues in this House and I thank him for it.

That said, he raised a very important question. As previously mentioned, this bill seems like a step in the right direction, but a number of deficiencies remain, including some I pointed out a few moments ago.

I must point out that our colleague from Winnipeg Centre just touched on another major gap in this bill. As I was saying earlier, although we are in favour of this bill in principle, it is very important that we make a number of changes and improvements to it in later stages. Then we could find all the provisions we would like to have in a bill to protect workers and retirees in the event of a bankruptcy or the abrupt closure of a company.

I call on our colleagues, especially those in the government, to be open to the concerns and proposals that will be presented in committee and at report stage, so that we can bring about a bill that Canadians and Quebeckers can be really proud of.

Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.): Mr. Speaker, my question will actually be a comment. It will not concern the subject matter of Bill C-55. Instead, it will be directed, through you, at the man.

A few weeks ago, I gave a speech which, apart from the fact that it was much longer, said essentially the same thing as what our colleague told us today. I too would like to say what a pleasure it has been for me to work with him. I am speaking for myself and, as the longest serving member of our caucus in the House of Commons, on behalf of all my hon. colleagues, I am sure.

Over the years, he has filled many positions within his party, as have I in mine. We have both been officers of this House. I am sure that I speak on behalf of all parliamentarians in saying that he has always discharged his duties in a very dignified manner.

When he arrived in this House, he was among the youngest parliamentarians. As surprising as it may sound, 12 years later, he is 12 years older, and others are now younger than him. Granted, there are many more who are younger than me. Some parliamentarians were not even born when I arrived at the House of Commons in 1966. My hon. colleague opposite could probably be included among them. I understand that he was 1 year old.

This was just a comment to say that, at any rate, as far as I am concerned, he has been a good member and a good colleague. If I were to ask anything of him, it would probably be this. In his remarks, he mentioned the volunteers working within political parties. I am not being partisan. This goes for all parties, without exception. I think that volunteers are the great heroes of democracy. They work hard; during election campaigns, they head off to the headquarters with their lunch boxes as if they were going to work, to give their time, and they give a lot of it. They ask for nothing in return, besides an opportunity to participate in this exercise in democracy.

Are they not the real heroes of democracy? I respectfully submit that these are the great heroes of democracy to whom all of us, parliamentarians and other elected officials, even those who are not elected but who are less involved than these people, the citizens of this country, owe a debt of gratitude.

● (1325)

Mr. Stéphane Bergeron: Mr. Speaker, first of all, I want to thank you because you are being very lenient about time.

Naturally, I want to thank the hon. member for Glengarry—Prescott—Russell and tell him that the feelings are mutual. It was a great pleasure to work with him when he was the Leader of the Government in the House of Commons and I was the chief whip of the Bloc Québécois. We had to work quite closely together. Generally speaking, even though there were moments of intense disagreement between our two political parties, people always approached each other in a cordial and civilized manner. This allowed us, despite our disagreements, to maintain, at least until the most recent election, some decorum in this House, a decorum the public most certainly could be proud of. Decorum has probably diminished over the past few months and with good reason.

That said, I think my colleague from Glengarry—Prescott—Russell is quite right to stress the importance of the work of volunteers. We all know certain democracies—no need to look far—where money is the driving force and large numbers of handsomely paid employees run election campaigns. In Canada and Quebec, there is a spending ceiling and rules on political party funding, and we cannot afford highly paid staff for an election campaign. What we have are people who offer their services and give their time and energy because they believe in the cause, because they believe in their political party and because they believe in the person representing their political party.

In closing, I think I could not agree more with my colleague in saying that the true heroes of democracy in Canada and Quebec are those who give freely of their time to causes they believe in.

[*English*]

The Deputy Speaker: The time for questions and comments has expired.

Hon. Don Boudria: Mr. Speaker, I rise on a point of order. When I gave a certain speech not that many weeks ago, the House was generous enough at the time to extend questions and comments considerably. I would like to ask for the same thing to be extended now because I see another hon. member who no doubt wants to ask a question or make a comment. Without knowing what he is going to say, and with the same generosity, perhaps we could extend questions and comments by 10 minutes. I would seek that consent.

● (1330)

The Deputy Speaker: Is there unanimous consent?

Some hon. members: Agreed.

Mr. John Duncan (Vancouver Island North, CPC): Mr. Speaker, I thank the member for Glengarry—Prescott—Russell, because he has indeed read my mind and I think the will of the House right now.

In a sense, we have just heard a farewell speech from our esteemed colleague from the Bloc. He is someone who has travelled widely and also has had many overlaps with other members over the 12 years he has been here. I have been here that same length of time. I also know that some of the newer members have a strikingly high opinion of all of their dealings with the member for Verchères—Les Patriotes.

I have some very vivid memories of the member, particularly from the trade portfolio when I held that portfolio as critic, and also from some international travel. They say that we do not really know someone until we travel with them and then we see them warts and all. Those of us who have been put on the same bus,on the same airplane or in the same routine, very often in a strange or foreign land for an extended period of time, get to know each other very well. I would say that the member for Verchères—Les Patriotes has indubitably passed all those tests.

The respect that the member carried had a personal impact on me. There was a point in time when there was a document produced by him which was sent to all members of Parliament. I read that document, which was a very lengthy document, and I could tell that he had poured his heart and soul into writing it. It was basically an analysis and a description of the expulsion of the Acadians. I know there is a personal family connection for the member and I knew that this was something he thought about for a long time. I complimented him on the quality and calibre of the writing. It certainly provided me with a point of view I highly respected, one that touched my heart. This is the kind of member of Parliament that we have been blessed with in this place for the last 12 years.

I feel compelled to wish my colleague good fortune in where he is going. I know that my colleague from Blackstrap beside me could not help but notice the passion that the member brought to the job and to his endeavours.

At this time, if the member for Verchères—Les Patriotes wishes to respond to my non-question, he would be more than welcome to do so.

● (1335)

[*Translation*]

Mr. Stéphane Bergeron: Mr. Speaker, I will be brief. I must say that it is starting to be somewhat embarrassing to have to reply to every compliment paid to me. I am deeply touched and moved by so much praise.

I am also touched by the generosity of the House, which has agreed to extend by 10 minutes the time for questions and comments to allow members who may wish to pay me tribute to do so. Those who will be speaking next may have something other than praise to say, who knows. That said, I thank my hon. colleagues for being so kind and graceful to me.

I would be remiss if I concluded these remarks without thanking my hon. colleague for what he said and telling him how much I too appreciated the opportunity of working together on the issue of international trade. He should know that it was a great pleasure for me to work with him on those occasions when, for instance, we went on trade missions outside Canada.

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Mr. Speaker, I too wish to add my voice to this chorus of praise, and at the same time reassure my colleague from Verchères—Les Patriotes that we have only praise for him.

Incidentally, as labour critic, I must tell him that I feel quite honoured by this diversion of the debate. We were debating Bill C-55. I view as a privilege the fact that the member for Verchères—Les Patriotes would chose to make this very touching announcement while we are considering a bill dealing with the interests of workers.

My colleague from Shefford, who is the deputy labour critic, is asking me to convey the message to him that he too feels very honoured.

It is very likely that the member for Verchères—Les Patriotes had a good reason for choosing to make this announcement during the debate on Bill C-55. The fact is that he is himself an indefatigable worker. I have known him personally since 1993, when we had the pleasure of working together. He has always worked very steadfastly and rigorously.

As we know, rigour is the trademark of Bloc members. Our batting average is very high, still our colleague from Verchères—Les Patriotes outdoes us. He has always had dignity as a leitmotif in whatever he did.

Finally, I must add that he was the Bloc Québécois whip—I do not remember for exactly how long. And a highly efficient one too. My colleagues and I are grateful to him for that.

I know that the Bloc will find the time and place to pay tribute to him more appropriately. At this time we will just tell him how much we all regret his departure.

Mr. Stéphane Bergeron: Mr. Speaker, I have been greatly moved by all the comments and praise. These are particularly meaningful when they come from members of one's own party.

I thank my colleague from Saint-Bruno—Saint-Hubert, whose words were, I gather, on behalf of a number of Bloc Québécois colleagues.

Some hon. members: All of us.

Mr. Stéphane Bergeron: I am told she was speaking on behalf of all my colleagues in the Bloc Québécois in delivering this message, not one of farewell, but rather of au revoir. I will, in fact, never be far away. I have always said that, from the moment I announced my intention of leaving the House of Commons before long.

It is now my turn to express my appreciation and consideration to all past and present Bloc Québécois colleagues. It has been a real pleasure and a great honour to work with them.

I am absolutely sure that I have made the right decision. I am leaving, more than ever convinced of the importance and pertinence of the Bloc Québécois. I am leaving, more than ever convinced that the Bloc Québécois, in conjunction with the Parti Québécois and the other sovereignist forces in Quebec, will lead Quebec to its logical destiny, that is as a member of the concert of nations.

● (1340)

The Deputy Speaker: I thank the hon. member for Verchères—Les Patriotes for his speech and his personal comments.

When I was first elected in 1993, at the same time as the hon. member, I was totally unilingual. He was the whip for the Bloc and I for the Opposition, and so I told him that my problem with French was that he spoke too fast for me. I think that was the problem.

The hon. member is a real professional, a true democrat, a good man and a good friend. Good luck, my friend.

[*English*]

Hon. Don Boudria (Glengarry—Prescott—Russell, Lib.): Mr. Speaker, I am pleased to have the opportunity to speak to the second reading of Bill C-55, an act to establish the wage earner protection program act and to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.

As members know, insolvency laws cover both personal and commercial situations. For my part, I will be focusing these comments on the commercial side of Bill C-55. In particular, I will be addressing those amendments which deal with commercial reorganizations. I would, however, first like to elaborate on the importance of our insolvency laws.

Data from the Office of the Superintendent of Bankruptcy illustrates the extent to which businesses experienced financial difficulties. In 2004, notwithstanding the tremendous health of our economy thanks to the excellent government we have, notwithstanding that, there were still some 8,200 businesses that filed for bankruptcy for various reasons. These firms had approximately $800 million in assets and over $3 billion in liabilities. As we can see, there were, at least in some situations, a lot more liabilities than there were belongings.

Unfortunately, there is no detailed statistical breakdown on the Companies' Creditors Arrangement Act cases, as there has not been a central registry. However, it is estimated that there are more than 50 cases under the Companies' Creditors Arrangement Act each and every year. It is generally accepted that the restructuring of major companies take place under the CCAA rather than the Bankruptcy and Insolvency Act. One of the goals of Bill C-55 is the creation of a central registry for the Companies' Creditors Arrangement Act cases within the Office of the Superintendent of Bankruptcy, which would enable statistical and other analysis of the restructuring process.

Canada's economy is a market economy based on entrepreneurship and risk taking. As we all know, risk taking is integral to the functioning of the marketplace and it is fundamental to success in a market based economy. This is particularly the case with today's increased global competition.

Risk taking also helps to ensure that Canada's prosperity is maintained and continues to move forward. In other words, risk taking is the essential ingredient of economic growth and jobs. When risk taking is promoted and encouraged, by definition there will be failures. If there were not failures, there would not have been a risk. There are many successes, but some failures, unfortunately. Supporting risk taking behaviour, because of the prosperity it brings, also means that our laws must deal with the cost of these failures, however unfortunate they are.

From this perspective, the obvious role for bankruptcy and insolvency laws is to provide the legislative framework by which non-viable firms are liquidated and dissolved. In these situations, the business assets are sold off, the business closes its doors and, unfortunately, employees lose their jobs. The situation is almost always devastating for those involved. Jobs are lost. Small communities and single-industry towns are faced with decreased economic activity and prospects, not to forget the principals in the companies, who have invested sometimes everything they had, and who also sometimes lose their life savings in the failure of the business in question. They should not be forgotten in all of this either.

However, bankruptcy and insolvency laws provide a framework to permit and facilitate potentially viable but financially distressed firms to survive and hopefully to continue to operate. They should allow and encourage the financial restructuring of firms which have a reasonable expectation to return to financial health but which at the present moment are not capable of meeting their current obligations.

● (1345)

Bill C-55 makes many improvements that promote restructuring. These changes are necessary and indeed critical to improving the reorganizational provisions in both the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.

Interim financing, while not explicitly covered in the current legislation, is a critical issue for reorganizing companies. This short term financing allows a company to continue to operate while finalizing its restructuring. Courts have permitted interim financing but have done so on a case by case basis.

Bill C-55 would add both the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act ground rules for the granting of interim financing.

By providing factors to be considered directly within the legislation, the parties involved would be better able to understand when and under what circumstances the court will grant interim financing. These new rules would provide a much greater degree of predictability and should help companies obtain the financing needed during the critical restructuring period.

The proposed amendments would also allow a restructuring company to terminate certain agreements where it is necessary for the viability of its restructuring process and would not be overly injurious to the other party to the agreement. This amendment would make it easier for companies to escape economically damaging contracts while providing the other parties to the agreement with a right to claim damages caused by the disclaimer. This amendment would ensure greater clarity in the process and would create a more orderly process for disclaiming contracts and ensuring successful reorganization plans.

Collective agreements, however, do not fall into the group of contracts that can be disclaimed by debtors. These agreements will remain in force until the parties agree to change them. Bill C-55 would create a process that would allow the parties to negotiate but would not force workers to make concessions.

The bill would also make changes to the role of key participants in the insolvency process. Interim receivers would be just that, interim. Limits on their power and on the term of their appointment would mean that they would no longer be allowed to operate for extended periods of time.

To cover the gap, we are creating a national receiver that would be able to operate in any province. The bill would also clarify the role of the monitor in a Companies' Creditors Arrangement Act case, ensuring that the monitor would be a qualified trustee, acting in accordance with the code of conduct and responsibilities placed upon trustees under the Bankruptcy and Insolvency Act.

The changes would also improve the transparency of the process by establishing clear rules regarding notice to creditors and by providing that payment of the third party costs may be paid out of the debtors' assets to allow all key parties to effectively participate. It would also allow courts to remove directors who unreasonably impair the restructuring process and it would allow them to make orders indemnifying the directors from liability.

The proposed legislation also contains amendments to the provisions governing international insolvency. Bill C-55 adopts the United Nations Commission on International Trade Law, or UNCITRAL model laws, for dealing with cross-border insolvency and should facilitate cooperation with foreign jurisdictions.

Our largest trading partner, the United States, recently approved the adoption of the same model. Therefore, standardized rules governing international insolvencies are becoming increasingly important to foreign investors. Adopting the most up to date and comprehensive rule in this area will make Canada a more attractive place to invest.

● (1350)

There is no doubt that Canada's insolvency laws fundamentally contribute to the efficient functioning of the marketplace. These rules of the game provide predictability and security to the marketplace participants, both domestically and foreign. It is important that marketplace framework laws, such as insolvency laws, be kept up to date and respond to the needs of the marketplace. Bill C-55 responds to the new issues that have emerged from a rapidly changing marketplace. I urge all members to support the provisions in Bill C-55 and of course the bill overall, along with its reference to committee.

[*Translation*]

As I said earlier, it is a pleasure for me to speak in the House at second reading of Bill C-55, an act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act. As I said already, insolvency legislation applies to individuals and businesses. So does the legislation before the House today.

I am pleased to hear our colleagues propose various amendments on protection for workers. I am eager to see the bill go before the committee. We will ensure that the bill has the broadest scope possible, while maintaining balance, encouraging investments in business and—as has been said so eloquently a number of occasions—protecting the rights of workers.

[*English*]

Some might ask why we are doing the insolvency reform now. An efficient and well functioning insolvency system is vital to our economy. I believe I was sitting in the House in opposition when we started these reforms in the 1990's but many issues were left unresolved and new issues have emerged with our rapidly changing marketplace.

As I indicated a few moments ago, the United Nations and the United States have adopted that model and it is incorporated in the bill we have today. Therefore it is important that the marketplace framework laws, such as the insolvency laws, be kept up to date, respond to the needs of the market and to a degree, as well, to the needs of the international conventions that we sign on to.

We all know that extensive consultations were conducted regarding the bill. As was indicated a little earlier, there was a broad consensus to reform and to modernize Canada's insolvency laws. The proposal before us today reflects the input received from a broad spectrum of stakeholders, such as, insolvency practitioners, representatives of the financial and business communities, labour groups, for which I am proud, consumers' associations and, of course, members of the academic community.

The Senate committee on banking, trade and commerce also conducted public hearings in 2003 and made a number of recommendations for changes to the law and I understand that some of these recommendations are found in the bill that is before us now at second reading.

The reforms in question, if I were to summarize them in the little bit of time that is left, have four main objectives. First, it would encourage restructuring of viable businesses as an alternative to bankruptcy. In this regard, the Companies' Creditors Arrangement Act will be significantly modified to provide increased predictability while preserving flexibility.

Second, the reform would improve the protection for workers in bankruptcy. We have heard a lot about that issue particularly over the last little while. The bill creates a legislative framework for the wage earner protection program that will ensure that workers get compensation for their unpaid wages in the event of an insolvency.

Third, the bill is designed to make the insolvency system fairer and to reduce the potential for abuse. For instance, the bill introduces an exemption for RRSPs and lowers the period of discharge for student loans while it tightens the rules for debtors with surplus income and those with high income tax debts.

Fourth, the bill contains a number of technical amendments to improve the administration of the insolvency act. I raised the issue of the recommendations made by the Senate committee and the work of the committee was very helpful, I might add, and provided a solid basis for developing many of these proposals.

Finally, in response to the issue of Bill C-281, or the wage earner protection raised by other members later, the bill proposes a comprehensive reform to Canada's insolvency system.

In summary, those are basically the highlights of the bill. I urge the committee to do a thorough review and improve it where necessary so that we can further improve on Canada's laws, creating at the same time a favourable climate for investment, both domestic investment and investment from an outside country, while at the same time increasing the protection for consumers, wage earners and others where it is provided in the legislation.

● (1355)

[*Translation*]

Mr. Gérard Asselin (Manicouagan, BQ): Mr. Speaker, I want to ask the member for Glengarry—Prescott—Russell what he thinks about workers who invested in company pension funds for many years but then lost everything when their company went bankrupt because the contributions from employees and the employer were put into the company's consolidated fund.

Does he agree with me that the pension funds of these workers should be protected by law? These pension funds could be put into trusts, consolidated funds or guaranteed special-purpose funds, so that workers whose company goes bankrupt will not lose the money they put in their pension fund.

Hon. Don Boudria: Mr. Speaker, I agree entirely. I do not know if I am going to commit a faux pas in the eyes of some, but in my view, we should be protecting even more than accrued unpaid wages, which are in fact previously accrued assets. At some point in the case of insolvency, if someone is a worker, he or she can decide not to provide services any more, but a worker cannot withdraw past contributions.

In my view, the threshold is even more important when it is a matter of contributions to a retirement fund or any previous contribution at all. These are accrued assets, and the way things stand now, the conditions cannot be changed by the worker.

At most, employees can say that since the employer is not paying anymore, they are leaving right away. This is technically possible when such a situation arises. However, nothing can be done to change a previously established condition, in particular one related to contributions made to a retirement fund 17 years earlier. This can no longer be changed.

That is why the protection in this regard should probably be increased to better shield these kinds of assets, if I can call them such.

● (1400)

[*English*]

The Deputy Speaker: There will be an additional eight minutes after question period for further questions and comments. We will now move to statements by members.

STATEMENTS BY MEMBERS

[*English*]

CRIME PREVENTION

Mr. Paul Szabo (Mississauga South, Lib.): Mr. Speaker, safe homes and safe streets make safe communities. We as federal legislators help through progressive legislation which responds to the realities of criminal activity and which provides effective deterrence and other crime prevention measures.

Policing authorities and the courts also need the means and resources to enforce and defend our laws. National, provincial and community crime prevention organizations contribute through education, training and research. Business and industry does its role through their support of community based crime prevention initiatives, and our families play a role by providing guidance and encouragement to youth and others they encounter.

We all have a role to play and we can all help if we are better informed about the facts related to crime in our own communities. Therefore, I want to advise the House that last weekend I participated in the fifth annual Mississauga crime awareness day which was attended by over 10,000 residents.

I would specifically like to recognize and congratulate the Mississauga Chinese Business Association who organizes this event which has helped Mississauga to remain one of the safest communities in all of Canada.

* * *

AGE OF CONSENT

Mr. Vic Toews (Provencher, CPC): Mr. Speaker, I rise today to express my deep disappointment with the Liberal government's failure to protect Canadian children by voting yesterday against two Conservative Party initiatives to raise the age of sexual consent from 14 to 16.

Canada has one of the lowest age of sexual consent laws in the world. This fact has put our children at risk of exploitation from much older sexual predators. The Minister of Justice claims that children between the ages of 14 and 18 are already protected by the Criminal Code. However, anyone who understands how a criminal trial works knows that these provisions place the burden of the trial on the shoulders of the young victims making prosecution very difficult.

The decision by the Liberals to oppose raising the age of sexual consent is a matter for which the people of Canada will ultimately hold this government to account.

* * *

SEARCH AND RESCUE

Mr. Don Bell (North Vancouver, Lib.): Mr. Speaker, on September 17 it was my honour to attend the 40th anniversary celebration of North Shore Rescue, a volunteer and community based search and rescue team. It has approximately 40 members from all walks of life who share a common interest in providing an important life saving service to the public, year round, 24 hours a day.

The team has served our community during the last 40 years by successfully completing 1,600 search and rescue tasks involving over 2,000 individuals who are frequently found in dangerous conditions. North Shore Rescue volunteer members have contributed well over 100,000 rescue hours during the past 40 years and in doing so have become recognized for their high levels of expertise and dedication throughout B.C. and beyond. To date, in 2005, they have responded to over 82 calls, far greater than in previous years.

I would like to thank these volunteers for their caring and dedication to the community and thank their families who are without them while they are away helping others in need. In the past year we have all been witness to the necessity of emergency preparedness and we are comforted knowing that the men and women of North Shore Rescue give their time and energy to remain prepared.

* * *

[*Translation*]

ADÉODAT SAINT-PIERRE

Ms. Louise Thibault (Rimouski-Neigette—Témiscouata—Les Basques, BQ): Mr. Speaker, Adéodat Saint-Pierre is a man of the land. Protecting it, living on it, and making sure it flourishes have long been his objectives.

First regional and then national president of the Fédération des producteurs de bois du Québec, president of the Coalition urgence rurale du Bas-Saint-Laurent, a driving force behind Maisons familiales rurales au Québec, a former farmer and forester honoured with the Hommage bénévolat-Québec award in 2001, Mr. Saint-Pierre is known for his remarkable commitment and contribution to the environment.

It is truly an honour for me to acknowledge his ardour, determination, audacity even, and his vision for sustainable use of the land.

Next Saturday, l'Université du Québec in Rimouski will award him its prestigious Médaille institutionnelle in recognition of his exceptional contribution to the development of his community. I fully support their choice. I want to thank Adéodat Saint-Pierre and congratulate him on all his accomplishments.

* * *

[*English*]

ANIMAL RIGHTS

Mr. Mark Holland (Ajax—Pickering, Lib.): Mr. Speaker, over the course of the summer I was truly taken by the number of constituents, and indeed Canadians, who spoke up on the issue of animal cruelty and the lack of strength in the current legislation.

The last time these laws were changed was in 1956 and those were only minor amendments from the changes made in 1892. In fact, animals are still in our property section and are really afforded no protection. As various abuses occur, the reality is that nothing is being done.

The House has been dealing with an animal cruelty bill since 1999. We are now on our seventh incarnation of the bill. It is imperative that we take action. Bill C-50 is hopefully going to be presented to the House soon. It needs to be passed by all members of the House with great expediency. It is essentially the same bill that was passed previously. The bill that is currently before the Senate is woefully inadequate. It does not protect animals. It keeps them in the property section.

It is important to say this because there are a lot of people in the hunting community who have received false information. They have nothing to be worried about—

● (1405)

The Speaker: The hon. member for Yorkton—Melville.

* * *

GASOLINE PRICES

Mr. Garry Breitkreuz (Yorkton—Melville, CPC): Mr. Speaker, two and a half years ago I informed Parliament that the most common complaint I was hearing from farmers in my riding was that they were fed up with the high price of fuel. Imagine what they are seeing today.

Liberals are telling Canadians that they will not lower taxes because high taxes are helping municipalities and the provinces. This is false. Funding for infrastructure in our communities will only amount to 5¢ a litre and not until 2010. This is a far cry from the 40¢ a litre every Canadian is paying in gasoline taxes today.

Many grain producers at this time of year are paying at least $400 a day for fuel. That is well over $100 a day in taxes alone. In 1969 gas was about 6¢ a litre and farmers were getting about $1.40 a bushel for their wheat. Today gas prices are 12 times higher, yet wheat prices are barely twice as much. It is obvious that something has to change.

Is it not sad that the finance minister, who lives in Saskatchewan, will not lower gas taxes?

* * *

CANADIAN BROADCASTING CORPORATION

Ms. Anita Neville (Winnipeg South Centre, Lib.): Mr. Speaker, I am compelled to rise today to speak out on the ongoing labour dispute between CBC and the Canadian Media Guild. I cannot stress enough the importance of restoring regular CBC programming to our airwaves as soon as possible. I applaud the hard work of the Minister of Labour and Housing to facilitate the negotiations.

The role that CBC fulfills is quite singular and the work stoppage is being felt across the country. The lockout has left a void in Canadian radio and television. Canadians, both in my constituency of Winnipeg South Centre and elsewhere, have made it quite clear that they want to see an end to this lockout immediately. Workers in my community ask for fairness and respect as employees.

I ask the management of the Canadian Broadcasting Corporation to allow the workers to do their work while the negotiations continue. End this lockout now, for the truth is that all Canadians are being locked out.

* * *

[*Translation*]

NOËL LACAS

Mr. Pierre Paquette (Joliette, BQ): Mr. Speaker, it was with sadness that we learned of the passing of Noël Lacas last week.

I want to acknowledge his exceptional contributions to the union movement and to the development of the Lanaudière region for over 50 years.

In 1952, the Conseil central des syndicats nationaux de Joliette hired him as a union advisor. It was in this role that he became instrumental in forming new unions and in negotiating for the public sector and for prison guards in Quebec.

Since his retirement in 1984, Noël Lacas had been heavily involved in sovereignist activities.

With his passing, the Lanaudière region and Quebec as a whole have lost a great unionist and staunch defender of Quebec.

A historian as well, he brought us a well-researched history of the Conseil central de Joliette, now the Conseil central de Lanaudière

His funeral was held on September 22 at the Joliette Cathedral. The Bloc Québécois offers its condolences to his family and loved ones.

* * *

FEDERAL GAS TAX

Mr. David Smith (Pontiac, Lib.): Mr. Speaker, I want to share with my colleagues my enthusiasm in light of the historic agreement signed between the Government of Quebec and the federal government to transfer a portion of the federal gas tax.

I am especially pleased because the 43 municipalities in my riding will benefit from new funding. This will allow small municipalities to plan and get work done, instead of waiting for funding.

During the last election campaign, we talked about the need for a new deal for cities and communities: promise made, promise kept. So, thanks to our government, Canadian municipalities will receive $5 billion over the next five years.

This is a government that keeps its promises, a responsible government, our government.

* * *

● (1410)

[*English*]

BRUCE—GREY—OWEN SOUND

Mr. Larry Miller (Bruce—Grey—Owen Sound, CPC): Mr. Speaker, this month across Ontario there are dozens of agricultural fairs and community festivals, and my riding of Bruce—Grey—Owen Sound is no exception. I have attended many of these events, some of which have celebrated their 150th anniversary.

This weekend I will participate in the Meaford scarecrow invasion and family festival. This annual event is celebrating its ninth year, and from mid-September to mid-October attracts thousands of people eager to see the creations which pop up throughout the municipality thanks to hundreds of volunteers, businesses, schools and individuals. I would like to congratulate everyone for making these community events so successful.

I would also like to congratulate the city of Owen Sound for being selected the winner of the 2005 national edition of the communities in bloom. The city was competing with such places as Brandon, Brockville, Grand Prairie and Charlottetown, and was recognized for excelling in all criteria, including landscaping, environmental awareness and community involvement. Congratulations to Owen Sound.

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CHILD CARE

Mr. Gary Carr (Halton, Lib.): Mr. Speaker, I rise in the House today to applaud the government for its commitment to Canadian families, and especially the families of Halton.

As a result of the early learning and child care agreement signed with Ontario, Halton will receive 500 new spaces over the next three years. The child care spaces will primarily be located in or near schools so that junior and senior kindergarten students can benefit from a seamless full day of learning and child care.

Regional chair, Joyce Salvoline, said, "The investment made by the provincial and federal governments recognizes the importance of providing the tools for early learning to support the development of our children".

I am proud that my riding of Halton is able to benefit from this initiative. We are providing families with the resources they need to ensure that their children, our future, get the best possible start in life. I am very proud that Halton families have a government that they can rely on and trust.

* * *

GASOLINE PRICES

Hon. Bill Blaikie (Elmwood—Transcona, NDP): Mr. Speaker, a study just released by the Canadian Centre for Policy Alternatives makes it clear that oil companies have raised gasoline prices away above what can be justified by the current price of crude oil. The study shows that Canadians should be paying several cents a litre less in the current circumstances, instead of being gouged at the pumps as is now the case.

The willingness of oil companies to profiteer from any and all situations would probably also apply to any tax relief on gas. They would just take up the slack and put it into their own pockets. That is why we would be better to have, as the NDP recommends, an energy pricing commission that would regulate the decisions of those who actually raise the prices in the first place.

Focusing on gas taxes is the approach of those who do not want to challenge the power of the multinational oil companies or those who do not want Canadians to be reminded of the fact that NAFTA curtails our ability to sell Canadians their own energy at a lower domestic price.

At the moment Canadians are paying the price of having a Liberal government and a Tory opposition that are both unwilling to tackle the real culprits.

* * *

AGE OF CONSENT

Mrs. Nina Grewal (Fleetwood—Port Kells, CPC): Mr. Speaker, over 80% of Canadians want Parliament to raise the age of consent so children are protected from sexual predators. In most democracies around the world, the age of consent stands at 16 years but in Canada it is 14.

Liberal social policy is making Canada a hot spot for Internet predators. Sexual predators are flocking to Canada to take advantage of our vulnerable youth. Kids in grade 8 or 9 are not mature enough to drink, drive, smoke or watch certain movies, but the government believes 14 year olds can make adult decisions when it comes to sex.

This is not about puppy love, but about perverts preying on our children. We need to act now before more innocent lives are ruined.

Shame on the Liberals and shame on the minister for not taking the protection of our children seriously. A Conservative government would do the right thing. We stand up for Canadian children.

* * *

[*Translation*]

CANADA POST

Ms. Christiane Gagnon (Québec, BQ): Mr. Speaker, in August, Canada Post announced that it would be transferring mail sorting services from Quebec City to Montreal, eliminating 500 full-time and part-time jobs in the region, with all the economic repercussions that this entails.

At a press conference this morning, a number of political and socio-economic stakeholders reiterated their support for a broad coalition that opposes this decision by Canada Post. Given the support of this broad coalition and the public, the Bloc Québécois will continue to demand a moratorium on this closure until the crown corporation tables a comprehensive restructuring plan.

The Minister of Transport, who is responsible for the regions of Quebec, downplayed this issue during his stopover in Quebec City, and the minister responsible for Canada Post has washed his hands of this matter by making his officials deal with it, despite the fact that the government is bound to act to save the sorting plant and the jobs at that plant.

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● (1415)

[*English*]

PREMIER OF NOVA SCOTIA

Mr. Peter MacKay (Central Nova, CPC): Mr. Speaker, I rise to pay tribute to the great Nova Scotia Premier, John Hamm, who announced his retirement today.

A man of sterling reputation, Premier Hamm has led his province with distinction for six years and the people of Nova Scotia will enjoy the fruits of his labour for generations to come. Through his leadership the finances of the province of Nova Scotia are in the best shape they have been in decades. Under his watch reinvestments were made in health, education and infrastructure.

Among his many accomplishments, his greatest may be his securing of an offshore royalty deal that will ensure a prosperous and bright economic future for the people of Nova Scotia.

The Leader of the Opposition, the Conservative caucus and myself took great pride in working with Premier Hamm and his government.

Perhaps Gentleman John Hamm's greatest legacy will be the integrity and decency he brought to public life and the esteem he brought to the office of the Premier. He accomplished much with humble perseverance, humour and grace. At a time when cynicism about public life is high, John Hamm is leaving office with an ever increasing respect and affection of the people he served.

To John and his wife Genesta and their entire family, we extend our heartfelt thanks and best wishes.

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CARMEN PROVENZANO

Mr. Brent St. Denis (Algoma—Manitoulin—Kapuskasing, Lib.): Mr. Speaker, this past July my friend and our former colleague, Carmen Provenzano, suddenly passed away. He was Sault Ste. Marie's federal member of Parliament from 1997 until 2004. He was a loving husband to Ada, a caring father to their children, a devoted member of the community, a hard-working MP and a great friend. His funeral mass was a wonderful testimony to his life.

Carmen will be missed but in many ways he will be remembered, including through the recent establishment of the Carmen Provenzano Memorial Cup to be given to the Sault Ste. Marie or Blind River team that does best in each of the Northern Ontario Junior Hockey League seasons.

Whether it was fighting to save the Sault's Algoma Steel Plant, working to ensure FedNor funding northern Ontario as our caucus chair, fighting effectively behind the scenes to advance community projects or doing the countless smaller but important things he did for his constituents, he will be fondly remembered as a man who loved his family, his friends, his community and Canada.

May my friend rest well and enjoy his place in paradise.

ORAL QUESTIONS

[*English*]

NEWFOUNDLAND AND LABRADOR

Hon. Stephen Harper (Leader of the Opposition, CPC): Mr. Speaker, yesterday an all party event on the front lawn of Parliament was raising money to support the flood victims of New Orleans. Yet it seems no one is paying attention to what is happening here at home.

Stephenville, Newfoundland is under two feet of water due to heavy rains and flooding. A state of emergency has been declared and 181 people have been evacuated.

Given that Newfoundland and Labrador has no cabinet representation, what is the government doing to help the evacuees and to aid the situation?

Hon. Bill Graham (Minister of National Defence, Lib.): Mr. Speaker, I can assure the hon. member that we have been in contact with the local authorities. Military assistance has been given to the region. We have emergency preparedness in our country that is unparalleled. We discussed that this morning in cabinet.

We are ready to help and we are willing to discuss with the province of Newfoundland and Labrador exactly what we can do, what assets of a federal nature we can put in, and they will be there when they are needed and as requested. The local authorities are in charge. They have it under charge, and we are there supporting them fully.

* * *

DAVID DINGWALL

Hon. Stephen Harper (Leader of the Opposition, CPC): Mr. Speaker, I would urge the government to keep on top of the situation. We will, of course, aid it in anything we can do.

Yesterday while David Dingwall was resigning for his scandalous spending, the Prime Minister was defending him in the House. What a change for the man who said that he would clean it all up.

Will the Prime Minister now do the right thing and ask the Auditor General to do a thorough investigation of Mr. Dingwall's spending and contracting practices at the Canadian Mint and at Technology Partnerships Canada?

● (1420)

Hon. John McCallum (Minister of National Revenue, Lib.): First, Mr. Speaker, not only did David Dingwall turn the company around financially but he also produced a new positive spirit and higher morale as indicated by the fact that employees, as we speak, are writing a petition that he not resign.

That having been said, no performance in this regard is an excuse for breaking the rules. There is no evidence he did but, and this goes to the question, the board will be appointing external experts to conduct an independent review of the policies to ensure that he did not break any policies and to consider—

The Speaker: The hon. Leader of the Opposition.

Hon. Stephen Harper (Leader of the Opposition, CPC): Mr. Speaker, David Dingwall is accused of a wide range of misspending. There are suspicions about what exactly happened with moneys at Technology Partnerships Canada.

If the minister wants, he can negotiate with him some kind of golden parachute. The Treasury Board president can continue to urge him to stay and the Prime Minister can proclaim him to be the St. David of public service. If they are so certain, why do they not call in the Auditor General to investigate what actually happened?

Hon. John McCallum (Minister of National Revenue, Lib.): First, Mr. Speaker, I would have thought the Leader of the Opposition would know by now that the Auditor General is the auditor.

In addition to that, there is no evidence that Mr. Dingwall broke any rules. The expenses were signed off by the chief financial officer and approved by the board. However, for greater certainty the board is gong to two highly reputed external experts to ensure he broke no policy and to analyze whether the existing policies are the right policies for the future.

Mr. Brian Pallister (Portage—Lisgar, CPC): Mr. Speaker, a year ago the Prime Minister was saying that he wanted to get to the bottom of all the wrongdoing. Yesterday he was nominating David Dingwall for the Order of Canada. What the heck happened?

It seems he is only a proponent of cleaning things up when he can send the bill to Jean Chrétien, but this happened under his watch. This is his dirty laundry. These lavish expenses should have been stopped by him, and Canadians are mad as hell. When will the government understand that they are not willing to take it any more?

[*Translation*]

Hon. John McCallum (Minister of National Revenue, Lib.): Mr. Speaker, given that the member has not apologized for questioning the right of a francophone to speak French before a parliamentary committee, I am happy to reply to him in French.

The answer is the same as the one I have just given: there is no proof Mr. Dingwall did not follow the rules. The evidence will be examined by outside experts.

Mr. Brian Pallister (Portage—Lisgar, CPC): Mr. Speaker, the minister is saying a lot, and nothing, at the same time.

[*English*]

Yesterday the Prime Minister tried to defend, as his colleagues are doing today, the indefensible. The Prime Minister had a choice yesterday: Liberal crony or Canadian taxpayer. He chose Liberal crony. He chose wrong.

The Prime Minister makes these bold pronouncements about improving governance, but they are nothing more than bogus. Now he is planning to add insult to injury by giving David Spendwell a severance package. Why is the Prime Minister giving more money to Dingwall when he should be getting it back?

Hon. Reg Alcock (President of the Treasury Board and Minister responsible for the Canadian Wheat Board, Lib.): Mr. Speaker, I do not think the member opposite should play fast and loose with the truth. Would he please identify a single law that has been broken, a single rule that has been broken?

How does he defend the fact that he seems to think it is inappropriate for the head of a $400 million corporation, which generates $182 million offshore, to travel to do that business? This whole thing is nothing more than a character assassination on somebody who has done an excellent piece of work.

[*Translation*]

Mr. Gilles Duceppe (Laurier—Sainte-Marie, BQ): Mr. Speaker, the president of the Royal Canadian Mint resigned after embarrassing revelations on his spending while in that position. In 2004 alone, Mr. Dingwall and his entourage claimed miscellaneous expenses of $750,000 for such things as maintenance of the minister's BMW, a golf club membership and even chewing gum. Despite the extent of the scandal, the president of the Treasury Board asked Mr. Dingwall to stay on.

How, with such an attitude, does the Prime Minister have the nerve to say that his government has learned a lesson from the sponsorship scandal?

● (1425)

Hon. John McCallum (Minister of National Revenue, Lib.): Mr. Speaker, the leader of the Bloc should know that this $750,000 figure is not accurate because most of that money was for office expenses and not personal expenses.

That being said, there is no evidence that Mr. Dingwall broke any rules. To be still more certain of this, the board is appointing two outside experts to conduct an audit and make recommendations to determine whether policies should be changed.

Mr. Gilles Duceppe (Laurier—Sainte-Marie, BQ): Mr. Speaker, that sounded just like Alfonso Gagliano answering the initial questions on the sponsorships. It is the same tune.

The minister responsible for the Royal Mint even thanked the fallen president for "his service to Canadians".

Should he not instead have condemned Mr. Dingwall for helping himself to public funds?

Hon. John McCallum (Minister of National Revenue, Lib.): Mr. Speaker, I think we should be honest and if someone did a good job, that should be recognized.

The government is extremely serious about the possibility of rules being broken. That is why the board is hiring two experts.

That being said, the fact that employees at the Royal Canadian Mint organized a petition for Mr. Dingwall to stay on suggests that he served the employees and the government well.

Mr. Odina Desrochers (Lotbinière—Chutes-de-la-Chaudière, BQ): Mr. Speaker, it is incredible to hear the government pay tribute to David Dingwall after he resigned following revelations in the newspapers yesterday on his administration's laxity.

How can the Prime Minister explain the fact that he supports someone who has resigned as a result of poor administration and who made Chuck Guité responsible for the entire sponsorship program after ensuring the latter was a faithful Liberal?

Hon. John McCallum (Minister of National Revenue, Lib.): Mr. Speaker, it seems that the Bloc Québécois has trouble understanding whenever there is a two-part answer.

First, we are going to look into whether there were any irregularities. However, to date, there is no evidence that there were. We take this point very seriously.

Second, the facts suggest that, yes, he did a good job at the Royal Canadian Mint, with regard to both its profitability and company morale.

Mr. Odina Desrochers (Lotbinière—Chutes-de-la-Chaudière, BQ): Mr. Speaker, whenever we asked questions, back then, about Alfonso Gagliano, the government had exactly the same attitude it does now and it gave the same answers: he is beyond reproach, he is a great Canadian.

Given its arrogance with regard to the Dingwall scandal, is the government not showing that it has learned nothing from the sponsorship scandal and that it has no more respect for taxpayers' dollars now than it did back then?

[*English*]

Hon. Reg Alcock (President of the Treasury Board and Minister responsible for the Canadian Wheat Board, Lib.): Mr. Speaker, I think the concern I have is that members take an area where there was a significant problem that is being addressed and then use that to slander anybody they choose. The reality is that Mr. Dingwall has not been accused of anything. Nothing. What we have is an opinion on his expenses.

Let me tell members this. On the reforms that we have put in place, Dave Brown, the past chairman of the Ontario Securities Commission, says they are very positive steps. They are practices adapted from the private sector. This clarifies the accountabilities within the crown corporation structure and between the corporations in a responsible manner. It reaffirms the essential stewardship of the crowns.

* * *

● (1430)

FINANCE

Hon. Jack Layton (Toronto—Danforth, NDP): Mr. Speaker, my question is for the Minister of Finance.

Apparently there is an announcement coming for a program for energy efficiency for homes. It is about time. The NDP put $100 million into the budget so that people could pay less for precisely that problem. That is why it is there. Left to themselves, the Liberals would have given it away in a corporate tax cut rather than helping people burn less.

Will the Minister of Finance simply confirm that his preference was to give money in corporate tax cuts to the oil companies, not to energy efficiency?

Hon. Ralph Goodale (Minister of Finance, Lib.): No, Mr. Speaker, I will not confirm that because the hon. gentleman obviously has difficulty reading a balance sheet. He is referring to two fiscal years that are three years apart and he is drawing the wrong conclusions.

This government believes that we can have a good, solid competitive tax policy and also a very strong environmental policy and housing policy all at the same time. They are not mutually exclusive.

* * *

THE ENVIRONMENT

Hon. Jack Layton (Toronto—Danforth, NDP): Mr. Speaker, that answer is patently absurd in light of the environment commissioner's own report today, so my next question is for the Minister of the Environment.

The environment commissioner said that "bold announcements" are being made but forgotten before "the confetti hits the ground". No wonder she is angry. It is the same anger Canadians feel. Our government gets up and lectures the world about how important climate change is, but we do not have the guts to impose fuel emission standards on cars. Can the minister explain why 10 states have such standards but Canada does not?

Hon. Stéphane Dion (Minister of the Environment, Lib.): Mr. Speaker, I would like to say first that the government welcomes the report of the commissioner and accepts all her recommendations. They are going in the same direction as the plans that the Prime Minister has for climate change and the environmental policy as such; it is project green.

I want to say that what the hon. member has said is wrong. Canada has standards for cars. They need to decrease their emissions by 25%. It is a measurement and there is a trajectory. If they do not increase their energy efficiency by 25%, we will regulate, but we are comfortable that they will do it because they have a commitment toward the Canadian people.

* * *

TECHNOLOGY PARTNERSHIPS CANADA

Mr. James Rajotte (Edmonton—Leduc, CPC): Mr. Speaker, we have just seen ministers defend Mr. Dingwall because they said he did not break the rules. He did break the rules. It is expressly forbidden for lobbyists to receive contingency fees when they help to secure a Technology Partnerships Canada grant for their clients.

In spite of this rule, former Liberal cabinet minister David Dingwall received at least $350,000 as a reward for securing a TPC grant and he sees nothing wrong with this. Yet this government is not pursuing Mr. Dingwall or any other lobbyist who has defrauded the taxpayers by receiving kickbacks. Why will this government not force Mr. Dingwall to return this fee to the government, to the taxpayers of Canada?

Hon. David Emerson (Minister of Industry, Lib.): Mr. Speaker, I think the hon. member knows that there is a prohibition against companies paying contingency fees to lobbyists under the technology partnerships program. We have dealt with the company. The company was in breach of contract. The company can deal with Mr. Dingwall. We have recovered the money.

I might also say that the technology partnerships program has led to $14 billion plus in research and development and innovation in Canadian companies

Mr. James Rajotte (Edmonton—Leduc, CPC): Mr. Speaker, this is unbelievable. This thing is a racket. The taxpayers of this country deserve some respect. There is no punishment for those who break the rules because in fact the lobbyists may be allowed to keep the money they take, against the government's own rules.

The fact is that David Dingwall is not alone. Up to 15 lobbyists have received kickbacks for securing TPC grants. The minister admitted yesterday that this number could be growing. Why is this government not going after former Liberal cabinet minister David Dingwall? Why is it not standing up for Canadian taxpayers?

Hon. David Emerson (Minister of Industry, Lib.): Mr. Speaker, if only the hon. member would remind himself that nearly 90% of the companies that are assisted under Technology Partnerships Canada are small companies. The Government of Canada is in the business of supporting small businesses in Canada and helping them to become competitive, not in the business of punishing them.

We are getting the money back, we are correcting the breaches and that is the right thing to do.

● (1435)

Mr. Michael Chong (Wellington—Halton Hills, CPC): Mr. Speaker, it has been a year since the government ordered a partial audit of the TPC program and still we have no answers. Thirty-three contracts have been audited. Eleven, one in three, have been found to have been in breach. It looks like there are eleven more David Dingwalls out there, yet the government refuses to reveal their identities and how much they received in kickbacks.

The public deserves to know today who was involved in these breaches and how much money was siphoned off. Who are these eleven other David Dingwalls? How much did they receive in kickbacks?

Hon. David Emerson (Minister of Industry, Lib.): Mr. Speaker, I see that the hon. members have finally got back to their core niche, which is to drag people through the muck rather than talk about the public policy issues of this country.

We have worked closely with the Auditor General to audit the technology partnerships program. We will find any breaches of the program. We will correct them. We will recover the money. The hon. member should just sit down and think about what the best interests of Canadians are.

Mr. Michael Chong (Wellington—Halton Hills, CPC): Mr. Speaker, the facts speak for themselves. The auditor's interim audit states that one-third of the 33 randomly selected contracts are in breach. There are 160 contracts in the TPC program. It would only be logical to assume that one-third of them are also in breach.

We do not need more reports and hyperbole from this government. What this House needs is answers, answers as to which contracts are in breach, who is involved and what are the amounts of the kickbacks.

When will this government come clean on the $2.4 billion TPC program? Who else other than David Dingwall received these kickbacks and how much did they get?

Hon. David Emerson (Minister of Industry, Lib.): Mr. Speaker, I think the hon. member knows or should know that it is not illegal to hire a lobbyist under Technology Partnerships Canada. The only thing that was in breach of contract was either to not be registered or to have a contingency fee or a success fee.

That program has accounted for over $14 billion of small businesses investing in research and development and technology. For the member to malign a program that has that kind of positive impact on Canada I think is just wrong.

* * *

[*Translation*]

HEALTH

Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ): Mr. Speaker, the commissioner of the environment denounced Health Canada's inability to determine water quality on board Canadian aircraft. She said, “Canadian travellers do not know for sure that the water used for drinking and food preparation on aircraft is safe”.

Does the Minister of the Environment find it acceptable that Health Canada reacted by saying that aircraft inspections will only be carried out in response to complaints, emergency situations or incidents, when there is obviously a health risk?

[*English*]

Hon. Ujjal Dosanjh (Minister of Health, Lib.): Mr. Speaker, the hon. member raises an important question. We agree with the recommendations of the commissioner for the environment. I have asked my staff to contact the airlines and report back to me within six weeks. I want to see the evidence that they are complying with voluntary regulations. If they do not, we will regulate them.

[*Translation*]

Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ): Mr. Speaker, one has to wonder why, if it was aware, the government did not act earlier?

Some 60 million passengers travel on aircraft each year in Canada. Does the government not realize that, by not acting, it is endangering the health of a great many passengers? Is it waiting for people to get sick before assuming its responsibility?

[*English*]

Hon. Ujjal Dosanjh (Minister of Health, Lib.): Mr. Speaker, I have already said we agree with the recommendations of the commissioner. We will be enforcing and implementing those recommendations. I have asked my department to report back to me in six weeks as to the progress, if any is made by the airlines. If it is not made, we will actually regulate them through legislation.

* * *

[*Translation*]

SOFTWOOD LUMBER

Mr. Paul Crête (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, BQ): Mr. Speaker, after representations were made by Guy Chevrette and Henri Massé on behalf of the forest industry, the Minister of Industry indicated that he would at last start working on an aid package for the victims of the softwood lumber crisis. High time, too, since we have been calling for such a plan since the crisis began, and the government has done nothing ever since.

Can the minister confirm to us whether the loan guarantees the industry wants and the Bloc Québécois has been calling for since the crisis began will at last be part of his aid package?

● (1440)

Hon. Jacques Saada (Minister of the Economic Development Agency of Canada for the Regions of Quebec and Minister responsible for the Francophonie, Lib.): Mr. Speaker, referring specifically to Quebec, the forest industry's problems go far beyond the softwood lumber issue. We are talking about the lumber supply, the Coulombe report, and a 20% reduction in access to softwoods. This is why we must help the communities affected according to their actual problems and not according to theories.

Mr. Paul Crête (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, BQ): Mr. Speaker, if the minister were aware of the reality of these businesses, he would never dare make such statements.

The forest producers' associations, which have been involved in the legal battle with the United States from the word go, are also complaining about the poor financial assistance forthcoming from the government.

Does the government intend to beef up its financial support in order to defray a portion of the huge legal costs incurred by the associations during this whole softwood lumber battle? That is reality.

Hon. Jim Peterson (Minister of International Trade, Lib.): Mr. Speaker, it is true that the court battles have been hugely expensive. That is why we have allocated $20 million to help the associations with their legal expenses.

* * *

[*English*]

JUSTICE

Mr. Mark Warawa (Langley, CPC): Mr. Speaker, last night the government had a chance to support my bill with real measures to deter and combat auto theft. However, once again the Liberals showed that they are not listening to Canadians. Auto theft has doubled in Canada. It is a billion dollar a year crisis and it is killing and injuring Canadians.

When will that soft on crime government take serious action on auto theft? When will the Prime Minister finally listen to Canadians and impose mandatory prison sentences for these serious and violent offences?

Hon. Paul Harold Macklin (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, Lib.): Mr. Speaker, we already have within the Criminal Code many tools that are helpful in dealing with auto theft, whether it be the general criminal statute, whether it be fraud, whether it be joyriding, or whether it be possession of a stolen vehicle.

The government introduced in the House yesterday a new piece of legislation dealing with vehicle identification numbers. It will have an adverse effect on organized crime which has been a very integral part of this process. This government is very much interested in dealing with auto theft and we are going to prove it.

[*Translation*]

Mr. Colin Carrie (Oshawa, CPC): Mr. Speaker, after two years of this Liberal government, our per capita rate of auto theft has now surpassed the U.S. level. Last night, this government voted against a Conservative bill that would have given the courts the power to set mandatory jail sentences for car thieves.

When, then, will the Minister of Justice acknowledge that mandatory prison sentences are justified?

[*English*]

Hon. Paul Harold Macklin (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, Lib.): Mr. Speaker, last evening we did deal with Bill C-293, but I do not think that was an appropriate bill to go forward. One of the reasons it was not an appropriate bill to go forward is we do not believe this is the time to be reducing sentences on auto theft. That bill actually proposed to reduce the sentence from 10 years to five years and we do not agree with that principle.

Mrs. Nina Grewal (Fleetwood—Port Kells, CPC): Mr. Speaker, yesterday members opposite chose to reject my motion to raise the age of consent, choosing instead to protect predators who prey on young teens. Parents and families need laws that protect children, not predators. Now predators are coming to Canada from around the world to take advantage of our weak Liberal laws. Police and family groups across Canada support this change.

Could the Minister of Justice explain why he is giving a pass to sexual predators instead of protecting young Canadians?

Hon. Paul Harold Macklin (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, Lib.): Mr. Speaker, clearly the Minister of Justice is doing no such thing in terms of encouraging that type of conduct. In fact, as Bill C-2 clearly stated and which passed through the House and is now becoming law, we want to deal not with the child but with the person who exploits the child. That is the key to getting this resolved.

● (1445)

Mr. Rick Casson (Lethbridge, CPC): Mr. Speaker, it is statements like that from the government that cloud this issue and put our children at risk.

By refusing to raise the age of consent, the government has turned its back on the weakest of our society, our children. Why does the government continue to ignore the calls for action by parents and police? Why does it refuse to recognize that most countries have a higher standard than Canada?

By raising the age of consent to 16 with a close in age exemption for teenagers, our children can be protected from the adult creeps who prey on them. Just do the right thing. Protect our kids.

Hon. Paul Harold Macklin (Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, Lib.): Mr. Speaker, no one can consent to being exploited. Whatever the age, that consent cannot be given.

The reality is what we are doing in the process with Bill C-2 is to deal with the cause of the problem. The cause is the person who exploits our young people. Those are the people we are going to get and bring to justice.

* * *

THE ECONOMY

Ms. Yasmin Ratansi (Don Valley East, Lib.): Mr. Speaker, my question is for the Minister of Industry.

Recently the World Economic Forum released its annual report on global competitiveness. The report measures the competitiveness of 117 countries using a wide range of indicators, including both hard data and an opinion survey of nearly 11,000 business leaders.

Could the minister inform the House how Canada stacked up against the competition and what steps the government is taking to improve Canada's economic competitiveness?

Hon. David Emerson (Minister of Industry, Lib.): Mr. Speaker, it is very interesting that the World Economic Forum, at a time when members opposite are trashing one of our pre-eminent programs of innovation support, had this to say about the Government of Canada:

> We have been well impressed by Canada's strong performance among her G-7 peers, particularly the cautious management of public finances.

It went on to say that more importantly, the country continues to nurture its capacity for innovation and there have been improvements with respect to company spending on R and D, the extent of absorption of new technologies and the level of business community and continued penetration—

The Speaker: The hon. member for Windsor West.

* * *

GASOLINE PRICES

Mr. Brian Masse (Windsor West, NDP): Mr. Speaker, another economist's report was tabled today that shows that Canadians are being ripped off at the pump. The fact of the matter is that prices should not be above $1 per litre. In fact, the sheer profiteering from hurricanes has been devastating to consumers. At the same time the industry itself has described its profits as spectacular.

The government has been sitting on a gas report tabled two years ago to bring accountability. Have enough Canadians been ripped off for the Liberals to act?

Will the Minister of Industry create a watchdog price monitoring agency now to protect Canadian consumers?

Hon. Ralph Goodale (Minister of Finance, Lib.): Mr. Speaker, the government has indicated that we are working on a variety of measures to deal with the concerns of Canadians with respect to transparency and competition in the marketplace, particularly the Minister of Industry and the Minister of Natural Resources. I have been very active on this file. It has been very helpful to have the advice of the Parliamentary Secretary to the Minister of Foreign Affairs, the member for Pickering—Scarborough East, whose work on this file has been exemplary.

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THE ENVIRONMENT

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Mr. Speaker, the environment commissioner released a scathing report today confirming what 11 environmental groups have said all along, that the Liberal government has broken promise after promise to Canadians when it comes to our environment. New Democrats have long said what the auditor now confirms, that any credibility the Liberal government had when it comes to the environment is now gone.

Would the minister like to stand up today and make another promise that he is only going to break tomorrow?

Hon. Stéphane Dion (Minister of the Environment, Lib.): Mr. Speaker, the hon. member would not be able to list one promise that I have not kept since I have been in Parliament.

We are committed to go ahead with our 10 year plan for clean air; to go ahead with our climate change plan, which is the most compelling one to be found on earth now; to go ahead in the next 15 years with our plan to decontaminate all federal sites. All those commitments will be fulfilled.

* * *

● (1450)

INCOME TRUSTS

Mr. Monte Solberg (Medicine Hat, CPC): Mr. Speaker, Doug and Kay from Oakville sent us an e-mail today saying that they lost $30,000 in their savings on September 19 because of the finance minister's inept management on the income trust issue. We understand that Liberals do not care about small investors and seniors like Doug and Kay, because according to them, they do not count politically.

The minister told us that he thought these stories were a bunch of exaggerations. Is he saying that Doug and Kay are lying?

Hon. Ralph Goodale (Minister of Finance, Lib.): Mr. Speaker, I hazard a guess that my concern for Doug and Kay and their counterparts is every bit as deep, if not more, than that of the member for Medicine Hat. I would say to that member, not to Doug and Kay, but to that member, that those who feed a sense of fear and exaggeration are doing a disservice in the marketplace and elsewhere to those whom they purport to represent.

Mr. Monte Solberg (Medicine Hat, CPC): Mr. Speaker, if the finance minister is really so concerned, then why does he not do something about it? Why does he not stand in his place right now and say without equivocation that income trusts are here to stay and he will not implement taxes on them?

Hon. Ralph Goodale (Minister of Finance, Lib.): Mr. Speaker, the hon. gentleman is—

Some hon. members: Oh, oh!

The Speaker: Order, order. The poor member for Medicine Hat has asked a question and he wants to hear the answer. I can see him just quaking, waiting for the answer from the Minister of Finance. We cannot hear a word because of all the noise in the chamber. The Minister of Finance has the floor and the member for Medicine Hat is entitled to hear the answer he is about to get.

Hon. Ralph Goodale: Mr. Speaker, the hon. gentleman is inviting me to pre-empt a legitimate public consultation process that is in place to find out exactly what are the right answers in terms of public policy for Doug and Kay and all of the other investors in this country, whether they invest in income trusts or in other dimensions of the Canadian economy.

I would invite all Canadians to participate in that process. They can do so through the Finance website at www.fin.gc.ca. They can call 613-992-1573 and we do accept collect calls.

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SPONSORSHIP PROGRAM

Mr. Gary Lunn (Saanich—Gulf Islands, CPC): Mr. Speaker, yesterday we asked the Minister of Public Works whether the RCMP had recently seized documents relating to the sponsorship scandal. The minister responded by claiming the RCMP had asked Public Works for a single invoice.

For the third time, is the minister aware that the RCMP attended the Public Works offices in Gatineau, Quebec on September 14 and seized over 100 boxes of documents from the records management group? Can the minister confirm or deny that this in fact happened?

Hon. Scott Brison (Minister of Public Works and Government Services, Lib.): Mr. Speaker, yesterday the member for Saanich—Gulf Islands actually claimed that Public Works provided information to the RCMP that had been withheld from the Gomery commission. I said yesterday in the House and I will repeat again today in the House that the information provided to the RCMP to help cooperate with their ongoing investigations was provided in fact twice to the Gomery commission.

That hon. member ought to rise in the House and correct what he said yesterday because he was wrong when he tried to bring disrepute on the work of Justice Gomery.

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ABORIGINAL AFFAIRS

Mr. Jim Prentice (Calgary Centre-North, CPC): Mr. Speaker, today the Auditor General reported that the government has spent $2 billion on aboriginal drinking water and it is still failing first nations people in this country. The government is proposing to spend another $2 billion in the next three years without any performance standards, without any regulatory framework, without providing accurate information to Parliament, zero accountability.

The government's record is one of 12 years of failure. Why are first nations citizens still waiting for clean drinking water and where did the $2 billion go?

Hon. Andy Scott (Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, Lib.): Mr. Speaker, I join with the Minister of Health and the Minister of the Environment in saying that the government accepts the report of the environment commissioner. We are acting on the recommendations now, in fact. We are working with first nations communities to put the regulations in place that are necessary to make sure that we deliver good water to first nations communities.

* * *

● (1455)

[*Translation*]

FOREIGN AFFAIRS

Ms. Francine Lalonde (La Pointe-de-l'Île, BQ): Mr. Speaker, on Monday, the Minister of Foreign Affairs applauded the announcement that Canada was to resume nuclear cooperation with India. But this means that he is lifting the strict moratorium he had imposed on India following the nuclear testing it conducted in 1974.

What message is Canada sending to those countries that have complied with the non-proliferation treaty? Does the minister realize that he is rewarding the delinquent countries and compromising international non-proliferation efforts?

Hon. Dan McTeague (Parliamentary Secretary to the Minister of Foreign Affairs, Lib.): Mr. Speaker, Canada recognizes that India recently undertook to take a number of measures to adhere, so to speak, to long-standing nuclear non-proliferation standards and applauds this commitment. This is where matters stand.

Ms. Francine Lalonde (La Pointe-de-l'Île, BQ): Mr. Speaker, let us face it; this is a 180 degree turnaround in the Canadian non-proliferation policy.

Could the minister tell us why no debate on this issue is taking place in the House of Commons, when the American Congress could, if it so decides after consideration, stop a similar agreement signed between the United States and India in July from being implemented?

Hon. Dan McTeague (Parliamentary Secretary to the Minister of Foreign Affairs, Lib.): Mr. Speaker, the hon. member knows full well that, if the Bloc Québécois wants a debate on this issue, it can always use its opposition days for that purpose.

I must say and point out to the hon. member that things have changed. We acknowledge the fact that India is expanding and becoming a major political and economic player on the international scene. This is a reality that has obviously eluded Bloc members.

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[*English*]

SPONSORSHIP PROGRAM

Mr. Jason Kenney (Calgary Southeast, CPC): Mr. Speaker, yesterday, in response to a question from me about the apparent seizure of documents from the Department of Public Works, the minister said, "I am informed that last week the RCMP contacted Public Works [which] provided an invoice to the RCMP...".

Is it the position of the minister that the invoice ran over 100 boxes long? Is it not true and will he not confirm that over 100 boxes of information were taken from the offices of his department by the RCMP related to the sponsorship inquiry?

Hon. Scott Brison (Minister of Public Works and Government Services, Lib.): Mr. Speaker, yesterday that hon. member said on the floor of the House of Commons that in fact the information that was voluntarily provided by Public Works to the RCMP in full cooperation with the ongoing investigations of the RCMP was in fact withheld from the Gomery inquiry.

He was wrong. In fact, that information had been provided to the Gomery inquiry on at least two occasions previously. In fact, over 28 million pages of documents have been provided by the Government of Canada to the Gomery commission.

That hon. member should rise and apologize to the House.

Mr. Jason Kenney (Calgary Southeast, CPC): Mr. Speaker, is that not interesting? The minister will not deny that he claimed yesterday that an invoice was seized when in fact, by all appearances, over 100 boxes of evidence were taken from the offices of his department.

We are not going to accept the transparent diversions of the minister. We would like a straight answer. Were over 100 boxes of information seized by the RCMP from his department and were those boxes of information relevant to the sponsorship inquiry, yes or no?

Hon. Scott Brison (Minister of Public Works and Government Services, Lib.): Mr. Speaker, the fact is that there are several ongoing RCMP investigations and Public Works has cooperated fully with the RCMP.

Beyond that—

Some hon. members: Oh, oh.

The Speaker: Now we have to have pity on the member for Calgary Southeast. He asked this question but how can he possibly hear the answer? I cannot and I am sure he cannot.

The Minister of Public Works and Government Services has the floor and we will have some order so we can hear the answer that the minister is giving to the question.

Hon. Scott Brison: Mr. Speaker, the fact is that Public Works is cooperating fully with any RCMP investigation. That is the right thing to do. Beyond that, Public Works is cooperating fully with the Gomery commission by providing over 28 million pages of documents to the Gomery commission.

We are interested in getting to the truth. We are interested in supporting the work of Justice Gomery and working with the RCMP to do the right thing on behalf of Canadians.

All they are doing over there is in fact bringing disrepute on the work of Justice Gomery and disrepute on the important work of the RCMP.

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● (1500)

HUMAN RESOURCES DEVELOPMENT

Ms. Ruby Dhalla (Brampton—Springdale, Lib.): Mr. Speaker, today thousands of volunteers from across the country have participated in the CanWest Raise-a-Reader campaign to raise money for literacy. The most recent report from OECD shows that 42% of working age Canadians perform well below the required level of literacy for a knowledge based economy.

Could the Minister of State for Human Resources Development please tell the House what the government is doing on its part to address this very important issue?

Hon. Claudette Bradshaw (Minister of State (Human Resources Development), Lib.): Mr. Speaker, first, I would like to recognize the volunteers, organizations and businesses involved in this important campaign.

[*Translation*]

The government has committed to developing a comprehensive strategy on contributions. Over the summer, I met with stakeholders across the country to get feedback from communities and know what their priorities are in terms of a comprehensive strategy.

[*English*]

I want to assure the House and Canadians that I will be working very closely with the provinces, territories and communities on this important issue. The provinces and territories have made literacy their priority and so will this government.

TRANSPORT CANADA

Mr. James Moore (Port Moody—Westwood—Port Coquitlam, CPC): Mr. Speaker, on Tuesday another CN freight train derailed, this on top of four serious derailments in August.

An investigation into a fatal derailment in 2003 states:

> Although TC had developed a program...that called for...inspections and audits... the program was not consistently carried out....

The review concluded:

> Because there was no Transport Canada...audit of work procedures, there was no opportunity to identify...[problems].

Transport Canada dropped the ball and two people died.

Investigating CN is not enough. When will the minister start doing his job at protecting Canadians?

[*Translation*]

Hon. Jean Lapierre (Minister of Transport, Lib.): Mr. Speaker, I thank the hon. member for his question.

Not only has a full investigation into CN practices been ordered, which was carried out over the past month and the results of which I have received a few days ago, but inspectors in my department have met with CN officials and challenged them to immediately correct any flaws, otherwise they would face much more serious action on our part.

* * *

[*English*]

CITIZENSHIP AND IMMIGRATION

Mrs. Carolyn Parrish (Mississauga—Erindale, Ind.): Mr. Speaker, immigration to Canada can take up to 60 months. French speaking candidates can and are processed through overseas Quebec offices in five short weeks. Quebec receives $3,785 per immigrant, a formula that does not take secondary migration into consideration. Immigrants land in Montreal and within days, sometimes hours, they move on to Ontario and other provinces with no attached settlement fees. They stay in Quebec.

When will the minister take the necessary steps to ensure every province and every immigrant are treated fairly, particularly before we open the floodgates to 300,000 new Canadians next year?

Hon. Joseph Volpe (Minister of Citizenship and Immigration, Lib.): Mr. Speaker, I take great pleasure in recognizing the member's interest in immigration and its powerful dynamics with respect to the growth of the country. In fact, many people say that immigration is wealth and we should have more of it. The fact that we spend a substantial amount of money on settlement and integration programs speaks to the way that we keep people in the country and make them into solid Canadians who build the country of the future.

I am happy to say that both the Premier of Ontario and the Prime Minister have been engaged in discussions on settlement and integration issues, discussions that will go on with other provinces.

PRESENCE IN GALLERY

The Speaker: I draw the attention of hon. members to the presence in the gallery of the Hon. Doug Horner, Minister of Agriculture, Food and Rural Development for Alberta.

Some hon. members: Hear, hear.

● (1505)

The Speaker: Order, please. I believe the Parliamentary Secretary to the Leader of the Government in the House of Commons is rising on a question of privilege.

* * *

PRIVILEGE

ORDER PAPER QUESTION NO. 151

Hon. Dominic LeBlanc (Parliamentary Secretary to the Leader of the Government in the House of Commons, Lib.): With your indulgence, Mr. Speaker, I would like to make a few points with respect to the question of privilege that was raised yesterday by the member for Delta—Richmond East respecting Question No. 151. I thank you, Mr. Speaker, for giving me the opportunity to put a few points forward prior to your making a decision.

Yesterday the member for Delta—Richmond East suggested that the government had attempted to deny answers to a member of the House of Commons. The member cited a Speaker's ruling on December 16, 1980, which stated that:

> While it is correct to say that the government is not required by our rules to answer written or oral questions, it would be bold to suggest that no circumstances could ever exist for a prima facie question of privilege to be made where there was a deliberate attempt to deny answers to an hon. member—

The complete quotation from that Speaker's ruling in 1980 added:

> —if it could be shown that such action amounted to improper interference with the hon. member's parliamentary work.

That part of the Speaker's ruling, which the member conveniently left out, is absolutely germane. I can demonstrate that there was in this case no intention whatsoever to interfere with the member's parliamentary work.

The Minister of Labour and Housing wrote to the member for Delta—Richmond East earlier this year and indicated that the material which the member was seeking was part of an action before the British Columbia Supreme Court and, as such, goes to issues before that court. The letter provided background information on the matter of interest to the member. However, given that the matter was at that time before the Supreme Court of British Columbia, the minister explained that it would not be appropriate for him to comment on the particular case.

The government has also declined to provide the material requested by the member because this, itself, would interfere with the court's proceedings.

It is clear that this was not an attempt to interfere with the member's parliamentary work but was done in order to protect the integrity and the work of the B.C. Supreme Court.

The member's suggestion that there is a question of privilege has to be taken in the context of all the circumstances of this case. In fact, if the government had provided the material requested, this would have been an abuse of the obligation of the government and Parliament to protect proceedings before the courts. We in this House have a tradition that Parliament does not assert its privileges at the expense of ongoing judicial proceedings and that is a position which I believe we should continue.

In conclusion, there was no deliberate attempt in this case to interfere with the member's parliamentary work. Rather, the government's approach was guided by the longstanding principle of the respect for the integrity of the courts.

If the House agrees, I would be prepared to table, in both official languages because I think it is important that the House see that, copies of the minister's letter to the hon. member in this case.

● (1510)

The Speaker: Does the hon. the parliamentary secretary have the consent of the House to table the letter in question?

Mr. Jay Hill (Prince George—Peace River, CPC): Mr. Speaker, I hesitate to allow that to happen until I have had the opportunity to find out what the net effect of this is on my colleague, who is not in the chamber at this particular time. If the letter indeed was a correspondence between the minister and himself, then the member for Delta—Richmond East should have the opportunity to at least give his approval of that before it is released. I would think that would be the appropriate thing.

Hon. Mauril Bélanger (Minister for Internal Trade, Deputy Leader of the Government in the House of Commons, Minister responsible for Official Languages and Associate Minister of National Defence, Lib.): Mr. Speaker, I would like to table this document at this time.

The Speaker: That settles that.

This being Thursday, I believe the hon. opposition House leader has a question he would like to ask. I apologize for forgetting this at the end of question period.

* * *

BUSINESS OF THE HOUSE

Mr. Jay Hill (Prince George—Peace River, CPC): Mr. Speaker, I was waiting patiently for you to get to that and I thank you for belatedly recognizing it.

I see that the Leader of the Government in the House of Commons is here and also waiting patiently to reveal to us what exactly he intends for the business of the House. Specifically, perhaps the government House leader could enlighten us, as he reveals what he intends for the government's legislative agenda over the next week or so, as to whether he ever intends to give the opposition their supply days before November perhaps.

Hon. Tony Valeri (Leader of the Government in the House of Commons, Lib.): Mr. Speaker, I would like to lay out the business for the next week.

We will continue this afternoon with Bill C-55, which is the wage earner protection program. Then we will proceed to the second reading of Bill C-57, the financial institutions bill, followed by second reading of Bill C-54, which is the first nations oil and gas and moneys management act.

Tomorrow we will consider report stage and, if possible, third reading of Bill C-25 respecting Radarsat. I understand as well that there are some ongoing discussions about the disposal of Bill C-63, amending the Canada Elections Act. We would also like to deal with Bill S-38 respecting the spirits trade and Bill S-31 respecting autoroute 30.

On Monday we propose to commence report stage of Bill C-11, which is the whistleblower bill. We would like to give this bill priority all week in the hope of completing all of the remaining stages.

We would then return to any business left over from this week and, if there is time, begin consideration of Bill C-44, the transport bill; Bill C-28, the food and drug legislation; Bill S-37, respecting the Hague convention; Bill S-36, the diamonds bill; and Bill C-52, the fisheries bill.

With respect to the business of supply during the present period, Mr. Speaker, I will reconfirm that you confirmed to the House that there will be seven allotted days during this period. In response directly to the opposition House leader's question, as per our discussion at the House leader's meeting this past Tuesday, we understood we would schedule the supply days after the Thanksgiving break.

In any event, it will be a topic that I look forward to discussing with House leaders at our meeting this coming Tuesday, so that we can in fact schedule all the required opposition days.

* * *

● (1515)

[*Translation*]

POINT OF ORDER

AMENDMENT TO MOTION NO. 164

Hon. Mauril Bélanger (Minister for Internal Trade, Deputy Leader of the Government in the House of Commons, Minister responsible for Official Languages and Associate Minister of National Defence, Lib.): Mr. Speaker, given the item on today's Order Paper for private members' business, I ask to raise an objection concerning the amendment proposed to this item by the member for Joliette. We believe this amendment is out of order.

Motion No. 164 reads as follows:

> That, in the opinion of this House, the government should establish, in compliance with international agreements, a policy of assistance to the textile and clothing industries in order to enable the industries to compete throughout the world, particularly by broadening the TPC program to include these two sectors.

At the conclusion of the first hour of debate, the member for Joliette proposed the following motion, and I quote:

> That Motion M-164 be amended by inserting the following after the words "in particular":
>
> by maintaining the tariffs on imported clothing and the types of textiles produced in Canada;
>
> by establishing, as required, quotas on Chinese imports under the protocol on China's accession to the WTO;

as well as ten other proposed requirements.

Point of Order

This amendment was proposed at the end of the first hour of debate and this is the first opportunity to seek your ruling on whether this amendment is in order.

According to the authorities, it is clearly not acceptable for an amendment to a substantive motion to expand the scope of the motion to deal with a new question or proposition.

Erskine May states at page 343 in the 22nd edition that:

> The effect of moving an amendment is to restrict the field of debate which would otherwise be open on a question.

Marleau and Montpetit states at page 453 that:

> An amendment is out of order procedurally if:
>
> it is not relevant to the main motion (i.e. it deals with a matter foreign to the main motion or exceeds the scope of the motion, or introduces a new proposition which should properly be the subject of a substantive motion with notice).

Beauchesne's at paragraph 579 states that:

> (2) An amendment may not raise a new question which can only be considered as a distinct motion after proper notice. (Journals, October 16, 1970, p. 28).

Private members's motions are "substantive motions" and the precedents on substantive motions are clear.

Speaker Fraser ruled on December 17, 1987 that an amendment to an opposition day motion which puts a new proposition to the House should be put forward as an independent motion on notice.

On January 16, 1991 Speaker Fraser ruled that a subamendment to a government motion on the middle-east conflict was out of order since it went far beyond the terms of the motion by introducing "a variety of entirely new concepts."

Speaker Fraser noted that while the concepts involved were "perhaps germane" to the issue, they were nonetheless new and therefore not in order.

On March 26, 1992, the Speaker ruled out of order an amendment to an opposition day motion on health care, since the intent of the amendment was to expand the scope of the debate.

That is also the case here. The main motion deals with the issue of assistance to textile and apparel industries.

The amendment lists a whole series of issues which are broader than assistance to the textile and apparel industries, including assistance to elderly workers, the increased transfer of training programs to Quebec, restrictions and quotas on international trade, and foreign policy such as labour standards and environmental policy.

The government has sought to be cooperative with the member on this important issue and is prepared to support the initial motion.

However, it appears that the Bloc now wants to try to widen the scope of the motion to include many new and complex issues which require much more analysis and consultation.

These matters may be considered by the House at another time, but they expand the scope of Motion No. 164, and are not in order.

Speaker's ruling

● (1520)

Mr. Michel Gauthier (Roberval—Lac-Saint-Jean, BQ): Mr. Speaker, I appreciate my colleague's effort to render unacceptable the amendment proposed by the hon. member for Joliette. Unfortunately I cannot share his point of view. The amendment is exceptionally crystalline in its clarity.

On page 453 of *House of Commons Procedure and Practice*, we read:

> An amendment must be relevant to the main motion.

Are the elements present relevant to the main motion? Absolutely. The main motion speaks of a plan to assist the textile industry. Each part of the amendment is a refinement of the assistance plan. This satisfies the criteria of an amendment on all points, since it is relevant to the main motion.

> It must not stray from the main motion—

The proposal states that there will be an assistance plan, and each of the measures is part of that plan. This is consistent with the motion. Not only is the amendment relevant to the main motion, not only does it not stray from it, but it aims to further refine its meaning and intent. Nowhere does the text state that the amendment must further refine the meaning and intent, but in less than 50 or 10 words.

I challenge my honourable colleague to tell me which of the different parts of the amendment does not serve essentially to further refine the meaning and intent of the main motion. We are in fact talking about an assistance plan, and each part of the amendment is a refinement of what the assistance plan must be.

An amendment should take the form of a motion to:

> leave out certain words in order to add other words;
>
> insert or add other words to the main motion.

This is what the amendment does. I have trouble accepting what the deputy government House leader is saying. I do not understand his argument. The amendment is in fact relevant to the main motion, does not stray from it, further refines the meaning and intent, and utilizes the process of adding words or explanations to the main motion.

Nowhere in *House of Commons Procedure and Practice* is it stated that an amendment must not contain more than so many words. The only thing I can see that might be an element of my colleague's argument is the fact that the amendment is substantial. Well, it is substantial, quite simply, because it further refines the assistance plan.

The proposal satisfies on all points the definition of an amendment, however much that may displease my colleague. It is even a model amendment.

● (1525)

SPEAKER'S RULING

The Speaker: I have listened to the arguments presented by the Deputy Leader of the Government in the House of Commons and the Bloc Québécois House leader. I greatly appreciate their assistance on this matter. It was a bit tricky but I believe that there is another quote that may be significant on page 453 of *House of Commons Procedure and Practice*.

> An amendment is out of order procedurally, if:
>
> it is not relevant to the main motion—

That is not at issue here.

> —(i.e., it deals with a matter foreign to the main motion or exceeds the scope of the motion, or introduces a new proposition which should properly be the subject of a substantive motion with notice).

What is at issue here is that the motion makes the following proposition:

> That...the government should establish, in compliance with international agreements, a policy of assistance to the textile and clothing industries in order to enable the industries to compete throughout the world, particularly by—

That was one proposition. Now, we have an amendment that introduces 11 other propositions and eliminates the only proposition contained in the main motion. As a result, I have some reservations, particularly when we consider the propositions that are being made. As I mentioned, there are 11 of them, and they are much broader than and very different from the initial proposition, which was to broaden the Technology Partnerships Canada program to include these two sectors. I am concerned about that aspect.

Consequently, I am inclined to rule in favour of the argument presented by the hon. Deputy Leader of the Government in the House of Commons. In my opinion, the amendment is out of order. Perhaps another amendment will be made. However, it is my belief, to quote once again from *House of Commons Procedure and Practice*, it is because the amendment "introduces a new proposition which should properly be the subject of a substantive motion with notice".

Mr. Michel Gauthier (Roberval—Lac-Saint-Jean, BQ): Mr. Speaker, you know I always respect your rulings, this one included. I would, however, ask you to go a little further, please.

This is why: an amendment makes it possible to delete part of a motion and replace it with something else. There is no indication anywhere in our procedures that the addition must be of a given length. If the amendment had contained only the first two elements of the aid package, no one would, I believe, have considered it not in order.

With reference to length, based on the wisdom of your decision, those in future who have to reach decisions on what constitutes an acceptable and an unacceptable amendment will read that, in 2005, the Speaker of the day—I cannot give your name, Mr. Speaker, but it will be cited in all the treatises—had decreed that length could influence the quality of an amendment and make it unacceptable and inadmissible.

What I would like to see added to your ruling, Mr. Speaker, perhaps after some reflection—it cannot stay the way it is—is "as seems reasonable in the eyes of a Speaker". I would also like to see you indicate the point at which an amendment ceases to be reasonable and becomes unacceptable. If this afternoon or tomorrow I present an amendment in my capacity as House leader on the same motion, indicating that I wish to replace the term "notamment" with the following, and then give the first three paragraphs, I will have to ask myself this: according to the Speaker's ruling, is three paragraphs too long, or not long enough? Can I add four or five? This is a very serious matter. I have in fact, six or seven elements to add to the resolution, and am told this is inadmissible. So it is solely about length.

I would therefore like you to give some indications in future when amendments are being made. If we add two paragraphs, that is fine, so are three, but four is just borderline, and five no good. We would need to know, Mr. Speaker. You would not like to see your name go down in procedural references as the speaker whose ruling added a grey area to the understanding of our rules. I would like to have that clarification.

● (1530)

Hon. Mauril Bélanger (Minister for Internal Trade, Deputy Leader of the Government in the House of Commons, Minister responsible for Official Languages and Associate Minister of National Defence, Lib.): Mr. Speaker, I thank you for your ruling.

I will point out to my honourable colleague opposite that the government only raised the fact that the amendment could not broaden the scope of the main motion, that it could only narrow it. There was no mention of the length. I do not think, Mr. Speaker, that you talked about the length in your ruling. This is about broadening or narrowing the scope of the initial motion.

We thank you, Mr. Speaker, for your decision.

The Speaker: I would not want to say something that the hon. Bloc Québécois House leader does not want to hear, but there is a problem here. The problem is not with the length, but rather with the number of proposals. There are 11 proposals as to what should be done. The length of the amendment is not the problem, but the number of proposals contained in the amendment. The argument is slightly different.

I realize that the hon. member asked how many proposals could be included in his amendment, should he wish to move it later today, during the debate on this motion. It depends on the topic.

For example, one of the proposals in the amendment states, "by establishing, as required, quotas on Chinese imports under the protocol on China's accession to the WTO". That is completely different from the Technology Partnerships Canada program. That is where I can see a problem. This amendment contains so many things that were not mentioned originally that it becomes impossible to consider it in order.

If the hon. member wishes to consult the clerk before moving an amendment later this afternoon, he may do so. Perhaps he will find out how many of these paragraphs he can include in his amendment. I do not want to suggest anything at this time. It all depends on the individual paragraph. I am sure that, if he asks the clerks, the hon. member will receive an answer that will please him. I will probably accept their decision, whenever the question is put to a vote later today.

● (1535)

Mr. Michel Gauthier: Mr. Speaker, I would like to say one thing, if you will allow me. I appreciate your suggestion to consult with the clerks. It so happens that I did that before we brought forward this amendment. It was found interesting and acceptable by the clerks.

I do not want to get anyone into trouble, but who do you think I should turn to now, since I have already consulted with the clerks?

The Speaker: I encouraged the member to consult with the clerks. Perhaps he has already done so. I am the one who makes the final ruling. However, this ruling may change sometimes on the basis of arguments presented in the House.

An argument was raised today. If the member so wishes, he may consult with other people later on. He will then obtain an answer, which will probably by accepted by the Speaker. I do encourage him to have these consultations before 5:30 p.m., which is when the debate on the motion in question will start. He will then be able to propose an amendment if he so wishes.

[*English*]

QUEENSWAY CARLETON HOSPITAL

Mr. Paul Szabo (Mississauga South, Lib.): Mr. Speaker, the matter that was just dealt with is very much relevant to another situation.

Since the Chair has taken the time to consider the rules, I refer specifically to Motion No. 135 that was dealt with by the House on September 27, and for which there was an amendment proposed later in the debate. The same question about whether it was in order came up. I am aware that the decision was deferred until some consideration could be given.

I have taken the time to look at some of the details and I have become aware of a couple of issues, certainly with regard to the discussion we just have had.

First, the motion in essence asked the government to consider selling the land on which the Queensway Carleton Hospital sits for one dollar. The amendment, with the appropriate wording changes, sought to change it all to say "continuing to lease" the land to the hospital for one dollar starting in the year 2013 because there was an existing lease. I do not have to explain the difference in the nature of a sale and a lease. The ownership interest is a significant change.

Also, it has come to my attention that there is an issue with regard to the laws governing the custodianship of National Capital Region properties, particularly the greenbelt which is what we are talking about, and the authority of the National Capital Commission to dispose of that property in any way, shape or form.

There are some other issues and the references that the deputy House leader gave with regard to Erskine May's 22nd edition, section 343, and the references that you made, Mr. Speaker, to the House orders.

With regard to the ruling on the admissibility of the amendment, I would hope that these additional items would be taken into consideration.

The Speaker: I thank the hon. member for his submissions. I understand this matter is already under advisement and I will be back to the House in due course.

GOVERNMENT ORDERS

● (1540)

[*English*]

WAGE EARNER PROTECTION PROGRAM ACT

The House resumed consideration of the motion that Bill C-55, 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, be read the second time and referred to a committee.

Mrs. Joy Smith (Kildonan—St. Paul, CPC): Mr. Speaker, I am pleased to rise today to put some comments on record concerning Bill C-55. I will be speaking to three aspects of the bill: the creditors ranking aspect, RRSPs, and the student loans aspect. Bill C-55 is an act to establish the wage earner protection program act and to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.

I will be sharing my time with the member for Okanagan—Coquihalla.

Annually, more than 11,000 businesses and 100,000 individuals use the Bankruptcy and Insolvency Act. While business bankruptcies have declined in Canada recently, consumer bankruptcies continue to rise. When a personal or corporate bankruptcy occurs, the BIA provides a mechanism for insolvent or business debtors to avoid bankruptcy by negotiating arrangements with their creditors to reorganize the debtor's financial affairs.

The CCAA provides a legislative framework for the reorganization of insolvent corporate debtors under the court's supervision. Currently, secured creditors rank first in a bankruptcy. Consequently, a trustee takes title to a debtor's property subject to the rights of the secured creditors in that property while unpaid wages rank fourth in the list of creditors.

As we can see, it becomes very worrisome for the people who are working in the business involved when a bankruptcy occurs. The Bankruptcy and Insolvency Act was up for review by Parliament in 2002. The Senate reviewed it, making 53 recommendations at that time. Recently the member for Winnipeg Centre introduced a private member's bill in Parliament that would allow employees to be paid before other secured creditors.

A CPC committee reviewed that private member's bill and proposed a CPC wage earner protection plan that would draw from the employment insurance fund. The government would pay employees up to two pay periods of unpaid wages before the bankruptcy was declared and up to approximately $3,000 in wages and vacation pay. The government would then assume that the employees would claim against the assets of the company.

Companies are encouraged to restructure rather than file for bankruptcy. There has been a problem with inequities in the treatment of personal bankruptcies and these will be addressed. Reforms will improve the administration of the system and several provisions in both the BIA and CCAA will be clarified and modernized.

The bill is a good first step. However, there are some concerns. Wages should be paid quickly, but the government should set up a separate fund to pay wages rather than change the ranking of those payments.

Also, the use of superpriority status interferes with secured transactions to some extent and is not a preferred course. The creditors who lose security over inventory, accounts receivable or cash are granted the equivalent of the workers' preferred status. This lacks the degree of certainty that secured creditors require.

Members on this side of the House support the quick payment of unpaid wages to employees; however, while this bill should have top priority, it should not be passed in a day. Hearings will be very important due to the complex nature of the legislation. Members on this side of the House anticipate proposing some amendments at the committee level and will seek to clarify the implications of the bill to all concerned.

Reform is needed in this area to better protect those adversely affected by the potential bankruptcy. Facilitating restructuring as an alternative to bankruptcy to save jobs and keep businesses viable is critical to an efficient marketplace. Restructuring can preserve employment and lead to better returns for creditors.

The bill also speaks to exempting all registered retirement savings plans and RRIFs from being liquidated on behalf of creditors should an investor declare a personal bankruptcy. Currently, many life-insured based RRSP products, such as segregated funds and employer sponsored registered pension plans, are exempt, while regular RRSPs are wide open to creditors. This poses a huge gap between employers who force their employees to save and those Canadian citizens who choose to do it on their own.

● (1545)

However, this does not mean that this legislation will give us a massive RRSP contribution one day so we can declare bankruptcy the next and pull out all the money a week later. The draft bill proposes that contributions made 12 months prior to bankruptcy will not be exempt from seizure.

Protecting RRSPs from seizure is consistent with the public policy of encouraging and helping Canadians to save for retirement. This is especially important to employees who cannot participate in their employer sponsored pension plan and for self-employed business people and professionals. This creates a level playing field.

The complexities of this bill merit public hearings and careful examination.

On the last point, I will speak about student loans. It is proposed that student loan debt will be eligible for discharge at bankruptcy if seven years have passed since the former student has terminated his or her studies. Currently, student loan debt can only be discharged after 10 years from the termination of studies. In addition, in cases of undue hardship, a bankrupt may apply to the court to obtain the discharge of the student loans after five years.

I will point out that the member for Newmarket—Aurora, just four weeks before leaving this side of the House to take up the post of Minister of Human Resources in the government, voted for a private member's bill that would have reduced to two years the waiting time before graduates would be permitted to apply for bankruptcy relief. The bill was defeated.

I must say that Bill C-55 is a very complex bill. It has many aspects. Many important aspects need to be reformed to assist in this very stressful time during bankruptcy and insolvency, so that both businesses and wage earners feel as if they have a future and so people can retain their homes and their lifestyles.

In conclusion, I very much look forward to hearing more about the bill and to having some input. on it. It is a top priority bill and the reformation is long overdue in this aspect.

Mr. John Duncan (Vancouver Island North, CPC): Mr. Speaker, I listened to my colleague speak about this bill. She mentioned the idea of changing priority during a bankruptcy in terms of creditor priority. I am wondering if the member could elaborate in terms of how changing priority could actually be a counter-productive measure and how we could avoid doing that and still achieve our goal, which is worker protection in the event of an insolvency.

Mrs. Joy Smith: Mr. Speaker, it is viable to look at that very aspect, because it does not necessarily need to have the prioritizing change, which could be done in another way.

There are many questions centred around this bill right now. The member brought up what is really the most important point: the employees who work in a company. It is better to have a company able to restructure, to set things up so it can continue to be a viable business. It is better if the workers can still be employed to do that.

The member makes a good point. This is something that needs to be examined. I would expect that during hearings and when amendments are made to this bill this is one aspect which we as a House should and could take a very close and serious look at.

[*Translation*]

Mr. Robert Vincent (Shefford, BQ): Mr. Speaker, I listened carefully to the speech of my dear colleague. I am a little concerned about something. I would like to have her thoughts on that.

We were talking about students going bankrupt. On reading Bill C-55, I see that it allows a court to discharge bankrupt people from their student debts if they have been out of school for five years and if they are suffering excessive financial hardship. Moreover, for the court to authorize the foregoing of the student debt because of excessive difficulties, it must be certain that the debtor acted in good faith and will still have financial difficulties in the near future.

A student who is going bankrupt must have financial difficulties before and also after. How far can we go?

I would like to get the member's thoughts on this. It seems that the person must continue to have financial difficulties in the near future. This means that, being bankrupt, before getting the protection of the Bankruptcy and Insolvency Act, the person must prove that, in the years to come, he or she will still have difficulties and his or her life will be difficult, despite the provisions in the bill.

I would like the member to comment.

● (1550)

[*English*]

Mrs. Joy Smith: Clearly, Mr. Speaker, students going through post-secondary school nowadays go through great hardship in many respects, because they get loans, they have to go out in the workforce and they have to pay them back. That aspect of the bill is being looked at right now and we should not be hasty in passing the bill until we have these questions answered.

I agree that students need to get all the help they can get, but the proof has to be concrete. They cannot just make up a story that they are going through hardship. It has to be concrete. I went through nine years of university and paid for every cent of it. It took me an awful long time. In our family we have six children and we have put them all through post-secondary education.

I can tell the member that this can raise some real questions. I think the intent of the bill and the intent of what members of the House are trying to do at this point is to be reasonable and to make things possible for people to be successful.

The one thing I do like about the bill is that I can see an opening for businesses to become viable if they have the opportunity to restructure. I can see in the bill that wage earners will be able to get their money if something happens. I can see also the student loan aspect, where students who are going through hardship are not put in an impossible position.

This is why I strongly recommend public hearings: so that we can get all these questions answered and so it is not done in a rushed way.

Mr. Stockwell Day (Okanagan—Coquihalla, CPC): Mr. Speaker, my colleague from Kildonan—St. Paul, once again, has accurately and incitefully described the major components of this bill and areas where there is some possible adjustment required.

I think the government is generally on the right track with this particular bill. That is something we do not often admit to in this House because we do not often have the opportunity to do so, given what we see. However, in this case, it is on the right track.

Basically, we are talking about protection for wage earners. It is a very key component and something that we want to support. The Bankruptcy and Insolvency Act itself does a number of things. It provides for the liquidation of assets. It provides also for the distribution of what may be remaining to creditors. Even more important, it provides mechanisms by which renegotiations can take place, and possible reorganizations, of either the company or the individuals involved. When it comes to the Companies' Creditors Arrangement Act, CCAA, it is looking at proper provisions under court supervision in terms of how assets can be distributed.

There is currently a framework in terms of the order of payout. If a company or an individual is going bankrupt and money is owed to other individuals or other companies, there is actually a ranking, a preference order, in terms of who gets paid first. This is very important, especially to the person to whom the money is owed.

It can be simplified by saying the classifications are: the secured, the preferred and the deferred. The problem in terms of the wage earners category is they are under the second classification and they come behind those who are secured. They would qualify as preferred, but they are fourth even in that list of preferred. There are a number of other creditors who would get paid out before the wage earners in a particular company. The people who worked hard, the people who applied the sweat equity to the company itself, are way down the list.

Quite rightly, the government is recognizing, and we have been urging this for some time, that those wage earners be moved up in terms of the preference order so that their hard work can be recognized and in fact redeemed through this particular system.

The danger in any type of legislation like this of course is that we have to be very careful with the balancing because we could take pressure off of a company or an individual who is considering going bankrupt. That of course applies to every type of government insurance. We do run the risk of creating a moral hazard. Do we want to encourage the very type of behaviour we are trying to in fact discourage?

That is why we will be watching this bill and how it progresses. We will be watching it very closely to ensure we get the right balance here. We want wage earners to be taken care of. We do not want employers, in the case of individuals, to sleep well at night thinking that the government will come along and take care of all these employees and there will be no problem, and they can go ahead and claim bankruptcy without having anything resting on their shoulders. There is a balance that has to be achieved here. The government is on the right track, but we are going to have to watch this carefully as we move through possible amendment stages.

As we go through the bill, and this is not a small bill, it is exciting nighttime reading, and I know some people will be waiting for the video to come out, there is some important detail here that is going to have to be looked at carefully at the committee stage.

Again, I think the government is on the right track trying to streamline some of the administration and some of the efficiency aspects, but we are going to be watching this very carefully.

We want the wages to be paid out quickly. In fact, we are going to look at this and we may even propose, depending how the government addresses this, the creation of a separate fund for wages for workers. If we have a separate fund created, then we do not have to worry and wait unnecessarily. There will not be the time restraints and constraints that could follow and hard-working people wind up not getting their dollars, not getting the money they are owed. We are going to look at that carefully in terms of setting up a separate fund.

My colleague from Kildonan—St. Paul went into some detail related to student loans. This is a factor that has to be looked at, something that students are dealing with in terms of the debt that they carry into their working life and their career environments. We have to look at this very carefully. My colleague detailed some of that.

● (1555)

The best approach actually, as in health care, is prevention. The more we can do to prevent or help a student not acquire a huge debt load the better. The more we can help them dispense of their debt while still recognizing their moral responsibility to do so, the better off we are.

That is why on this side of the House the official opposition, under our leader, is proposing a contingency based plan for paying back loans. Students would pay back a loan contingent with the rate of income they are receiving at the time. When most of us graduated either from elementary school, high school or university, most of us did not immediately move into the high wage end of a company or the profession we wanted to pursue.

We started at the low end, making minimum wage usually, and then we became upwardly mobile. When students graduate, they have a debt load. Let us allow some time for them to pay it back recognizing their rate of income at a particular time. When they are making just a little bit of income, the payment schedule should be adjusted.

That is not in Bill C-55, but we are suggesting that type of approach, so students will not face what this legislation is proposing but a mechanism providing a way for them to dispense with their loan. We want to help those students and we want to help them in a responsible way.

Those are the main elements that we wanted to address at this particular phase of the bill. We will be looking forward to the amendment stage and working with our colleagues to ensure that hard working people are properly recognized when a company or an individual falls into default. We want to ensure we are doing all we can to see the reorganization of debt before we see the obligation to pay the debt removed through bankruptcy, and especially addressing the concerns of students.

● (1600)

Mr. Paul Szabo (Mississauga South, Lib.): Mr. Speaker, the last details I saw on student debt was that 95% of students do pay off their loans on time, which is good news. There are people who do have problems finding their first job and the member knows they do not have to start paying off their loan until they find gainful employment. Even then the amount paid is linked to income. However, there are always better ways to improve this.

I want to ask the member for his thoughts on the limitations on the maximum of unpaid wages that an employee could receive. There is a limitation. Even to the extent that they may receive secured creditor status, it is limited.

My colleague talked about balance. Does he see a balance for the bondholders, for example, who put up the money so the business or organization could exist? Should there be some sort of a balance where even the unpaid wages ought not be subject to such a low limit?

Mr. Stockwell Day: Mr. Speaker, I understand the limit is at $3,000 at this point and that is something we should look into during our discussions. We should be hearing from various groups. As my colleague from Kildonan—St. Paul mentioned, that is why we need to have some public input. There is possibly some room to move on this. Let us look at all the implications, what it would mean if it was raised. The $3,000 limit could be woefully short of what a wage earner has put in, so it does need to be looked at.

Mr. Pat Martin (Winnipeg Centre, NDP): Mr. Speaker, my question also has to do with the wage earner protection program aspect of Bill C-55. The bill, as put forward by the Liberals, makes workers who have less than three months on the job ineligible to make an application for compensation out of this program. Would my colleague's party share our view that it does not make any sense at all? If employees have less than three months on the job, they are even more vulnerable and perhaps need the compensation more than individuals who have had 20 years of employment to put life savings together.

Mr. Stockwell Day: Mr. Speaker, that is a good question. I also congratulate the member for Winnipeg Centre. Many people may not be aware of some of the private member's legislation that he has proposed in this regard. Our party, in taking a look at that, saw some merits in what he was proposing.

As a matter of fact, in principle, philosophically of course, I agree with the member. Simply because individuals have worked less than three months does not mean their due is any less. They have put in the work and perhaps they are even more exposed than someone who has been with the company for some period of time.

We are sensitive to the member's proposal. We agree it should be looked at. We also congratulate the member for some of his thoughts on this in terms of his private member's legislation.

Mr. Paul Szabo (Mississauga South, Lib.): Mr. Speaker, it is estimated that some 10,000 to 15,000 employees each year in both federal and provincial jurisdictions receive no unpaid wages as a result of the bankruptcy or insolvency of the companies or organizations that they have worked for.

This is an issue where I think Canadians would agree that the security status of employees who have made a company work may not be able to survive very well without having received wages owing. We must consider that a company that is imminently coming into some difficulty and the period during which wages would be unpaid is not necessarily since the last regular paycheque. It may in fact be an extended period. There could be a substantial amount of money involved.

I also understand that for those who do receive moneys, the average payout is about 13¢ on the dollar. Having said that, there is no question that Bill C-55 is an important bill. I hope the bill will have the support of the House following the rigorous review and consultation by the standing committee.

Bill C-55 is entitled 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. Most people will know what we are talking about in terms wage protection. They will also probably have a general idea about bankruptcy and insolvency. Most Canadians have heard these terms.

One piece of legislation people may not be familiar with is the Companies' Creditors Arrangement Act. It is a vehicle that has been around for a long time. As a matter of fact, before I became a member of Parliament I practised as a chartered accountant. I actually was involved with a company that went under the Companies' Creditors Arrangement Act. I thought I would very briefly explain what that means.

A company which gets into some difficulty and would otherwise be petitioned into bankruptcy by a creditor, such as a bank or a bondholder or whatever, has an opportunity under the CCAA to petition the courts to freeze the operations, as it were, in terms of its financial obligations. This provision gives them some time to come up with a plan to make a settlement with all of the outstanding creditors.

The courts would appoint a trustee to go in and takeover the operations and management of the company. In my experience, the most effective way in which trustees do that is they seize control of the bank account.

Following the appointment of the trustee, the interesting difference between bankruptcy and going under the Companies' Creditors Arrangement Act is that the company is allowed to continue to operate and that all persons and businesses who continue to be suppliers of goods and services to the company have preferred or first status in terms of payment. They will be paid. They are guaranteed to be paid, even though they may be owed other moneys leading up to the date under which they made the petition under the Companies' Creditors Arrangement Act.

That is an extremely popular and very important act because it does give companies an opportunity to survive once they can get some relief from the existing creditors which they may not otherwise be able to deal with. Very often a plan is put together which proposes certain details as to all the outstanding creditors and how much they will receive and be paid through the trustee. Then the business would carry on.

The whole proposal, though, is subject to the approval of all the creditors before the courts. As long as all of them agree to the proposal of the company, then the various creditors would take the settlements that they are entitled to and the company would carry on under the restructured basis. That may involve, as some refer to it, taking a haircut for the bondholders. There may be a moratorium on assets or forgiveness, or there may in fact simply be the same distribution of some percentage on the dollars. However, the livelihood of the business could in fact survive.

● (1605)

From what I have heard in the debate so far, I am please there is support here. I want to briefly remind the House of the elements. It is a very long bill but I think members will understand that it is important to establish a program like this and make the necessary amendments both to the Bankruptcy and Insolvency Act and to the Companies' Creditors Arrangement Act which takes a great deal of integration of the existing and proposed laws.

The enactment not only deals with those who are owed wages by employers who are bankrupt or subject to receivership, but it also sets out the conditions for the eligibility for payment. It is the process for the program and the administration arrangements for the implementation and enforcement mechanism. It also provides regulation making powers for carrying out the purposes of the act and provides for a review of the act within five years. I think this is very important.

From time to time I have seen legislation come before the House that does not provide for a periodic review to be done. I am hoping this becomes a regular feature of legislation. We need to ensure that it is kept up to date and that it happens on an automatic basis rather than at the discretion of the government of the day.

The bill also contains amendments to the Bankruptcy and Insolvency Act. Those amendments include changes to the appointment and oversight functions of the Superintendent of Bankruptcy, as well as the obligations and amendments. They also expand the act to cover income trusts which is certainly a current topic of interest to many Canadians.

New corporate proposals have been created to address, among other things, the treatment of contracts and collective agreements which is important. It would provide the authority to amend the term of collective agreements. Other proposals are interim financing and governance arrangements and changes are made to the priority of charges, including with respect to wages and pension contributions, which are basic parts of the wage protection program.

The scope and application of consumer proposals is expanded. New provisions have been introduced to deal with bankruptcies, protecting retirement savings plans from seizure and to allow for the automatic discharge of second time bankrupts which is a matter that comes up from time to time.

The period of eligibility of discharge of student debt is reduced and members have addressed this area of concern. As I had indicated in my question to the member, part of the comment was that 95% of students pay their loans on time.

There are changes in the treatment of preferences, as well as other numerous technical changes.

As I indicated, there are amendments to the Companies' Creditors Arrangement Act. This is slightly different. They are to the same effect as the changes to the Bankruptcy and Insolvency Act. The amendments also expand the act to cover income trusts. I note again that the issue is being dealt with.

The scope and application of the initial stay is clarified, as I explained, and the nature of petition under this act. We have introduced new provisions regarding the treatment of contracts, collective agreements, interim financing and governance arrangements.

As members of the House can see, there are substantive issues and areas that are being dealt with to ensure that the bill is balanced and fair.

I had an opportunity to follow the debate earlier and I noted some of the points that were made by other members. I heard points that I did not know so I thought I could perhaps share them with members.

● (1610)

It is a matter of how these reforms will improve the protection to workers whose employers undergo restructuring or become bankrupt. As I indicated earlier, some 10,000 to 15,000 employees each year find that they receive nothing when something like this happens. That is not just with regard to their wages. It also may affect their pension benefits. In many cases there are horror stories where pensions have accumulated significant unfunded liabilities as a consequence of the failing business and its inability to meet its current obligations with regard to discharging an unfunded liability under pension plans.

Under our current system, three-quarters of unpaid workers in a bankruptcy receive nothing for their work. It is really interesting. The average payout was only $13 and the existing federal-provincial labour laws protect the workers who perform work but are not paid by their employers. However these labour laws cease to be in effect when bankruptcy or receivership occurs so they fall through the cracks, which is why it is important that this bill be here.

The program obviously has to operate efficiently and there will be a significant cost in doing that. It is estimated that it will cost about $30 million a year. In the event that we spike in terms of the total number of bankruptcies, that could increase to about $50 million. This is not an insignificant expenditure or contingency for the Government of Canada to protect these but it is important that the moneys be provided quickly to the employees so that they at least have some continuity while, hopefully, under the Companies' Creditors Arrangement Act, a deal would be struck with the existing creditors and their jobs may in fact be secure.

In the event of bankruptcy I do not think anybody wins but the lawyers and that is probably too bad. However it is a very substantial investment and it is important to protect the workers to the greatest extent possible.

There is an expectation that there will be a recovery of about half of those costs once arrangements are made with the creditors and payouts are made. Under the wage earner protection program, the government will assume the workers' claims against the bankrupt employer's estate so that the employee will somehow be represented in this process by the government being the spokesperson or the intermediary in this process.

The point was made that the limited superiority for unpaid wages balances the risk of bankruptcy between employers and other creditors of the bankrupt company. As I raised with the member from Coquihalla, there probably is a question that the committee should consider because there is a limit on the amounts that can be paid to employees of some $3,000. I am aware of the case that I was involved in where wages were unpaid for some time. It was not that we had a paycheque last week, two weeks ago or last month. It could be for an extended period where the employees are basically told that the company is trying to survive, that it cannot pay them now but that they should hang in there. However those are legitimate wages and I know there has to be some balance.

I am not sure what the current thinking would be and certainly the mark of the industry with regard to how much protection can be provided without impinging on the preferred or the fully secured status of bondholders who put the money up front and who in fact may very well be represented by someone's RRSP client or their investment in an organization that has provided funding. There are other parties that are directly or indirectly involved, so that if there is a loss, the money is neither created or destroyed, it just changes hands. In this regard there may have to be some offsets.

However if we were to have a serious impingement upon the security level that a first secured bondholder may have, if the laws indicated that they would be subrogated to unpaid wages for a much larger amount or something like this, the capital providers, those who provide the bonds to the company, may have built into their costs, the interests rates that they are charging to the company, a risk premium on the interest rate. We have to be careful about not disrupting the security level that they hold but at the same time try to balance the interest of the wage earners and those who provide the capital for the company.

● (1615)

I would like to mention one other thing. In most bills we usually see consequential amendments to other acts and in this one I believe there are three acts and the Canada Labour Code. There will be an amendment to the Canada Labour Code. The parties may agree to revise the term of a collective agreement without the approval of the board. That will be pretty important and it may be part of the arrangement.

One can understand when a company restructures to deal with all of its unsecured creditors, et cetera, it continues under the Companies' Creditors Arrangement Act and then all of a sudden it has union difficulties and decides it is time for a new contract which throws the company back into a situation. This is an important change which they may want to consider, for instance, extending the term of a collective agreement to ensure that there is some opportunity for the company to get on its feet and be able to deal with labour demands. I think that will be an interesting discussion as well in the committee.

There are some amendments to the Canada pension plan, particularly with regard to employer and employee contributions and the related interest during that period. Moneys held in trust by a company with regard to payroll deductions have secured status so they will have to be addressed. Similarly, the Employment Insurance Act will have a similar amendment to deal with that.

Finally, there is also a change to the Income Tax Act in a case where the minister has knowledge or suspects that a particular person is or will become, within one year, liable to make payments. There are some complications but it is interesting that they pick these things up. I find it to be a very difficult bill to read. One does need to have some of the other legislation and I think one also has to be close to the labour realities out there and some of the conditions.

I think the witnesses that will be heard by the committee will be providing an excellent education to members about the realities of what happens when employees lose wages to the extent that 75% would get nothing and those who receive something only get 13¢ on the dollar compounded with the likely impairment of their pension benefits.

This is an extremely important bill. I gather from the debate so far that the parties are very supportive of ensuring we have an appropriate bill to deal with the interests of not only wage earners but also with existing creditors to ensure there is a balanced approach to this and that we make sure wage earners are not put in an untenable situation.

* * *

● (1620)

BUSINESS OF THE HOUSE

Hon. Raymond Simard (Parliamentary Secretary to the Minister of Internal Trade, Deputy Leader of the Government in the House of Commons and Minister responsible for Official Languages, Lib.): Mr. Speaker, in the spirit of cooperation and in order to allow the members of the Bloc Québécois to attend their convention, I believe you would find consent for the following motion:

That the House shall not sit on Friday, October 28, 2005.

The Deputy Speaker: Does the hon. parliamentary secretary have the consent of the House to move the motion?

Some hon. members: Agreed.

The Deputy Speaker: Is it the unanimous consent of the House to adopt the motion?

Some hon. members: Agreed.

(Motion agreed to)

* * *

WAGE EARNER PROTECTION PROGRAM

The House resumed consideration of the motion that Bill C-55, 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, be read the second time and referred to a committee.

Mr. Dave MacKenzie (Oxford, CPC): Mr. Speaker, the member opposite has talked at length about the bill. He obviously has spent a great deal of time on it. A couple of issues are important for Canadians with respect to this bill and I think he touched on at least one of them, which is the number of people who are likely to receive benefits in the $3,000 amount and the number of students who are likely to take advantage, if that is the right term, of the shortening of the period of time for bankruptcy.

I thought I heard the member say something in the area of 10,000 to 15,000 workers per year. I would ask him to give us those numbers and what he calculates the total to be for those 10,000 to 15,000 workers a year at $3,000 each, some of which would obviously be recovered through the receiver section of the bankruptcy.

● (1625)

Mr. Paul Szabo: Mr. Speaker, the source of the numbers are from the speech of the labour minister of yesterday, September 28:

> —we are proposing new measures, including a wage earner protection program, for the first time in our history which will provide workers with a guaranteed payment for unpaid wages up to $3,000. An estimated 10,000 to 15,000 workers...across the country in both federal and provincial jurisdictions are left with unpaid wages or reduced pensions due to employer bankruptcies in Canada.

I believe that the ministry of labour will be providing a great deal more information.

This will also be an important opportunity to get an update on the student debt situation. We have constantly looked at this. We know how important it is that young Canadians pursue post-secondary education so they have the tools they need to take on those responsibilities of adult life in the workforce. I think all members would share the value that no one in Canada should be denied a university, or college education, or an apprenticeship or whatever because of lack of money.

Mr. Pat Martin (Winnipeg Centre, NDP): Mr. Speaker, I thank my colleague from Mississauga for a very fulsome and interesting speech. I would like to ask him the same brief question I asked of the member for Okanagan—Coquihalla recently.

In the wage earner protection program, of which the NDP is in favour, if a person has worked for less than three months at the time of the bankruptcy, the employee is not eligible for any benefits. Would the hon. member not agree with me that this is silly and not in the spirit of the bill in terms of compensating employees who are disadvantaged by a bankruptcy?

What would his reaction be to an amendment to the bill that would say that all employees owed back wages and benefits should be eligible for the wage earners protection fund?

[*Translation*]

Mr. Paul Szabo: Mr. Speaker, I agree.

[*English*]

Mr. James Bezan (Selkirk—Interlake, CPC): Mr. Speaker, I am glad we are debating the bill today and I thank the member for Mississauga South for his interventions and representation today.

There is no doubt that wage earner protection is crucial and important. We have been debating this in the House for quite some time. Wage earners deserve to be protected in case of bankruptcy and insolvency. They need to be covered, and I am glad we are considering this under the bill.

The Conservative Party wants to see this get to committee so we can have a good debate. We should have the proper witnesses with a balance of labour and employee representation as well as witnesses from the financial industry, the chamber of commerce and the Canadian Federation of Independent Business. We will see how this all comes into play when we have those expert witnesses before the committee.

There was talk about how this might affect capital. We see in the bill so far that it does have that balance and should restrict capital investment from a majority of different sources, including lenders and investors going into our businesses. Our small business built our country. We want to ensure that continues and that our small businesses succeed, grow and prosper.

Could the member for Mississauga South, especially with his expertise in financial matters, allude to how he sees this playing out from the standpoint of security to the investment industry and how that will play out in our business community?

Mr. Paul Szabo: Mr. Speaker, I share the member's curiosity as to how this might play out. If I am a lender and a venture capitalist, I am going to put some money in, I am going to set financing terms which meet the risks and the rewards and I am going to consider the prospect of business success or failure. That is what venture capitalists do.

However, if we change the laws that all of a sudden say we may be a first secured creditor for the bonds that are owing to us, but we are going to change the rules of the game, all of a sudden there is another class of effectively secured creditors, being the employees, I think the House would agree that from day one as long as there is a dollar of unpaid wages, a dollar of unpaid wages is a dollar of unpaid wages. I do not care how long an employee has been there. That is the right thing.

However, we have some transitional provisions. Maybe this is something the committee has to consider. I do not want to delay, but if we are talking about $30 million to $50 million, maybe a transitional provision could be put into this. Maybe there is a way to smooth this so the government may pick up the unpaid wages itself and not recover during some transitional period. At least there would be a phase-in.

However, when we change the rules of the game, somebody will win and somebody will lose. Who knows, depending on the level of business failures, it could very well be a significant loss to the secured creditors and I am not sure if that is fair either. That is the idea of balance. I am not sure how that will happen.

These are important aspects at which the committee will have to look. I am glad we are talking about this now at second reading. It will go to committee and I am sure we will hear these answers and get the numbers. Let us find out what the numbers are because we need to know. Estimates at 10,000 to 15,000 and 13¢ on the dollar, et cetera, I am not sure what that translates into in terms of a business of an average size.

However, I know it is a lot better under the Companies' Creditors Arrangement Act than it would be under the bankruptcy act. Under the bankruptcy act there is no possibility of ongoing operations to make up and continue to operate. Usually under the CCAA the amount of exposure for the creditors is limited to the amounts owing at the time they went into court protection, but they are 100% guaranteed from that day forward. Under the existing laws the CCAA is preferable. However, we have a lot of companies that there is just no solution whatsoever. The haircut that creditors have to take is just too great and no one is prepared to continue on under any circumstances.

● (1630)

Mr. Peter Julian (Burnaby—New Westminster, NDP): Mr. Speaker, I will be splitting my time with the member for Windsor West.

I am very happy to bring forward discussion on Bill C-55 today, the first part of the NDP's plan to address the issue of workers' wages in the event of bankruptcies. I will come back to that in a moment.

Bill C-55 is in large part a result of the NDP's negotiation for a better balanced budget last spring where we saw for the first time in some time a federal budget that actually responded to the needs of ordinary Canadians from coast to coast to coast. Part of our agenda has been wage protection. The other part of our agenda is pension protection. I have to flag the member for Winnipeg Centre's Bill C-281 which would protect pensions in the event of bankruptcy. We need to see is both wage protection and pension protection. We are happy to see that initial addressing of the NDP's concern, which we have had for some time, in Bill C-55.

Ordinary Canadians are having a harder and harder time of it. Over the past 15 years most Canadian family incomes have eroded. Lower income Canadians, working Canadians, Canadians in the middle class have lost 5% to 10% in real terms in family income over the past 15 years. That is the unfortunate legacy of both the Conservative government and the current Liberal government. Over this 15 year period Canadians are having a harder and harder time of it. Real income has declined at the same time as we have seen overtime charges and longer and longer working weeks. It is skyrocketing up to 33%. Canadian families are working harder and harder for less and less. They are working longer and longer weeks for smaller and smaller real income.

In addition, they have had no protection in the event of bankruptcies. That is why the NDP caucus pushed very hard last spring to change the budget to eliminate the corporate income tax cuts put forward by the Liberal government and to put in place wage earner protection. We will be working equally hard to put in place pension protection.

I would like to briefly work through the four key elements of the bill, most of which we support and some of which needs to be modified. We are hoping in committee to push forward those amendments. These are the kinds of changes that will help make a difference on the main streets of the country, from coast to coast to coast. We have seen Bay Street receive a lot of attention over the last 10 or 15 years. Now it is main street's turn. As a result of pushing forward these amendments, we hope to make Bill C-55 better.

First let us talk about the key elements. I would like to address the issue of the threshold of $3,000 that would go to wage earners in the event of bankruptcy. That is an important first step in addressing workers' concerns in the event of bankruptcies. We have 10,000 bankruptcies a year in our country. We need to ensure that workers are protected. However, we believe the $3,000 threshold is not high enough to address the valid concerns that come out of bankruptcies and how workers are impacted.

We have seen a couple of elements that are very positive. For example, the change that does not allow judges to arbitrarily change collective agreements any more is an important step in recognizing collective bargaining rights. Now we finally have union and management sitting down and if there is mutual agreement to make changes through a collective bargaining process, that may take place. It is not to be imposed by an outside judge. It is not to be imposed on the workers. That is a important key improvement in Bill C-55.

We also are strongly in support of closing the loopholes that we have seen in the tax system, particularly for wealthy Canadians.

● (1635)

We saw with the George Radwanski affair where a wealthy civil servant started a new job at $230,000 a year and saw back taxes of $630,000 basically rubbed out with the stroke of a pen. It is a type of income tax system where ordinary Canadians are paying their taxes, ensuring that their responsibility to their community and country is kept. Yet wealthier Canadians have had the option to simply have their back taxes written off, even in the case of somebody like Mr. Radwanski who was starting a job which paid almost a quarter of a million dollars a year. It is very important that we close this loophole.

We in the NDP have been fighting the types of loopholes that exist. The member for Winnipeg Centre has been one of the strongest proponents in this regard. We need a tax system that is fair to all Canadians, where all Canadians pay their fair share. That is our collective wealth and our collective resources to deal with things like our health care system, to help support new child care programs, to help support working families. It is extremely important that we do not have these loopholes. It is extremely important that we not allow certain wealthy individuals to get off from paying taxes that they owe to the nation, to our country, to all Canadians.

We are certainly in favour of these key elements. There are other elements as I mentioned that need to be addressed in committee. As we adopt this bill in principle and send it to committee, we need to pay particular attention to these key issues, such as the threshold which I mentioned is too low, and particularly the elements affecting students.

What we are saying right now with the current bill, if there are no amendments, is that a student who undertakes student debt because of the current chaos in the post-secondary education funding in the country is chained to that debt for a 10 year period. Yet we know that inadequate funding for post-secondary education and inadequate supports for students across the country have led to the debt crisis among students. Many students have had no other option because there has not been the support in place for post-secondary education.

Our post-secondary critic, the member for Halifax, has been front and centre in this regard, pushing forward an agenda that meets the needs of students. We need to make sure that this bill does not handcuff students and does not treat them differently from how other Canadians are treated in the event of bankruptcy.

● (1640)

[*Translation*]

Still, it is important that certain elements of this legislation be adopted. We know full well that workers all over Canada have been suffering for the last 15 years because of policies put in place by this Liberal government and the Conservative government that came before it. Indeed, family incomes were reduced by 5 to 10%. A majority of Canadians have been hit.

It is important that we amend the Bankruptcy and Insolvency Act in order to help workers who lost their job because their company went bankrupt. This is what the NDP tried to negotiate last spring.

First, we want to deal with the issue of the money owed by these businesses to their employees. Second, with Bill C-281, we want to deal also with pensions lost because of the bankruptcy of businesses. The NDP member for Winnipeg Centre raises the issue of pensions and the CPP and the fact that we must protect the pensions of workers. This is the second aspect of the proposal that the NDP will make to this Parliament.

Consequently, we support Bill C-55, at first, in principle, so that, later on, in committee, we can improve it and ensure that it better protects the interests of all Canadians.

[*English*]

Mrs. Lynne Yelich (Blackstrap, CPC): Mr. Speaker, I noticed the member spoke about student loans. Right now the current legislation says that an individual can apply for discharge 10 years after he or she ceases to be a student. Bill C-55 talks about applying a discharge after seven years and allowing a hardship discharge after five years. I noticed Bill C-281 does not cover it. I am just wondering whether the member supports the discharge clause.

Mr. Peter Julian: Mr. Speaker, obviously we are facing a crisis in the post-secondary sector. Certainly in the last campaign as I went door to door knocking on doors throughout my riding, I came across students, or people who would like to be students, all the time who are faced with a crushing debt load and the lack of supports that exist in the post-secondary sector. This crisis has been created as a result of government inaction on post-secondary funding and the supports that should be going to students.

What I see virtually every week in my riding are people who have decided not to continue with their education because the supports are not there for them. That is why I believe the committee should be looking at the whole question of discharge, the whole question of hardship. It should be looking at it from the standpoint of the crisis that government inaction has created, which has made it more and more difficult for Canadians to get into the post-secondary system.

I do not know what direction the committee will take on this. It is fair to say, because student organizations have raised this concern, that the bill needs to go further to address the real post-secondary funding crisis and the lack of supports in this country.

● (1645)

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Mr. Speaker, I would like to thank my colleague from the NDP for having made this presentation on Bill C-55.

Regarding students faced with bankruptcy, I understand as well that he is very sensitive to their debt problems. Bill C-55 proposes a major change to the rules governing this debt.

At present, the Bankruptcy and Insolvency Act provides that people who go bankrupt cannot be discharged from their student debt before ten years have passed. Bill C-55 would reduce this period from ten to seven years.

The Bloc Québécois has been trying for a very long time, and more formally in its election platform of 2004, to abolish this waiting period. It is a period based on prejudice. The first is that it is easy to go bankrupt. We know, however, that a judge must normally make a ruling and reject frivolous requests. This waiting period is also based on the belief that students are more inclined than any other social group to want to go bankrupt in order to rid themselves of their student debt and start over. Well, there are no studies that show this.

The change from ten to seven years seems rather strange to us. It is very arbitrary. Why seven years? Why not six or five years? While we are at it, why not just make former students citizens like everyone else and state that all their debts are included when they go bankrupt?

Obviously the Bloc will propose an amendment in committee. I would like to know what the NDP member thinks in this regard. Will he support the Bloc amendment?

Mr. Peter Julian: Mr. Speaker, I would like to thank the member for her question.

There is obviously a crisis, as I said earlier, in our postsecondary education system. More and more students have a hard time finishing their postsecondary studies, especially those from less well-off families in our society. So there is an huge problem.

I agree with much of what the member said. We must address this problem that exists in our society because of government negligence regarding the funding of our postsecondary education system and the support that students should receive.

I think that it is important for the committee to study possible amendments. It is desirable to propose amendments like the one that the hon. member just mentioned. The committee should study how to improve this bill, and at the same time, meet the concerns that have been raised on many occasions by student organizations all across the country. It is important, therefore, to have these kinds of discussions in committee.

[*English*]

Mr. Brian Masse (Windsor West, NDP): Mr. Speaker, it is a pleasure to speak to a very important issue. Bill C-55 is critical. For the first time we have legislation before us that would allow workers to be put on the top of the heap as opposed to on the bottom of the heap when bankruptcy happens.

I can speak from personal experience. My brother worked for years at a plastics company here in Canada. He was a very diligent worker who went to work every single day. He made sure he made his contributions to the union, to his pension, and to the United Way. The company declared bankruptcy and went to the United States. The company not only took the workers' wages, but it also took their pensions.

It is very important to note that pensions are a deferred wage. They are a negotiated settlement among the workers, management and owners of a company. Pensions are deferred wages. They are important not only to the workers but also to our society. Pension earnings are a requirement for seniors in their lives after they have finished working. They are wages owed to them through their own planning and through arrangements made with management and the company. Those pensions belong to them. It is important to note that. This is missing from Bill C-55 and it is something our party is going to work on.

The company where my brother worked took the pension money. It also took the United Way money that the workers had contributed. It literally robbed the community of the contributions which the workers had made for the benefit of others.

The United Way in my community has had the highest donation per worker for a number of years. The money provides a full range of programs and services for people in need. I commend the executive director of our United Way, Sheila Wisdom. We have been challenged lately because many jobs have been lost in the auto industry and we have had to make sure that the United Way campaign expands into other groups and organizations.

We do not need companies leaving and taking money that workers have contributed toward their pensions. Sadly enough, Bill C-55 does not yet address this issue.

I want to continue the discussion with regard to students declaring bankruptcy. It is unconscionable that students have to wait 10 years to declare bankruptcy. We have witnessed a very significant escalation in tuition costs across the country, as well as other costs associated with going to school, such as apartment rentals, books, or other supports. Those costs have all gone up significantly and as a result, students have gone into more debt.

Young people have to be trained. People going back to college or university have to invest a lot of money in training, and they can accumulate a lot of debt as a result. With the record the students have with respect to repayment of their loans, they have earned the right to be treated better rather than being chastised at the 10 year limit. That is unacceptable.

As this crisis continues in terms of the educational system needing the necessary funds to run the programs, the training and the degree of technological improvements that are so important to compete in the world, people are increasingly being put into debt when they exit school and pursue their careers.

Some people are going to school later in life. They are not able to earn the necessary wages to pay off the debt. This also delays the start of families, which is a very important issue. Canadians are having children later in life. We need to put supports in place to avoid that. It is important that Bill C-55 address this problem.

I look forward to seeing amendments to this legislation. I am still not satisfied with the seven years. That can be improved.

● (1650)

I would like to note one of the other important issues related to this. It is the fact that as I started my speech this evening it is the first time ever that there is some mechanism whereby workers are at the front of the line, through the fact that they get $3,000 back in wages. That is very important. When a company goes bankrupt, for whatever reason, whether it is mismanagement or good management and the market conditions change, people lose their employment and do not have an opportunity to plan appropriately.

Three thousand dollars is a mere pittance. People cannot get by on that for very long, but at least it is something immediate that people can get. It will provide some sense of stability for them and their families as they look for employment transitions. That is important.

What I cannot understand about the legislation, though, is that the government will then try to get only $2,000 back. Why would it only go back for $2,000, not $3,000, from the company after insolvency? I do not understand that logic. I do not know why it would not, on behalf of taxpayers, try to recover the full amount. This should be looked at for sure.

The member for Winnipeg Centre has worked very hard on his private member's legislation on these matters, Bill C-281, which is much better than this bill, but this bill does have some elements of his. I want to recognize the fact that he has been able to push the debate on the matter this far and get Bill C-55 some attention because there has been a reaction. I am a member of the industry committee, where Bill C-281 has actually been sitting for a while. If we do not get to that bill right away, we will be looking at Bill C-55 as well. It at least encourages some modest improvements.

The member for Winnipeg Centre should be acknowledged for bringing this issue to the forefront far sooner than many expected. He has done similar work on the oil and gas industry with progressive legislation and also with a series of other bills. I want to acknowledge that and the pension issue, which I think definitely needs to be expanded upon.

Also important is the fact that the bill is going to take away a procedure that right now allows a judge, on a whim, to basically throw out a collective agreement between a company and a union. That is an atrocious abuse of an agreement collectively negotiated between a company and a union. The bill will require dialogue, and that was the spirit when this was originally dreamed up in the 1930s: that there would be some actual collective working together at the table before the judge would make some type of arbitrary decision in regard to anyone. This is important because the deals negotiated in terms of pensions, wages, benefits and all of those things come out of good faith negotiations.

Let me note that this is what should be happening with the CBC right now. The lockout should end. People should be back working together to make sure that they actually have a good agreement.

So that dialogue is what the judge will be doing in this new agreement. That is very important because it also, I believe, will create a healthier environment for the future.

We also want to note that it will be very important to change the legislation in regard to the $200,000 tax debt no longer being eligible for automatic discharge. It is something that could be abusive. We think this would be an important change to the legislation.

Last, I want to touch on the Radwanski example of the loophole that is finally going to be closed. It is unconscionable that an individual in our society can get hundreds of thousands of dollars of tax relief and then one day later receive a job for a quarter of a million dollars a year. That is unacceptable. This change is a very important one, because that was an absolute abuse of the people who get up and go to work every single day just to make a living.

* * *

● (1655)

[*Translation*]

HIGHWAY 30 COMPLETION BRIDGES ACT

(Bill S-31. On the Order: Government Orders)

June 22, 2005 — The Minister of Transport — Second reading, report stage and third reading of Bill S-31, An Act to authorize the construction and maintenance of a bridge over the St. Lawrence River and a bridge over the Beauharnois Canal for the purpose of completing Highway 30.

Hon. Raymond Simard (Parliamentary Secretary to the Minister of Internal Trade, Deputy Leader of the Government in the House of Commons and Minister responsible for Official Languages, Lib.): Mr. Speaker, there have been discussions among the parties and I think you will find unanimous consent for the following motion:

> That Bill S-31, An Act to authorize the construction and maintenance of a bridge over the St. Lawrence River and a bridge over the Beauharnois Canal for the purpose of completing Highway 30, be deemed to have been read a second time, referred to a committee and reported to the House without amendment, concurred in at the report stage, read a third time and passed.

[*English*]

The Deputy Speaker: Does the hon. parliamentary secretary have the unanimous consent of the House to move the motion?

Some hon. members: Agreed.

The Deputy Speaker: Is it the pleasure of the House to adopt the motion?

Some hon. members: Agreed.

(Motion agreed to, bill read the second time, considered in committee, reported without amendment, concurred in, read the third time and passed)

WAGE EARNER PROTECTION PROGRAM ACT

The House resumed consideration of the motion that Bill C-55, 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, be read the second time and referred to a committee.

Mrs. Lynne Yelich (Blackstrap, CPC): Mr. Speaker, I would like to ask the member about the proposed legislation and the student loans again, about applying for discharge after seven years but allowing hardship discharge after five. I wonder if the member would support an amendment to allow application for hardship at any time.

I also want to hear the member's comments on the exemption for RRSPs. Currently RRSPs related to insurance are exempt, but most others are not. In the proposed legislation, a wider range of retirement savings and products would be exempt from seizure in bankruptcy. I am wondering if the member supports either/or.

I also would like him to comment on pensions and whether there should not be a push to tighten pension laws so that companies cannot underfund them.

● (1700)

Mr. Brian Masse: Mr. Speaker, I think it is important to focus on the student issue in this bill. I believe we should be moving toward treating students like everyone else in terms of bankruptcy. I think it is very condescending not to. It was when the government outsourced the student financing element to the banks that this 10 year provision was created.

I know that people who go to school want to pay back what Canadians have provided for them. People who are in our school system are not thieves. They are not abusive. They are individuals who are going to better themselves. In every system we are going to have some problems and we have to seek that out, but in terms of repayment of student loans we are not having a problem to a significant degree.

I would argue that there is more benefit to treating them the same as everyone else. It would give us a stronger educational system because people would know that they would not have a life sentence. After 10 years if students cannot declare bankruptcy, they have the amount of the debt they have accumulated and the spiral of problems they have related to employment, and their life gets significantly difficult. That erodes all the benefits of the training they have undergone in university or in colleges such as the one I have mentioned, my local college, St. Clair College, a fine institution.

With regard to the issue on underfunding pensions, I think the member for Blackstrap makes an excellent point. The pension issue is one that is critical to all Canadians. In fact, I have introduced the notion of a seniors' charter of rights. Part of that is to protect pensions. Underfunding pensions is a significant problem that becomes a burden not only to the individuals but also to the country. I think that is a separate piece of legislation, but I think it is an important issue that has not had the attention it deserves. It is one that really undermines our economy because it can have significant consequences.

Mr. John Duncan (Vancouver Island North, CPC): Mr. Speaker, I think this has been a good day with a good set of debates on Bill C-55, which is an act to establish the wage earner protection program act and also to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, and to make consequential amendments to other acts.

Amazingly, we actually have a consensus from all parties in the House of Commons that we need legislation in this area. This bodes well for the fact that we have people who go to work every day and expect to be paid for their day's wages. Very often their medical and dental premiums are covered as part of that package. They will have other benefits paid for and so on.

Lo and behold, I think all of us in this place represent large enough constituencies such that over and over again we have seen instances where this does not occur. In some cases it leads not only to devastating personal circumstances, but on a very large scale it can affect whole communities where those communities are tied largely to one employer.

I certainly have that circumstance in my riding, along with the unhappy circumstance that the employer ended in insolvency. There was a restructuring, which also ended in insolvency, and we are now into another restructuring exercise which we are hopeful will conclude successfully. This community, the community of Port Alice, with its specialty cellulose mill, has been through a lot over the last couple of years and that has demonstrated the shortcomings of the status quo in terms of how workers' earnings protections are handled.

Bill C-281, the private member's bill from the NDP member for Winnipeg Centre, promoted an initiative in this place for all parties to get their act together in terms of doing something about this matter, which resulted in Bill C-55.

If one were to take a look at Bill C-55, it would be hard not to agree with the thrust of Bill C-55 and not hard to disagree with some of its details, because this is an area that is quite complex. For example, any attempt to try to change the creditor priority can have a positive effect on one party and a negative effect on another party and sometimes can be counterproductive for both parties. In order for me to explain that, I will probably have to give an example, but it does point out why we need to hold hearings on the issue. It is a complex area of law.

● (1705)

The bill is important to many people and consistent with the fact that I have a large union-certified membership in my riding. I have taken an active interest in these kinds of issues in my 12 years representing that area.

I joined the shadow cabinet subcommittee, which we put together as the Conservative caucus, to develop and propose a wage earner protection fund in the case of a bankruptcy. On May 3, 2005 the Conservative shadow cabinet approved a comprehensive proposal that would be funded through the Employment Insurance Act. Consistent with this report, the Conservative caucus tabled a motion in the House of Commons which reads:

> That, in the opinion of the House, immediate steps be taken to amend the Employment Insurance Act to provide for the establishment of a workers' protection fund that is funded and administered under the Employment Insurance Act to protect workers wages, medical and dental premiums, and severance payments to an amount of $5,000 per employee in the event of a business bankruptcy or insolvency.

This demonstrates our direction and intent at that point. On June 3, one month later, the government tabled a bill to establish a wage earner protection program. The government's bill would create a fund which would pay laid off employees up to $3,000 per employee in lost wages. The NDP proposed a similar program, of course, in Bill C-281 that gives super priority to workers in the event of a bankruptcy.

The difficulty we would have in the example that I have quoted, which was the Port Alice cellulose mill with something like what is proposed in Bill C-281, is the fact that the level of assets would be the determinant of how much an employee would receive and this would also be almost certain to result in a long wait for the employee to receive anything.

This is why the direction that Bill C-55 takes, in that specific area of the bill, is actually better because payment would be more quickly achieved. There is no time that is more appropriate for employees to receive their paycheques than when they were expecting them or very shortly thereafter.

The assets were being run down on a monthly basis and at the end of May, the 330 or so employees at the cellulose mill would have had a payout much less than $3,000 per employee. That is another way that Bill C-55 does have some improvements over the private member's bill first enunciated as Bill C-281.

However, we need to look at this in a broad way. I think all of the parties have their hearts in the right place in terms of trying to protect the workforce from employers that have, in some cases, actually gone out of their way to hide from them the fact that they have not been paying into things like their medical and dental premiums.

There was even the case, in the situation I was talking about, where a family support garnishee program had been shorted. In other words, the payments had not been forwarded. That employee was in trouble not just from a financial standpoint in not receiving wages and benefits but owed a payment through the courts that should have been automatic.

● (1710)

These are some of the wrinkles that can occur. We have to avoid an incentive to drive businesses having difficulties into early insolvency in order to keep the asset base up. That occurs as well.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert, BQ): Mr. Speaker, I thank my colleague the hon. member for Vancouver Island North for this excellent speech.

However, there is one element of Bill C-55 which he did not address. This concerns students faced with bankruptcy. Bill C-55 proposes a change to the rules governing the bankruptcy of former students, since at present the Bankruptcy and Insolvency Act says that persons reduced to bankruptcy cannot be discharged from a student debt if they are still at school or if they finished their studies less than 10 years previously. Bill C-55 would bring that period down to seven years.

The Bloc Québécois has for a very long time been committed, although more formally in its 2004 election platform, to abolishing the waiting period during which students cannot be released from their debts through bankruptcy. We believe that there are prejudices that cause certain persons to believe that it is easy to declare bankruptcy, even though we know that a judge has to rule on that question, and normally a judge would dismiss any far-fetched applications. There are also prejudices which hold that students are more inclined than other social groups to try and shirk their commitments, such as student debt. Yet no study has ever proven this.

Furthermore, the change from ten years to seven is very arbitrary. This bill speaks of seven years, but it could well be five. And why not four? Why not three? While we are at it, why not zero? So the Bloc Québécois could be expected to submit an amendment in committee to abolish this waiting period before students can include their education debts in a bankruptcy.

The hon. member from the Conservative Party said that all the parties here present have their hearts in the right place in terms of wanting to defend wage earners. Former students are also wage earners. I was wondering if the party represented by the hon. member for Vancouver Island North would forget about these prejudices and support the Bloc Québécois amendment that will be submitted in committee.

● (1715)

[*English*]

Mr. John Duncan: Mr. Speaker, I am not sure I fully comprehended the question.

In terms of the amendment dealing with student loan repayments, I have no difficulty with what the Bloc is presenting. I think that is an appropriate amendment. For example, we would support an amendment to apply for discharge after seven years and to allow for discharge based on hardship at any time. I think we are basically on the same wavelength. I am not sure if that is what the Bloc member was driving at or not.

Mr. Jim Prentice (Calgary Centre-North, CPC): Mr. Speaker, it is my privilege to rise and speak today to Bill C-55, the wage earner protection program act, which is before the House. I will be speaking generally in favour of the concept underlying the legislation while taking issue with some of the specifics which form part of the government's proposal.

I would like to acknowledge the work of a number of members of the House. First, the member for Winnipeg Centre did a great deal of work in terms of putting Bill C-281 before the House. I have worked with this member very closely. We do not always agree on issues, but I do respect the philosophy with which he has brought this matter forward and the private member's bill that he brought is a precursor to Bill C-55.

I would also like to acknowledge the hard work of the member for Edmonton—Leduc who is our critic in this area. He has worked very diligently, has examined this very complex legislation, and has led the Conservative Party in its very able response to the legislation. The member for Souris—Moose Mountain, our labour critic, has also worked with him and similarly been responsible for the carriage of this legislation.

My comments follow those of the member for Vancouver Island North. It is worth pointing out that he has been a very outspoken advocate on behalf of working Canadians and the protection of working Canadians under this legislation. He served on the subcommittee of the Conservative shadow cabinet which brought this concept to the House earlier this year in May.

There is some unanimity in the House in terms of the spirit which underlies this legislation, but there are important differences between the way the Conservative Party and the government has approached this issue. I wish to draw the attention of the House to the May 3 motion which was put before the House of Commons. It read:

> That, in the opinion of the House, immediate steps be taken to amend the Employment Insurance Act to provide for the establishment of a workers' protection fund that is funded and administered under the Employment Insurance Act to protect workers wages, medical and dental premiums, and severance payments to an amount of $5,000 per employee in the event of a business bankruptcy or insolvency.

Herein lies the genesis or the concept behind Bill C-55, but there are important differences between the Conservative position and that of the government which I will underscore in my comments this afternoon.

Generally speaking, I favour the wage earner protection program aspects of Bill C-55 and I will direct my comments exclusively to those provisions of the legislation. There are equally complicated provisions that deal with other aspects of the Bankruptcy Act. I will not be turning my mind to those today. The wage earner protection program features of this legislation are quite important because they provide protection for everyday working Canadians who find themselves caught up in the nightmare of a bankruptcy or an insolvency or a creditor protection scheme.

This is a matter that I have some experience with on a personal basis. In my own family, I recall being a young lawyer many, many years ago and my mother, who was an employee of a company called the Betty Shop, found her employer to be in a state of bankruptcy and insolvency. I remember how difficult it was for her when she discovered that she had absolutely no protection or priority as a wage earner. That company went bankrupt and it was my mother who was out of pocket with her wages because there was no government program to cover the company. She had absolutely no security under the Bankruptcy Act. That was 15 to 20 years ago, so I am pleased to stand here today on behalf of her and other working Canadians who find themselves in similar circumstances.

It is important that the House is drawing together to protect working Canadians, so that they do not suffer those kinds of losses in the event of a bankruptcy.

● (1720)

It is important that the matter proceed to committee and that the committee conduct a very diligent and searching review of the legislation that is in front of the House. Bill C-55 is quite complex and detailed in terms of the priority regime that it creates and the legislative balance that it strikes.

It is important that the committee hear from people in the legal and banking professions and the labour unions to make sure that the appropriate balance is struck with the legislation, because it is a question of balance. It is a question of striking a balance between protecting wage earners on the one hand and making sure on the other that we do not disrupt the balance which is at the heart of creditor relationships in the country. This is something I know in particular the member for Edmonton—Leduc and the member for Souris—Moose Mountain have spoken about but it requires some emphasis.

The priority scheme in the event of a bankruptcy is extremely complicated. It strikes a delicate balance between those who work in businesses and those who finance businesses. We must be very careful with this legislation that we do not disrupt that balance, because the ultimate losers will be working Canadians. It will be working Canadians at the end of the day who will suffer the consequences if it becomes more difficult to finance a business.

No one should think that by according superpriority status to one category of claims, in this case past wage earning claims, somehow it will be simply the secured creditors, the banks, who accept that loss. In fact, the way it works in the law of the business world is that the banks and other secured creditors will make darned sure that they have adequate security ahead of time. They will simply add the wage claims to the security which they seek which will make it harder for people to finance businesses. Essentially it will add to the equity that business people need before they can finance a business, because there will have to be adequate equity ahead of the other business assets to protect the banks. We have to be very careful of the balance which is struck.

There is one thing I am puzzled by. The motion that the Conservative Party put forward linked the employment wage protection, which is so important, and the Conservative Party specified an amount of $5,000 per person, not the $3,000 suggested by the government, but it linked it equally importantly to the Employment Insurance Act by ensuring that those claims would be paid from the employment insurance system. The government in a sense would guarantee wage earner claims in the event of a bankruptcy, up to the amount of $5,000 and it would be covered out of the premiums that had been paid by employers and employees to the employment insurance fund.

What the government is proposing is something that is in fact quite different from that. First, the protection is offered only up to the level of $3,000 per employee, which is much less generous than what had been proposed by the Conservative Party, much less protective of working class Canadians. Second, there is this very puzzling feature such that the money which is paid out under Bill C-55, the $3,000, can then be recovered by the government from the bankrupt estate, yet it can only be recovered in the sum of $2,000. This is very puzzling. I hope that the committee has a look at this.

I do not know why we would put forward a legislated system that compensates wage earners for $3,000, yet allows the government to pursue recompense or security protection only to the tune of $2,000. That simply makes no sense. There is no reason that the Government of Canada, if it is protecting wage earners and being subrogated in its position, should not have the position to step forward and seek full recompense for the amount of $3,000.

There are other features of the legislation which I think are sensible. One concern that we must have in looking at the legislation is whether it puts forward a government system which simply involves more government. I do not find that in the legislation.

● (1725)

I note there are extensive responsibilities in clause 21 which have been imposed on the bankruptcy trustee and receiver. It is their responsibility to police the system, to make sure they have identified the claim, determined the amount of wages, informed the individuals and provided the minister with the report. There is also a sunset provision relating to this aspect of the legislation. From the way it will work, I do not think it will necessarily produce more government in this country, but it will provide protection for working Canadians up to the sum of $3,000 in principal. That is something we support as Conservatives, although we would have sought legislation which provided even greater protection for Canadians.

Hon. Keith Martin (Parliamentary Secretary to the Minister of National Defence, Lib.): Mr. Speaker, the member's comments were well received and well researched. As he knows, the government has put forward this wage earner protection plan for the protection of workers across the country who from time to time are confronted with the horrible situation where the company they work for has gone into receivership or bankruptcy.

Our government has listened very carefully to those workers and has come up with a plan to try to address a concern that grips them at the very heart and soul of their being. The particular problem workers are confronted with, which is the loss of their pension plan, is something that affects their future security. That is why we have come up with the wage earner protection plan to address this issue.

The minister estimates that the amount that workers will receive will cost the taxpayer and the government's coffers about $50 million. We think this is money well spent. It is being spent on workers, as I said before, who are confronted by a horrific situation where their future income security and pension security is being compromised.

If the hon. member disagrees with the amount of money that the minister and our government has proposed a worker would receive, what money would he propose that a worker receive? Would he put a cap on it? How would he figure this out? What moneys would he give to a worker confronted by this problem?

● (1730)

Mr. Jim Prentice: Mr. Speaker, essentially the Conservative Party had suggested that the protection be capped at the amount of $5,000 per employee, as opposed to $3,000 per employee, which is what we find in the legislation. I do not see why we would not see greater protection for working class Canadians. I think in the House there is a consensus on the kind of protection that everyday people need in the event of a bankruptcy. Three thousand dollars is a start. I do not know why we would not go with the Conservative proposal, which was for $5,000.

The Acting Speaker (Mr. Marcel Proulx): It being 5:30 p.m., the House will now proceed to the consideration of private members' business, as listed on today's order paper.

PRIVATE MEMBERS' BUSINESS

[*Translation*]

TEXTILE AND CLOTHING INDUSTRIES

The House resumed from June 1 consideration of the motion.

Mr. Marc Boulianne (Mégantic—L'Érable, BQ): Mr. Speaker, I am very pleased to rise today on the motion of the Bloc Québécois regarding textile and clothing.

People working in these sectors do not know what tomorrow will bring. Closures are rampant and jobs are disappearing.

In the last several years, we have seen a shift toward low wage countries in the production of clothing and textile. This shift has increased with the elimination of the quota system.

In Quebec, for example, where most Canadian clothing and textile industries are located, clothing imports are on the rise and are increasingly coming from emerging and developing countries, particularly China, which captures alone more than 40% of Quebec imports.

The decline of textile and clothing industries will worsen if the current Liberal government does not act in the short and long term by taking rigorous measures.

Statistics show that clothing manufacturing lost a third of its manpower between 2002 and 2005, a loss of almost 20,000 jobs held mostly by female workers. In my region, Chaudière-Appalaches, this represents a loss of 52% of the manpower.

In addition, since the end of the Multifibre Arrangement, the losses have been mounting. People in this sector are very worried. Worry has become the daily lot of people in my riding, who feel more abandoned than ever by the Liberal Party.

Worst of all, the government's response—that is to say, the response of this party—reveals not only its inertia but a lack of humanity. They simply said that the problem was not as bad as all that and we should just try gradually to keep the system as it is.

Since the start of the year, 500 jobs have been lost in my riding of Mégantic—L'Érable. The vast majority of these jobs, as I said earlier, were filled by women, mothers of families, adolescent girls or mothers raising families on their own. But that does not disturb this government at all.

Plants in the RCMs of Granite, Amiante and Érable are closing, while the government remains arrogantly devoid of all humanity. The loss of 500 jobs is really something. I can name a few of the companies where these job losses occurred: Avanti in the Érable area; Canadel in the Lac-Mégantic area; Confection East Broughton; Confection Patry and Keystone. Those are all companies that closed or moved to Mexico. At the last Canadel plant in the Lac-Mégantic area, 185 people lost their jobs.

The government refuses to offer any solutions. The people in my riding have not given up. A little while ago, there was a petition to pressure the government to do something and get some results or solutions. In three weeks, more than 7,000 people signed our petition. This was an extremely important sign of solidarity to show that the government is an accomplice in this piece of our economy that is unfortunately going down. The workers in our region, in our riding, will just turn to other sectors or lose their jobs.

The plant closings in the textile industry are a trend that is not about to stop so long as the government does not take radical action.

There are solutions. The Bloc Québécois has some to propose to the government, but unfortunately it does not listen.

● (1735)

We already said that we need quota monitoring. China is obviously a major problem. Since the quotas were eliminated there has been a complete invasion. In fact, China accounts for almost 40% of our imports. Until we see an aggressive intervention in this regard, China will continue to invade our market.

Under WTO rules, countries can restore quotas for periods of 3 to 5 years. That could reduce imports by about 7%. That would be an extremely important measure that we should take and it is among the solutions put forth by the Bloc.

There is also another practice that should be stopped and it is the importation of foreign-made clothes without any customs duties. We must act against the invasion of foreign products. The U.S. did it. The EU is doing it for linen. Each country is reacting at one time or another to put a stop to the invasion of its market.

At the end of my intervention, I would like to move an amendment.

I move, seconded by the hon. member for Montcalm and with the support of the hon. member for Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, the following amendment:

> That the motion be amended by deleting all the words after the word "particularly" and substituting the following:
>
> "by allowing clothing made with Canadian textiles but manufactured abroad to be imported without customs duties and by creating an income support program for older workers."

The Acting Speaker (Mr. Marcel Proulx): This amendment is in order.

The member for Drummond.

● (1740)

Ms. Pauline Picard (Drummond, BQ): Mr. Speaker, please allow me first to salute the rigorous work that was done by my colleague from Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, who, since what we may call the textile crisis, has had numerous meetings and visited many regions in Quebec to fully grasp the extent of the problem. The quality of his work is an honour to the Bloc, and I commend him for it.

I am also pleased to take part in this last hour of debate on the amendment proposed by my colleague from Mégantic—L'Érable. This amendment reads as follows:

> That the motion be amended by deleting all the words after the word "particularly" and substituting the following: "by allowing clothing made with Canadian textiles but manufactured abroad to be imported without customs duties and by creating an income support program for older workers."

This amendment is part of five tools that we tried to propose to the government in order to help our industry, which really needs it.

Must we remind the House that the textile sector has long been one of the jewels of the economy in my riding? This is no longer the case today. Since 1998, the big textile and clothing sector has been losing ground in Drummond. Closures of businesses such as Celanese, Cavalier Textiles and, recently, Denim Swift, have something to do with that.

The Celanese plant closed gradually. It was like a slow death: 5,000 people in all had lost their job in March 2000. Management moved the facilities south of the border. Seven months later, another plant closed: Cavalier Textiles ended its production. In December 2003, Denim Swift management announced that it was ceasing its denim production activities in April 2004, putting 600 people out of work. It cited repercussions of the Caribbean Agreement to justify its announcement.

The industry came together. We brought various stakeholders together around the same table to try to find a solution. I personally intervened to get the then Minister of Industry to delegate a representative from the Economic Development Agency of Canada.

The Denim Swift strategy committee tried everything to get help from the federal government in order to avoid closing the plant, dismantling the facilities and moving the equipment to the United States. The Liberal government disappointed many in our region by choosing to do nothing.

Then, in May 2004, two letters came from the American president of Denim Swift, in which he expressed his concerns about the removal of tariffs and quotas. He indicated to the Minister of Finance that reducing customs duties would cause serious problems for the textile industry. He stressed the fact that removing tariffs would destabilize the market and cause major uncertainty for the future of the industry. It could affect the Drummondville community even more.

I want to share with you one of the questions raised by Mr. Heldrich, president of Denim Swift in the United States:

> This government appears to believe that the latest measures they have announced, CATIP and CANtex, are the solutions to the problems. Unfortunately, these programs are no substitute for appropriate and realistic policy for today's context. When our industry has no markets left, what good will these programs be?

The government did not respond. Six months later, during question period, the current Minister of Finance candidly admitted that he never read the letters in question.

Last March, the current minister responsible for the Economic Development Agency of Canada went to Drummond, but was not very forthcoming in his answers to journalists, who questioned him on the famous Caribbean Agreement. Allow me to quote this excerpt from the weekly *L'Express* site from March 31, 2005.

● (1745)

> When asked what his agency intended to do with regard to the Caribbean accord, an international treaty on textiles that has hurt companies like Denim Swift, (the minister) did not say much, mentioning the intervention of numerous ministers in order to resolve the issue.

Shortly thereafter, the Société de développement économique de Drummond published the employment rate for our RCM. Not surprisingly, it was not good. The loss of 600 jobs at the Denim Swift plant in Drummondville hit the regional economy hard. As a result, the textile and clothing industry now represents only 8.9% of all jobs in our RCM, and is the sixth largest provider of manufacturing jobs in the region. In comparison, it represented 12.5% in 2003 and was the second largest.

Those are the facts.

Since the first closure, and still today, the Bloc Québécois has made every effort to try to find practical and responsible solutions to these problems.

What can be done to prevent companies from electing to close their operations here because they can take advantage of low production costs elsewhere due to overly weak social and environmental legislation? An international policy capable of averting low-cost offshoring should also be adopted.

The action plan that the Bloc Québécois presented to the government also contains a measure to encourage the use of textiles from Quebec and Canada by allowing the duty-free entry of clothes made abroad, from textiles of Canadian origin. The government must negotiate Canada's accession to treaties signed by the United States and countries in Central America and the Caribbean. This would open the American market to textile and clothing manufacturers.

We have also spent a lot of time talking about the Chinese invasion following the lifting of tariff barriers on January 1, 2005. As we have said since the beginning, the government can use remedies under international treaties. For example, under the World Trade Organization accession protocol for China, these remedies allow for the adoption of quotas on Chinese imports in sectors where such imports could disrupt the market. Similarly, the government also has the duty to maintain import tariffs on clothing and types of textiles produced in Canada. That way, we can ensure that local manufacturers have sufficient flexibility until they are able to adapt to international competition.

Finally, behind all these figures and statistics are the faces of the men and women who are the first victims of the Liberal government's inaction. Worse yet, not only has the government done nothing to protect their jobs, but it has also proposed nothing concrete to help them out. In this connection, the Bloc's plan proposed that the government increase transfer payments to Quebec for trade training.

Then, for those who are close to retirement age, we continue to call for the creation of an aid package tailored to their reality. When people have spent their entire working lives with one employer, it is not easy to get back into the work force. This is why we believe that restoring POWA, the program for older workers, is essential in order to allow them to bridge the gap between EI payments and their pension cheques.

● (1750)

It is no longer a matter of figures, statistics, ratios, percentage; it is a matter of dignity and equity. These workers are bearing the brunt of our open borders, and of this government's laxness. If the liberalization of markets is good for society as a whole, it strikes me as normal for us, as a society of solidarity, to compensate the victims of the modernization of our economy.

[*English*]

Hon. Jerry Pickard (Parliamentary Secretary to the Minister of Industry, Lib.): Mr. Speaker, the motion tabled in the House by the hon. member from across the way includes two issues related specifically to tariff policy. These are: maintaining tariffs on imported clothing and types of textiles produced in Canada; and, allowing clothing made with Canadian textiles but manufactured abroad to be imported without customs duties. I would like to address these two issues and clarify the misunderstandings that may exist regarding the government's position on these policies.

Let me begin with the first issue of maintaining the tariffs on textiles and apparel produced in Canada.

The Canadian apparel and textile industries remain important providers of earned incomes and economic activity in this country. Concentrated in key urban areas, such as Montreal, Toronto, Winnipeg and Vancouver, the apparel industry serves as an important employer of new Canadians. The textile industry is a source of skilled employment in communities throughout Quebec, Ontario and the Maritimes.

The Canadian apparel and textile industries have faced and continue to face a challenging global trade environment, one that has encouraged their transformation from national to globally integrated companies and markets. Challenged by increasing competition from abroad, the Canadian apparel and textile industries have had to transform themselves over the past decade through focusing on higher value-added activity, on innovative and attractive new products, and through identifying the winning niche markets for their products.

However further change continues to be the order of the day. Apparel and textile markets continue to globalize. Domestic producers continue to face long competition from low wage countries. The Canadian dollar has demonstrated renewed strength in the last two years, and, most recently, textile and apparel quotas were limited in their entirety at the end of 2004, consistent with Canada's World Trade Organization commitments.

Although many of these changes are not unique to the apparel and textile industries or even to the Canadian economy, they are nevertheless having an impact upon the environment in which these industries have and continue to operate.

It is in the face of such challenges that the government has demonstrated its continued commitment to the long term viability of both the apparel and textile industries in Canada by working with them to confront these very great challenges.

It should be noted that the tariffs on imports of textiles and apparel are among the highest tariffs in Canada. While the Canadian average tariff is 4%, tariffs on textiles range from 8% to 14%, while the tariff on apparel is in the range of 17% to 18%. These tariffs serve to provide significant protection for the Canadian textile and apparel sectors.

Canada, along with over 144 other WTO members, is currently participating in the Doha round of multilateral trade negotiations and discussions are currently focusing on methods for achieving trade liberalization. The government is keenly aware of Canadian import sensitivities regarding the textile and apparel industries. Any decision to reduce tariffs would be predicated on an overall result that is beneficial for the Canadian economy.

That said, in order to enhance the competitiveness of the Canadian textile and apparel industries, the government announced in December 2004 that it would implement tariff relief on fibres, yarns and apparel fabrics not made in Canada. As a first step in the implementation of this initiative, the Canadian International Trade Tribunal, or CITT, was directed to inquire into and report on the availability of these products from domestic production.

In the course of its inquiry, the tribunal reviewed 591 textile tariff items. Information on textile production was collected by means of questionnaires completed by domestic textile producers and submissions from textile and apparel producers, as well as the Canadian Apparel Federation, the CAF, and the Canadian Textiles Institute, the CIT.

● (1755)

On the basis of the information, the tribunal issued a report on June 30 of this year and recommended the elimination of tariffs on 341 of the tariff items examined. The proposed tariff relief amounts to several million dollars in duty forgone. It is the government's intention to respond to this report as expeditiously as possible. As announced last December, any new tariff relief measures will be made effective January 1 of this year and importers will be able to request a refund of the duties paid since that date.

I would be remiss not to mention the other two elements of the package of competitiveness initiatives announced by the government last December, namely: the provision of $50 million in additional funding to the textile production efficiency component, CANtex, over the next five years to encourage Canadian textile companies to shift to higher value-added products, focus on niche markets and improve productivity; and, the extension of the duty remission orders benefiting textile and apparel manufacturers for five years, gradually phasing out benefits over the final three years.

CANtex encourages companies to improve productivity through projects such as lean manufacturing and the implementation of new information technology and logistics systems. Starting in fiscal year 2005-06, the additional funding is intended to encourage excellence and competitiveness in the manufacture of technical, specialty and industrial textiles, including assisting manufacturers producing textiles for the traditional apparel sector to reorient production to other textile product markets. CANtex will allow companies to apply for up to $3 million in repayable contributions for projects, including equipment and machinery acquisition.

Duty remission programs for textiles and apparel have been a feature of the Canadian tariff policy in these sectors for a number of years. Extending the six remission orders in question will help the textile and apparel industries in transforming their operations to adjust to the new competitive pressures. Over the next few years the government will review the current administration of the duty remission orders program and revise it as necessary to address the problems.

The measures announced last December were in addition to over $70 million in federal support for the textile and apparel industries over the previous two years, and more than tripled the annual level of assistance to these industries.

I am confident that these measures will help Canadian textile and apparel producers to lower costs and to invest in new initiatives and improve productivity as they continue to adapt to the challenges of a global trade environment.

I would like now to turn to the second tariff policy issue in the motion in question concerning the duty-free entry into Canada of apparel made from Canadian textiles. This policy is commonly referred to as outward processing and it is a policy that many of our trading partners, including the United States and the EU, have adopted to assist their textile industries.

Over the past decade, the Canadian government has on several occasions explored the possibility of introducing an outward processing program for textiles with Canadian textile and apparel producers. However these efforts have not come to fruition due to the fact that the two industries have not been able to agree on the details of the program.

The House may recall that in 2002 the government established a joint government-industry working group on textiles and apparels. The industries were represented by the Canadian Apparel Federation and the Canadian Textiles Institute, the two primary trade organizations associated with these industries, as well as by the Union of Needle Trades, Industrial and Textile Employees, representing employees. Government officials from Industry Canada, the Department of Finance, International Trade Canada, Statistics Canada, the then Human Resources Development Canada and the Canada Border Services Agency participated in these meetings.

● (1800)

This joint government-industry working group met on a number of occasions in 2003, during which representatives from the apparel and textile industries submitted recommendations for government action to address the issues related to the long term competitiveness of apparel and textile industries.

One of these recommendations involved implementation of an outward processing program, which the government responded to in February 2004. In this regard, I am pleased to inform the House that the Canadian textile industry has submitted the basis of a proposal for an outward processing program to the Department of Finance. The Canadian Textiles Institute is currently working with the Canadian Apparel Federation on details of the program.

I would again like to thank the House for this opportunity to clarify the government's position on tariff policy elements.

Mrs. Lynne Yelich (Blackstrap, CPC): Mr. Speaker, I rise today to speak to Motion No. 164, which reads as follows:

> That, in the opinion of this House, the government should establish, in compliance with international agreements, a policy of assistance to the textile and clothing industries in order to enable the industries to compete throughout the world, particularly by broadening the Technology Partnerships Canada program to include these two sectors....

I recognize that this is a very important issue for the province of Quebec and for the entire Canadian clothing and textile industry. We in the Conservative Party are committed to a real and sustainable industrial development policy.

I looked into the background of this motion. In December 2005, the federal government announced a program for the textile sector to, first of all, eliminate the tariffs on fibre and yarn imports. That was worth up to $15 million a year. There was also the elimination of tariffs on imports of textile inputs used by the apparel industry. That was worth up to $75 million a year. All of this was effective as of January 2005.

Additional funding of $50 million was provided to the textile production efficiency component, better known as CANtex, over the next five years. This encouraged Canadian textile companies to shift to higher value added products, focusing on niche markets and improving productivity. The program extended current duty remission tariff reduction orders benefiting textile and apparel manufacturers for five years, gradually phasing out benefits over the final three years.

This followed much pressure from all of the opposition parties to address the impending January 1, 2005 removal of textiles and clothing quotas. A Bloc day motion on February 9 called for industry support for the textile sector of $50 million over five years as well as an aid program for older workers and the invoking of special safeguard measures under existing trade agreements. The Conservative Party supported this motion. It was passed by the House.

On November 30, 2004, the Subcommittee on International Trade, Trade Disputes and Investment studied the issue. It was here that the Bloc first raised the issue of assigning part of the Technology Partnerships Canada program to research and development, for example, in this industry for the first time.

On November 30, 2004, an NDP concurrence motion was introduced on the issue of duty remission orders, which was consistent with our Conservative call to extend for a further seven years the duty remission orders covering the apparel sector.

My observation is that there is an inherent contradiction between the textile and apparel sectors about government action. The inherent contradiction with the textile industry is the concern that Canada already provides duty free entry for many fabrics used in garments made in Canada. The apparel industry is concerned about duty free entry for some garments that are 100% made outside of Canada. The textile industry struggles to find domestic markets within the apparel industry when garments made in other countries from Canadian fabrics are fully subject to duty.

This observation makes it clear that there is a need for further government-stakeholder consultations to agree to a whole industry approach to this issue.

We favour reducing subsidies to for profit businesses, but the tariff eliminations must be phased. There must be a phased reduction of duty remissions which benefit the domestic industry and the industry support commitments.

We must work with international organizations and individual nations to reduce protectionist policies to secure free trade agreements, and where there is injurious harm caused by a trade action we must have a reasonable chance of winning and/or reversing this action. We must support the industry on a temporary basis until the trade action is resolved.

● (1805)

This approach should not only reduce but eventually eliminate these subsidies to for profit businesses by focusing on improving overall economic growth through facilitating competition, improving productivity, streamlining regulation and fostering innovation in concert with free and fair trade agreements.

Technology Partnership Canada is not really designed to be an adjustment program for established industries, but to encourage new and emerging sectors to maturation. Therefore, it is not clear that the mandate of Technology Partnerships Canada extends or is appropriate for the clothing and textile program and that there may be another government program or service line that would better address this industry's needs.

We support an examination of programs delivered by Human Resources and Development Canada to assist all the workers, not just older workers displaced by changes in the textiles and clothing industries.

The apparel industry is the 10th largest manufacturing sector in Canada and the second largest in the province of Quebec. As of 2002, over 94,000 Canadians have been employed in the apparel industry, with an annual payroll of $2.3 billion. We recognize how important the apparel industry is to Canada and to Quebec.

The Canadian textile industry provides direct employment for almost 50,000 Canadians and indirect jobs for many thousands more.

The differing positions within the textile and apparel industry suggests that more work needs to be done by both the government and stakeholders to agree on a plan for the evolution of this Canadian industry. We have an appreciation that we must have a transition period in place so the industry can be encouraged to adapt to the new market conditions.

Again, I realize it is very important for Quebec and the entire Canadian clothing and textile industry. We are committed to real and sustainable industrial development policy. However, the Technology Partnerships Canada program I do not believe is designed to be an adjustment program for established industries, but to encourage new and emerging sectors to maturation, upon which time the Technology Partnerships Canada loans must be repaid.

Therefore, it is not clear that the mandate of Technology Partnerships Canada program extends or is appropriate for the clothing and textile program and that there may be another government program or service line available which would better address this industry's needs.

We would recommend also that we broaden the directive to the government to seek solutions from Human Resources and Skills Development to approach the labour market rather than narrow the focus on the program.

● (1810)

Mr. Borys Wrzesnewskyj (Etobicoke Centre, Lib.): Mr. Speaker, I am pleased to speak on Motion No. 164, especially as it relates to the Government of Canada's work with the textile and clothing industries to help them adapt to new market forces. We are committed to the long term viability of both of these industries. Our goal is to work with them to develop effective ways to address the impacts of the reduction of tariffs and quotas in these sectors.

The Government of Canada realizes that it is the personnel of an industry that faces the brunt of these impacts. We recognize that all workers, including older workers, can and want to continue making a contribution. This is why the Government of Canada, in close collaboration with provinces and territories, has been working to test approaches to assist older workers to find and retain employment.

The Government of Canada invested $50 million in the older workers pilot projects initiative between 1999 and 2005. The initiative was extended until May of 2006 and enriched by $5 million. This will allow the Government of Canada, with provinces and territories, to continue to explore ways to assist older workers in the labour market while identifying key lessons that will inform future policy and programming for older workers.

Quebec has signed an older workers pilot project initiative agreement with the Government of Canada, under this extension, for over $3 million in federal funding to carry out projects for older workers. In addition, under this agreement the Government of Canada has committed to continue to work with the province of Quebec to identify the needs and long term solutions for older workers.

As well, many older workers are assisted through employment programs funded through the Employment Insurance Act. Across the country, 142,000 Canadians aged 45 or over were served in EI funded programs either developing new skills or receiving support through job counselling, resumé writing and job search assistance. Last year over 50,000 workers over the age of 44 in the province of Quebec were assisted.

Our approach to assisting workers means looking to the long term by helping to adapt to changing circumstances so they can continue to stay productive. That is the driving force behind the workplace skills strategy which the Government of Canada announced in the Speech from the Throne. Budget 2005 set aside $125 million over three years to help us work with the provinces, industry and unions to: first, help develop a highly skilled, adaptable and resilient workforce; second, build a more flexible and efficient labour market; and, third, make our workplaces more productive, innovative and competitive.

Sector councils have led the way in anticipating and planning workplace adjustment. Across Canada some 30 national sector councils bring business and labour together in key industries to identify and address human resources and skills issues. Both textile and apparel sectors have used sector councils to help facilitate change.

Last spring Human Resources and Skills Development provided funding of $5.9 million to the Textiles Human Resources Council to improve the skill levels of the textile industry workforce and to encourage young people to consider the textile industry as a viable career option. The Apparel Human Resources Council received more than $3 million to promote the skill level of its existing workforce and to attract and retain a new generation of skilled workers.

I hope the foregoing amplifies how the government is committed to a thriving textile and apparel industry in Canada. By working with industry and showing Canadians that we care, we are building a society of opportunity for years to come.

● (1815)

Ms. Anita Neville (Winnipeg South Centre, Lib.): Mr. Speaker, I too am pleased to speak in favour of the original motion put forward by my colleague opposite regarding an assistance policy for the textile and apparel industries.

Both these industries are dynamic players in the modern Canadian economy. With combined shipments of $13 billion annually, both industries continue to contribute to the Canadian manufacturing landscape. Moreover, both the apparel and textile industries contribute to the social landscape of the country.

The textile industry is a major employer of quality jobs in many smaller towns across Quebec, Ontario and the Maritimes. The apparel industry provides a source of employment for Canadians in cities such as Montreal, Toronto, Vancouver and my city of Winnipeg.

Throughout the second half of the 1990s both industries have made efforts to reduce costs, achieve productivity gains and increase their exports to the United States to ensure their continued viability and contribution within the Canadian economy.

Irrespective of these strengths, members on both sides of the House are nevertheless aware that the Canadian textile and apparel industries are currently facing an unprecedented period of trade liberalization. This liberalization is primarily the result of international obligations under the WTO to remove all import quotas on textile and apparel goods on January 1 of this year.

As members of both sides of the House are aware, apparel and textiles did not fall under the normal trading rules of the WTO's general agreement on tariffs and trades for the two decades prior to 1994. Instead, trade in these industries was governed by the multifibre arrangement, MFA, which allowed quantitative restrictions on imports of apparel and textiles to be negotiated bilaterally between member countries.

The MFA was replaced in 1995 with the agreement on textiles and clothing. This agreement committed countries to integrate textile and apparel products into the normal GATT trading rules over a 10 year period that began January 1, 1995. Over the last decade three phases of quota removal occurred in 1995, 1998 and the year 2002 with a final reduction occurring on January 1 of this year.

This has been a major change to the global environment in which Canadian apparel and textile industries operate. However, as my hon. colleagues are well aware, the tremendous unknown behind the removal of import quotas have been our domestic industry's ability to compete with increasingly stiff competition from countries such as China and India, particularly with respect to the possible displacement of Canadian exports destined for the U.S. market.

Against such a backdrop, a host of factors that are affecting all sectors of the economy, factors such as new technologies and products, changing consumption patterns, increased global competition and individual decisions taken by Canadian firms are having a significant impact on both these industries. As a result, both the domestic apparel and textile industries are facing considerable restructuring challenges that are affecting their future viability.

While it is true, as I noted earlier, that the Canadian textile and apparel industries have improved their competitiveness in the 1990s through increased exports to the U.S. and the use of technologies and cost reductions, these challenges remain nevertheless.

Let me turn my attention to the critical part of the original motion in question, Motion No. 164 which reads as follows:

> That, in the opinion of this House, the government should establish, in compliance with international agreements, a policy of assistance to the textile and clothing industries in order to enable the industries to compete throughout the world...

As members on this side of the House are aware, the government is not only aware of the particular challenges facing these industries but has taken the necessary steps to strengthen them in face of the economic challenges. In so doing we believe the government is already working toward the objectives highlighted by the hon. member.

● (1820)

Now I will turn my attention to what the government has undertaken.

The most recent set of measures was announced on behalf of the government by the Minister of Finance and the Minister of Industry in December 2004. They were designed to address important policy considerations and remove tariff impediments to the competitiveness of both industries.

Included in these measures was the announcement of additional funding for the textile industry to refocus its production toward innovative products. Specifically, this is an increase of $50 million over five years to the funding support available through the textile production efficiency initiative, better known as CANtex, administered by Industry Canada in cooperation with Canada Economic Development for Quebec Regions. In total, the implementation of these measures is making available almost $77 million in direct financial assistance to the textile industry. Increasing CANtex funding will help the Canadian textile manufacturers diversify production toward new product lines and growing niche markets.

Also among the measures announced on December 14, 2004 is the elimination of certain tariffs on the products imported by the textile and apparel industries for further production in Canada. In the case of the textile industry, this action is aimed at eliminating tariffs on certain fibre and yarn imports for Canadian manufacturers to a value of $15 million per year.

To help ensure that this tariff relief does not adversely affect current domestic production, tariffs will remain on imports of fibres, yarns and textiles produced in Canada. Toward this end, the Minister of Finance has asked the Canadian International Trade Tribunal, an independent body responsible for providing advice on economic and tariff related matters, to consult with the textile industry to identify textile products currently produced in Canada.

Finally, the government announced the extension of existing duty remission orders in council that benefit the Canadian textile and apparel manufacturers. These duty remission orders were introduced in the late 1990s as a series of temporary measures to assist domestic textile and apparel firms in adjusting to a more competitive trade environment. The extension of these duty remission orders will allow these benefits to continue to flow to domestic manufacturers.

These measures do not simply stand on their own. In fact, they are only the latest actions taken by the government. They build on a number of transition adjustment measures already announced by the government since 2002, with a value of almost $100 million in support of the apparel and textile industries. These previous measures include: the $33 million Canadian apparel and textile industries program implemented in January 2003; funding of $10.9 million for the Canadian Border Services Agency to monitor illegal transshipments; the February 2004 creation of CANtex, as I mentioned, initially valued at $26.75 million over three years; and previously announced action to reduce tariffs to the apparel industry on textile imports.

The government continues to work to address the challenges facing domestic textile and apparel manufacturers. The measures announced over the past three years demonstrate that the government is listening to the industries and taking the steps it can to help ensure their continued viability in the Canadian economy.

Therefore, I am expressing my support for the original motion. As I have already articulated, the government is and remains committed to listening to the issues raised by both apparel and textile manufacturers, as well as those raised by members on both sides of the House.

Moreover, the government is listening to Canadians, who know that well-paying Canadian jobs in these sectors will only come from the competitive and strong industry these actions are meant to facilitate.

[*Translation*]

Hon. Claude Drouin (Parliamentary Secretary to the Prime Minister (Rural Communities), Lib.): Mr. Speaker, we have noticed that, on both sides of the House, members are dismayed by the situation experienced by women and men throughout the country, particularly in Quebec, in the clothing and textile sectors.

This situation is most difficult and the Government of Canada has acknowledged that. Since 2003, we have invested hundreds of millions of dollars to try to help the industry overcome this crisis. However, the rising Canadian dollar has negatively affected our chances to help the industry. At the same time, we have seen that the European Community has threatened and has even tried to impose quotas on Asia, particularly on China, but that it had to change its mind. These are difficult times.

Some businesses here in Quebec and in Canada have started to move to Asia and in other countries where wages, unfortunately, are very low. We are talking about people earning $1 or $2 an hour or, in some countries, that amount of money for a day of work. The situation is difficult. We must find solutions to help these women and men keep their jobs or find other avenues to ensure that the Canadian economy remains strong.

I am very concerned with this situation. In our province, we have lost 2,000 jobs since 2003, despite the investments that we have made to help increase productivity and find the right niches. However, at the same time, there are businesses in our province, in the clothing sector, that are currently creating jobs. They are rare, but there are some. We must find niche products. We must help the industry and we will do so once again. Both sides of the House must do so relentlessly to help find solutions for the women and men who make a living in the textile and clothing industries.

● (1825)

Mr. Paul Crête (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, BQ): Mr. Speaker, I will dedicate this reply to the men and women who work in those industries. In my riding, for instance, we have people working at Consoltex, Cavalier, Industries Troies in Saint-Pamphile, and Cuirs Leco in Saint-Pascal. There are many examples of this living reality.

The points made by the member for Beauce speak to the relevance of the motion. Past efforts have been insufficient. It is critical that an additional approach be put in place showing that the government wants to help these industries which are not necessarily moribund. That is what is important to remember.

The textile industry will have a future, provided that it is given access to markets. We have put forward an amendment to allow textiles produced domestically and intended for use in garment manufacturing abroad to enter Canada duty free. This is a concrete example of what can be done to ensure access to market. This was a suggestion from the industry itself.

Some people in the garment industry are very specialized. For example, Vêtements Peerless Clothing in Montreal specializes in products that are quickly penetrating the American market. This company is able to overcome challenges. But, at the same time, many, many people are losing their jobs. These are workers who are not able to easily return to the labour market. They were excellent workers in their fields. They created quality items that I could never make in a million years.

When people aged 45, 48, 50, or 52 have spent 20 years in the same job and are asked to find another occupation or they decide to travel 50 or 60 kilometres to take another job paying $8 or $9 per hour, and they do the math, taking into consideration the price of fuel and everything else, they find it hard. As a result, we believe that measures are needed to help the industry survive this crisis. However, we must also help those affected to ultimately improve their situation so they can survive.

So what we want is a policy to assist the textile and clothing industries. The federal government has put a few things into place so far. It must be admitted that the two sectors have a great deal of difficulty making joint proposals.The two industries have different objectives. Overall, however, it is the government's responsibility to make choices and to lay the most suitable proposals out on the table.

I hope that the motion, as amended, will receive the support of all parties in the House. This is a sector of industry that has a future if it is assured of markets. This is a sector that has made extraordinary efforts in the past in the area of R&D. The best machines are not enough by themselves; the right to sell what one produces is also necessary. The quality of our workers is not an issue; there has to be a right to service the markets.

There is another very concrete example. In the first years of NAFTA, Canadian textile products invaded the American market. Since then, the United States have signed agreements with Caribbean countries allowing them to take American textiles, do the sewing in the Caribbean and return the garments to the American market without paying custom duties. This killed the Canadian textile market. This is the type of measure that we would like the government to push. Labour is available. These people are capable, they have made a living in that industry and they deserve adequate support.

In conclusion, I invite all parties to read again the motion as amended. I know that the government felt there were too many suggestions in the initial amendment. The President declared it out of order. I respect his decision. However, at this point, all members of this House have to vote on the new wording of the amendment. Generally speaking, this amendment calls for a policy to support both the textile and apparel industries, and specifies two areas of support. As I mentioned earlier, these have to do with textiles used in garments manufactured abroad and income support programs for older workers.

A number of additional measures can be included in a policy. All that is already included in the motion. I hope that, for members who have this type of industry in their riding, it will be very clear when they vote on the motion. As for the others, they ought to know that we are in a changing world. What happens in a specific industry can happen in two, three or five years in another industry. We have to be proactive. These two industries deserve our support.

● (1830)

The Acting Speaker (Mr. Marcel Proulx): The question is on the amendment.

[*English*]

Is it the pleasure of the House to adopt the amendment?

Some hon. members: Agreed.

Some hon. members: No.

The Acting Speaker (Mr. Marcel Proulx): All those in favour of the amendment will please say yea.

Some hon. members: Yea.

The Acting Speaker (Mr. Marcel Proulx): All those opposed will please say nay.

Some hon. members: Nay.

The Acting Speaker (Mr. Marcel Proulx): In my opinion the nays have it.

And more than five members having risen:

The Acting Speaker (Mr. Marcel Proulx): Pursuant to Standing Order 93 the division stands deferred until Wednesday, October 5, immediately before the time provided for private members' business.

It being 6:32 p.m. this House stands adjourned until tomorrow at 10 a.m. pursuant to Standing Order 24(1).

(The House adjourned at 6:32 p.m.)

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