

RESTRUCTURING BULLETIN

June 2005

INSOLVENCY LAW REFORM BILL INTRODUCED

On June 3, 2005, Bill C-55 received first reading in Canada's House of Commons. If passed, the Bill would implement a number of substantive amendments to Canada's bankruptcy and insolvency regime. However, given the present political climate in Ottawa, it is not clear whether the Bill is likely to be enacted in its current form.

Bill C-55 represents, in part, the product of the five-year statutory review of the *Bankruptcy and Insolvency Act* ("BIA") and *Companies' Creditors Arrangement Act* ("CCAA") which was mandated by Parliament when those statutes last underwent significant amendment in 1997. The Bill adopts several recommendations of the Senate Committee on Banking, Trade and Commerce and reflects the input of a broad range of stakeholders including labour and business groups, insolvency practitioners, financial institutions, consumer associations and members of the academic community. McMillan Binch Mendelsohn lawyers played a significant role in providing input at various stages of the consultation process.

The following is a brief summary of some of the key proposed amendments affecting insolvent business debtors.

Governance. The amendments seek to address the governance of companies subject to formal insolvency proceedings by providing that:

- a judge in a BIA proposal or CCAA restructuring proceeding can remove and replace directors and grant a priority charge to indemnify directors and officers against obligations and liabilities incurred after the commencement of proceedings;
- in CCAA proceedings, actions or claims against directors that arose prior to the commencement of proceedings may be stayed;
- monitors appointed in CCAA proceedings must be licensed trustees; and
- auditors and recent former auditors of an applicant will not generally be permitted to act as monitors. This is consistent with the current rule for trustees under the BIA.

The amendments also purport to clarify the provisions to the effect that trustees and receivers are not personally liable for any claim against the debtor in relation to a debt or liability, present or future, to which the debtor is subject upon the appointment of the trustee or receiver.

Priorities. Several amendments are intended to protect current and former employees of insolvent companies by providing that:

- claims for unpaid wages and vacation pay earned in the six months preceding a bankruptcy or receivership, up to a maximum of \$2,000, are secured by a priority charge over the debtor's current assets, and are required to be paid immediately as part of any BIA proposal or CCAA plan;
- in certain circumstances, employees will be entitled to receive payments from a federal Wage Earner Protection Program up to a prescribed maximum amount and, to the extent of the payments, the Crown will be subrogated to the claims of the employees against the employer including under the priority charge described above; and

- outstanding current service pension plan contributions are secured by a charge on all the assets of the debtor in bankruptcy or receivership, and are required to be paid as part of any BIA proposal or CCAA plan.

Restructurings. The amendments provide for the following features in restructuring proceedings under the BIA or CCAA (much of which represents a codification of existing CCAA practice):

- the court may authorize interim financing and, after considering certain specified factors, order that such financing be secured by a charge ranking in priority to existing secured lenders;
- the court may authorize asset sales out of the ordinary course of business, provided that certain conditions are satisfied;
- under the BIA, new provisions have been added enabling a debtor company to terminate contracts with certain exceptions (termination of contracts was already possible in the context of CCAA proceedings);
- a debtor that satisfies certain conditions may obtain an order authorizing it to serve a notice to bargain on its employees' bargaining agent, triggering a renegotiation of the collective agreement and a claim by the bargaining agent for the value of any concessions; however, there is no provision for the judicial imposition of a settlement;
- in order to harmonize the treatment of aircraft lessors and financiers with US law, in certain circumstances, aircraft lessors and lenders with security interests in aircraft objects may repossess the aircraft objects;
- in order to harmonize the treatment of claims arising in connection with the purchase or sale of a share or unit of the debtor with US law, holders of such claims are not entitled to vote on a proposal or plan, are placed in the same class in relation to those claims for CCAA proceedings and, in bankruptcy or BIA proposals, are subordinated to the claims of other unsecured creditors; and
- persons granted the use of intellectual property by insolvent debtors are entitled to continue to use the property so long as they continue to perform their contractual obligations.

Income Trusts. The scope of the BIA and CCAA would be expanded to apply to income trusts.

Settlements and Reviewable Transactions. The amendments repeal the existing BIA sections relating to settlements (gifts) and reviewable transactions among related parties. In their place, new provisions will address "transfers at undervalue" which are subject to review by the court. There is a one-year "look-back" period for arm's length transactions and one or five-year "look-back" period for non-arm's length transactions, depending upon the circumstances. The Bill proposes no changes to the provisions relating to fraudulent preferences.

International Insolvencies. The amendments include new provisions based on the United Nations Commission on International Trade Law Model Law, which will replace Part XIII of the BIA and section 18.6 of the CCAA.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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