EVIDENCE

[Recorded by Electronic Apparatus]

Tuesday, June 11, 1996

.1536

[English]

The Vice-Chairman (Mr. Valeri): Order, please.

It is ordered that Bill C-5, an act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, and the Income Tax Act, be now read a second time.

I would like to introduce Mr. David Tobin, who can introduce the rest of the witnesses from the Department of Industry.

Mr. David Tobin (Director General, Corporate Governance Branch, Department of Industry): Thank you, Mr. Chairman.

Before I introduce the witnesses from the department, I would call the attention of the chair and the committee to Mr. Gordon Marantz and Mr. Max Mendelsohn, both of whom are practising attorneys, here to assist us and assist the committee in any understanding you may need for the bill.

Perhaps I can call on my colleagues to introduce themselves.

Mr. George Redling (Superintendent of Bankruptcy, Department of Industry): My name is George Redling. I am the superintendent of bankruptcy.

Mr. Marc Mayrand (Deputy Superintendent of Bankruptcy, Department of Industry): Marc Mayrand, the deputy superintendent of bankruptcy.

[Translation]

Mr. Jacques Hains (Director, Corporate Law Policy Directorate, Department of Industry): My name is Jacques Hains and I am Director of Corporate Law Policy with Industry Canada.

Mr. Tobin: Mr. Chairman, if you don't mind, we have a presentation of about 20 minutes.

[English]

The Bankruptcy Act, which we're here to discuss today, is part of a package of marketplace framework laws which are essential for critical jobs growth and innovation within the economy. As in most framework laws, the Bankruptcy Act and the CCAA balance many different and divergent interests. For example, they reconcile the interests of both debtors and creditors and creditors amongst themselves, and they balance provisions on reorganization and rehabilitation versus that of liquidation.

Reform to the Bankruptcy Act has had a long and chequered past. In fact the 1992 amendments, commonly referred to as ``phase one'', were the first in somewhat over forty years.

The focus of the 1992 amendments was very much that of reorganization versus liquidation. It was a question of saving businesses and jobs versus bankruptcy. The main features of the 1992 amendments were a revised commercial reorganization scheme, a new consumer proposal regime, and measures to streamline the bankruptcy administration, all of which were combined with a three-year review clause. Since 1992 there have been over 3,000 commercial reorganizations, of which 50% are still active. On the consumer side, there have been over 6,000 consumer proposals and somewhere between 65% and 70% are still active.

Given the three-year review clause that was put in the 1992 amendments, the department then considered how we would structure and prepare for the three-year period. We wanted to ensure that input for 1992 and beyond was based on private sector initiatives. Hence we established a bankruptcy and insolvency advisory committee to identify proposals for amendments and to assist in the three-year review. All major stakeholders are represented in the consultative process; that is, business, consumers, the lending industry, the legal profession, bankruptcy trustees, and other members of the insolvency community.

Over 100 individuals, representing 50 organizations, provided their time freely to provide input into this review. An overall committee was then divided into eight working groups, with numerous smaller task forces. I dare say, Mr. Chairman, the majority of the amendments proposed in C-5 are based on the recommendations of that private sector group.

We could look at the reforms proposed in Bill C-5 in a number of ways. We've chosen to divide them into four broad areas for the purpose of introducing them to you and your committee. The first would be categorized under promoting fairness; the second, encouraging responsibility; the third, fostering commercial reorganization; and the fourth, improving administration.

.1540

If you will bear with me, I'd like to spend perhaps a few minutes on each of those to present the highlights to you.

On the first one, promoting fairness, there's a provision in the act to increase the protection for spousal and child support orders. The proposal is to make spousal and child support orders claims provable, amounts accrued in the year before the debtor's bankruptcy plus any lump-sum payment order agreed upon.

Similarly, support orders would be given preferred creditor status, making them fifth in ranking priority, behind funeral expenses, costs of administration, superintendent's levy, and wage earners.

Finally, there would be no release of the remainder of the unsatisfied claim once those claims we've just mentioned would have been paid.

The second point is on seizure exemptions. To protect debtors' assets better and to ensure that essential needs are met, Bill C-5 proposes to exempt for low-income benefit payments such things as the GST credit reform. The objective here is to try to ensure that the debtors' essential needs are met.

While the GST is covered in the present act, other types of refunds could be added to by Order in Council.

Petitioning of farmers and fishermen: Provisions in Bill C-5 propose to expand and strengthen the protection for farmers and fishermen from being petitioned into bankruptcy. It would change section 48 of the act from individuals engaged solely in fishing or farming to individuals whose principal occupation and means of livelihood is fishing or farming. Again, this is to try to take into context the reality of the day that very few people actually make their living solely from farming or fishing and in some cases fishermen and farmers have to seek outside income to supplement that.

The second major area would be that of encouraging responsibility. To deal with what is a growing number of recent graduate students declaring bankruptcy prematurely, changes have been made in the act to recognize that at times students may have difficulty in repaying their loans, but at the same time we wish to protect the integrity of the student loans program. Therefore Bill C-5 proposes to make student loans non-dischargeable debts for the first two years following the completion of studies. However, at the end of the two-year period former students could apply to the courts to have the student debt discharged if in fact the hardship can be shown.

There are no special provisions for student loans that have occurred after the two-year period. That is to say, if a former student is bankrupt after the two-year period, the normal rules apply.

Surplus income: Again speaking of the balance I referred to earlier, in Bill C-5 we have tried to ensure that bankrupts will make contributions to the estate in accordance with their ability to pay. Therefore clause 60 of the bill imposes a duty on bankrupts to pay surplus income to the estate. The trustees are to set the amount of surplus income to be paid as per directives issued by the superintendent. If the bankrupt feels that the amount determined by the trustee is not fair, then mediation provisions are built into the act to allow official receivers to try to resolve the dispute between the trustee, the creditors, and the debtor. Finally, if the mediation fails, the matter can be referred to the courts.

Often people say that the discharge of bankrupts has to be examined, so one of the things that the bankruptcy and insolvency committee has suggested is that the trustee could set the terms of a bankrupt's discharge order. In making those recommendations, the trustee is to take into consideration the compliance with the surplus income payments I referred to earlier, as well as the amount of surplus income paid to the estate, taking into account the bankrupt's financial ability to pay and whether or not a consumer proposal should have been filed, rather than a simple declaration of bankruptcy.

Again, built into these provisions are mediation and attempts to resolve any differences between the parties. Again, if mediation fails, the matter can be referred to the courts for final resolution.

.1545

The last area under the theme of encouraging responsibility would be the provision dealing with assault judgments and orders. Bill C-5 proposes to make assault judgment orders in civil cases, non-dischargeable debts and bankruptcies. This is designed to prevent those who awards have been made against...of those types of awards.

[Translation]

The third part will be presented by Mr. Hains.

Mr. Hains: Thank you.

The third main objective of Bill C-5 is to continue to foster the commercial recovery and reorganization of businesses that, though viable, are in a difficult financial situation. The purpose is of course to protect these businesses and the jobs which depend on them.

There are four main proposals in Bill C-5 relating to commercial reorganizations. The first area affected is commercial leases. Bill C-5 purports to change the 1992 amendments to allow the debtor to make a choice among three options when he has entered into commercial leases that cause his financial situation to be particularly precarious. He may repudiate these commercial leases and in so doing will have three choices.

He may offer the landlord compensation equivalent to the loss incurred.

The second option would be to make a special offer to the landlord including him in a particular and exclusive category for landlords. Under such an option, the landlord makes an estimate of his loss based on a formula to be found in Bill C-5, namely one year of rent from the date of the disclaimer of the lease plus 15% of the rent for the remainder of the term of the lease for a total amount not to exceed three years' rent.

The third option open to the debtor is to make no offer to compensate the landlord who, in that case, is entitled to make a claim as an ordinary creditor based on the formula I have just described.

The purpose is to ensure that landlords have some say in the matter. Not only will they be made an offer based on the loss incurred or on the formula contained in the bill but they will be given a chance to vote on the proposal made to them.

The other main area of activity is to be found under the heading ``The promotion of commercial reorganizations with respect to environmental responsibility''. Once again, the proposal of Bill C-5 is to improve the amendments adopted by Parliament in 1992. There are four or five elements in the proposal contained in Bill C-5.

The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.

What are these four or five elements relating to environmental liability? First of all, insolvency professionals would no longer be considered personally liable for damage caused to the environment after their appointment unless they are guilty of serious negligence or deliberate misconduct.

Secondly, if the monitor were to receive an order to remedy environmental damage, he would have four options.

First, he could decide to carry out the order and remedy the environmental damage, the costs to be charged as costs of administration from the bankrupt's assets.

.1550

The second option would be to challenge this order to remedy before the appropriate courts; these two options are already to be found in environmental legislation.

The third option would be for the monitor to apply to the appropriate court for a period of stay to assess the economic viability of complying with the order, whether it is worth the trouble and whether the assets are sufficient to cover the clean up costs.

As a fourth option, if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies.

It should be emphasized that for the first time in the Canadian history Bill C-5 proposes to recognize that claims for costs of remedying any environmental condition shall rank in priority above any other claim. In other words, they would rank above any contractual charge such as a mortgage or any other right against the property to which the order applies, as well as to any other real property contiguous to the contaminated sites and affected by the contamination.

So as far as the assets are concerned, under this legislation environmental claims will rank above any others, including mortgages and any other contractual instruments.

Lastly, if in spite of the exercise of this first claim there remains money owing to the Department of Environment for work done to clean up the sites if there still is an unsettled claim, then the claim will be recognized as an ordinary claim against the assets of the bankrupt business.

It should be noted that although monitors are no longer personally liable unless they are guilty of serious negligence, Bill C-5 does not exempt them from the requirement to inform the proper authorities when they discover an environmental problem. It is our view that this will make an enormous contribution to a healthy environment in Canada and the cleaning up of pollution.

I repeat that the purpose of such provision is to encourage practitioners to accept mandates and to reduce the number of abandoned sites in the country. If there are any environmental difficulties, there will be someone on the spot to inform the appropriate authority. The other provisions I have described will also apply, including the priority status granted to environmental claims.

A third area under the heading ``Fostering Commercial Reorganizations" concerns the liability of directors. We should remember that the main purpose of the amendments approved by Parliament in 1992 and those contained in Bill C-5 is to safeguard businesses and jobs.

The directors of insolvent companies who are attempting to reorganize and turn around the business are also required to make very important decisions and offer the creditors less than what is due to them. When such decisions are taken, these directors often run the risk, under environmental and tax legislation, of having to pay the difference of the unpaid debt. This of course does not encourage directors to remain members of the board of directors and to make decisions aimed at safeguarding businesses and jobs. So the purpose here is to encourage directors of companies experiencing difficulties not to abandon the sinking ship but to attempt what they can to set it afloat again.

Let me give you a brief description of three elements contained in clause 82 of Bill C-5.

One of the proposals enables the directors of corporations to demonstrate that they have acted as prudent and diligent persons in making such decisions.

Secondly, there is the possibility of suspending procedures against the directors during the reorganization procedures. This does not amount to a denial of the right to obtain remedy from the directors but is simply a suspension, a moratorium for a limited period of time.

.1555

Third, as part of the recovery plan, directors are allowed to propose a compromise with respect to the claims that they might face as directors. These amendments are to be found both in the Bankruptcy and Insolvency Act as well as in the proposed amendments to the Companies' Creditors Arrangement Act.

This brings me to the last main point under the heading of ``Fostering Commercial Reorganization''. Clauses 120 to 125 of Bill C-5, on pages 80 to 90, set out to significantly amend the Companies' Creditors Arrangement Act.

The Advisory Committee on Bankruptcy and Insolvency seriously debated the matter of whether we should have a second federal Act relating to business recovery and reorganization, the famous Companies' Creditors Arrangement Act.

The Advisory Committee came to the conclusion that this Act was worth keeping but should only come into play in very large commercial reorganizations, in the case of businesses with debts over $10 million and the most complex reorganization. All others should be encouraged to use the Bankruptcy and Insolvency Act.

We also expect to increase requirements relating to the disclosure of financial statements and financial information enabling the creditors of such corporations to have an idea of where the debtor is heading and to make decisions with full knowledge of the facts.

Bill C-5 also provides for the appointment of a monitor in cases of reorganization under the Companies' Creditors Arrangement Act.

Another proposal sets out to impose a time limit on the initial moratorium period, that is the period of stay of procedures under the Companies' Creditors Arrangement Act to a maximum of 30 days without automatic extension. The debtor must return to the court if he requires more time.

This suspension or moratorium does not apply to those elements mentioned in the Bankruptcy and Insolvency Act, namely eligible financial contracts, letters of credit or other personal guaranties.

With reference to the Steinberg case in Quebec, Bill C-5 proposes that no supplier or creditor is to be obliged to advance further funds or goods without guarantee of immediate payment.

As far as the claims of Her Majesty are concerned, Bill C-5 will make the same amendment to the Companies' Creditors Arrangement Act as remained in 1992 to the Bankruptcy and Insolvency Act for the purpose of uniformity and harmonization.

Bill C-5 also stipulates that when a debtor company begins proceedings for recovery under one of the Acts, it may not decide to switch in midstream and start proceeding under the other Act realizing that perhaps creditors may cause problems.

The Bill also harmonizes the proportions of creditors' votes per category of creditors required under the two Acts to approve a recovery plan, establishing that it is two thirds, and adopt the same forms so that information is standardized for creditors and those involved in the business of recovery process.

Finally, my colleague Mr. Tobin will take a few moments to describe to you the situation of international insolvency. The amendments that we are suggesting with respect to directors and environmental liability apply as well to the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.

As I said, our intention is to have two systems, one for large corporations and more complex reorganizations, while at the same time harmonizing the rules of procedure of these two systems and the information made available to creditors so that they can make an enlightened decision on reorganization plans.

Thank you, Mr. Chairman.

[English]

The Vice-Chairman (Mr. Valeri): Thank you.

Mr. Tobin.

[…]