REPORT
ON
THE COMMERCIAL PROVISIONS OF BILL C-55

By

The Legislative Review Task Force (Commercial)

of

The Insolvency Institute of Canada

and

The Canadian Association of Insolvency and Restructuring Professionals

History of IIC/CAIRP Provisions

The Joint Task Force made the following recommendations regarding the governance of the debtor:

Recommendation 38: Provide statutory authority during *CCAA* and *BIA* proposal cases for the court to appoint an interim receiver and manager (being a licensed trustee in bankruptcy) in order to protect the debtor's estate or the claims of creditors, with such authority as the court may determine including the authority to manage the reorganization proceedings.

Recommendation 39: Provide that during the course of a *CCAA* or *BIA* proposal case, the court has the authority to replace some or all of the existing directors of the debtor if the governance structure of the debtor is impairing or could impair the process of developing and implementing a going concern solution.

Recommendation 40: Provide that the directors and officers, and applicable insolvency administrators, have a duty to notify the court on a timely basis if they have actual knowledge that there is a material risk that the debtor will be unable to pay wages or other debts being incurred during the course of a restructuring proceeding.

Recommendation 41: Provide that in exercising their duties during the course of a reorganization proceeding, the debtor's directors and officers and the applicable insolvency administrators shall take into account the priority of the claims of creditors and equity holders, and the apparent value of those claims in light of the likely range of values of the business and assets of the debtor.

Recommendation 46: Provide that service of the initial *CCAA* order or of notice of the commencement of a *BIA* proposal case on an insurer that provides unexpired directors' and officers' insurance, shall be deemed to be notice within the policy period of all claims that are subsequently made against the directors and officers relating to the failure of the debtor to pay pre-filing claims or the insolvency of the debtor.

Recommendation 47: Provide that during the course of *CCAA* or *BIA* proposal cases, the court has the authority to grant a court-ordered lien up to a fixed amount in favour of the debtor's directors and officers to indemnify them against third party liability for post-filing conduct to the extent that insurance is not available on reasonable terms for such liability, with exclusions for wilful misconduct and gross negligence.

Recommendation 49: Provide that when deciding whether or not to grant a charge in favour of the directors and officers, particularly in *CCAA* cases, the court shall consider whether the debtor's board has established appropriate governance mechanisms, whether by establishing an independent board committee, retaining a CRO or other means, for the proper management of the debtor's affairs during the course of the restructuring proceedings.

Recommendation 50: Provide that during the course of a restructuring proceeding the debtor shall not pay, or enter into an agreement to pay, retention bonuses, success fees, severance or termination pay or other extraordinary remuneration to its senior management, officers and directors without prior court approval, but that if so approved, the court shall have the discretion to provide that payment of all or part of those amounts are secured by a directors' and officers' charge.

Recommendation 51: Provide that the debtor's independent directors have protection from any personal statutory liability otherwise arising from the debtor's failure to pay pre-filing debts (e.g. wages, vacation pay, GST, etc.) so long as the debt is not more than seven (7) days overdue at the time of the commencement of a *CCAA* or *BIA* proposal case.

Recommendation 52: Provide that directors and officers shall have no personal liability for severance and termination pay claims arising during the course of a reorganization proceeding.

Senate Committee

The Senate Committee made the following recommendations in connection with corporate governance and director liability:

25: The *Bankruptcy and Insolvency Act* be amended to include a generally applicable due diligence defence against personal liability for directors.

35: The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit the Court to replace some or all of the debtor's directors during proposals or reorganizations if the governance structure is impairing the process of developing and implementing a going concern solution.[1]

JTF Draft Supplemental Report

The JTF Draft Supplemental Report made the following recommendations:

Recommendation S10: In order to implement Senate Committee Recommendation 25, provide for a general due diligence defence with respect to pre-filing statutory claims, in addition to specifying the matters for which independent directors (Recommendation 51) and directors and officers (Recommendation 52) are exonerated from personal liability.

Recommendation S12: Provide that shareholder meetings of public companies during the restructuring process are not required unless authorized by the court.

Bill C-55 follows Senate Committee Recommendation 35 and JTF Recommendation 39 by giving the court the authority to replace directors. It also goes one step further by giving the court the authority to remove a director if the court is satisfied that person is likely to unreasonably impair the possibility of a viable reorganization or is likely to act inappropriately as a director in the circumstances.

[1] Note: Recommendations re trustee/monitor independence omitted.

Issue: While the LRTF hopes that the courts would exercise this power cautiously and only in the clearest of cases, we had reservations about whether it is appropriate as a matter of public policy to give a court the power and responsibility for making predictions about possible future behaviour of directors.

Bill C-55 also implements JTF Recommendation 47 (directors' charge). The Bill does not adopt Recommendations 38 (appointment of interim receiver in *CCAA/BIA* proposal cases), 40 (duty to give notice if there is a material risk that wages will not be paid), 41 (duty to take in account priority and value of stakeholder claims), 46 (deemed notice to insurers), 49 (criteria to be considered in approving a directors charge), 50 (retention payments and success fees), 51 (protection of independent directors from personal liability), 52 (no personal liability for severance and termination pay claims arising during the proceeding), S10 (due diligence defence) and S12 (dispensing with shareholder meetings for public companies).

Issue: In some cases, replacing one or more of the debtor's directors may not be the most effective means of ensuring that the debtor is able to propose a viable restructuring plan. Sometimes the role of the monitor in a *CCAA* case has been expanded by having the monitor appointed as interim receiver of the debtor, and the interim receiver then proposes the restructuring plan to the creditors, with the assistance of the debtor's management. While we welcome the recasting of the role of interim receivers generally so that it is once again truly "interim", we believe that it would be helpful to continue to have the possibility of an interim receiver or receiver appointment of the type described above in restructuring cases.

Issue: We had previously recommended, as did the Senate Committee, that directors be provided with a general due diligence defence against personal liabilities. The proposed amendments do not provide equivalent protection and continue to leave directors open to the risk of personal liability even if they have taken whatever steps they are in a position to control to ensure that the payment is made. Other aspects of the proposed amendments, such as the government's subrogated rights in connection with amounts paid under the WEPP, will make claims against directors more likely. We expect that this will make it harder to persuade qualified independent directors to remain on the boards of troubled companies, when they are needed most. We strongly recommend that a general due diligence defence be made available for directors.

II. ISSUES THAT HAVE BEEN UNDER-TREATED OR REQUIRE SUBSTANTIAL AMENDMENT

1. COLLECTIVE AGREEMENTS AND NOTICE TO BARGAIN

The provisions of Bill C-55 specify that a collective agreement may not be altered except where the parties to the collective agreement have agreed to revise it, following service by the company of a "notice to bargain" and bargaining under the laws of the jurisdiction governing collective bargaining between the parties. These proposed amendments are not sufficient and require recourse to a final solution to impasse.

Where a debtor company and the union representing its employees fail to reach a voluntary agreement to revise provisions of the collective agreement, Bill C-55 gives the court jurisdiction to grant an order authorizing the company to serve a "notice to bargain" on the bargaining agent. While the "notice to bargain" constitutes a good first step in forcing the parties to come to a negotiated compromise regarding provisions of the collective agreement, the LRTF believes that the provisions of Bill C-55 are insufficient in that they fail to provide a timely process to arrive at a final solution to the collective bargaining issues, issues that are often critical to the successful outcome of the *CCAA* proceeding.

The Senate Committee recognized and the JTF recommended that implementing a comprehensive solution to address a protracted impassed over labour issues in a restructuring was necessary. For whatever reason, Bill C-55 fails to adopt such a comprehensive solutions. The LRTF recommends that Bill C-55 be amended to grant to the court express authority to implement some comprehensive solution to a labour impasse (whether it be by way of court supervised modification to collective bargaining agreements or through some other process) where, after a reasonable period, negotiations entered into pursuant to the service of a "notice to bargain" prove to be unsuccessful. The LRTF suggests that, apart from any other relevant criteria, the court's authority to do so should be subject to the court being satisfied that (i) a viable compromise or arrangement could not be made, taking into account the terms of the collective agreement, (ii) the company has made good faith efforts to renegotiate the provisions of the collective agreement, and (iii) failure to adopt a comprehensive solution could result in irreparable damage to the company.