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EVIDENCE
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The Chair (Mr. Brent St. Denis (Algoma-Manitoulin-Kapuskasing, Lib.)): Good morning, everyone. I'm pleased to call to order this November 17 meeting of the Standing Committee on Industry, Natural Resources, Science and Technology. We are today continuing our study of Bill C-55, which, in short, is an act to amend the bankruptcy and insolvency laws of Canada, including wage-earner protection measures.

Based on consultations with the committee, we decided to have two one-hour sessions and try to hear from two witnesses per session.

For questioning, I'll do my best to get everybody in, but if we don't get everybody in the first hour, I'll make sure you get on in the second hour. So try to organize between yourselves who's in the first round and who's in the second round, should we not get everybody on in the first round--but we will try.

We're pleased to have, in the first hour, the delegation from the Insolvency Institute of Canada; and another delegation, from the Canadian Bar Association.

We will have your presentations in the order of your appearance on the agenda. We thank you very much for being here. It's a very, very important bill.

I think there's a consensus emerging around the need to make these changes. Maybe there are some concerns here and there, but that's what we're here for, to listen to your concerns.

...

Ms. Thomson, will you be speaking for the Canadian Bar Association?

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): I will be making the opening remarks, Mr. Chair. Ms. Grieve will be addressing some commercial bankruptcy aspects and Mr. Klotz will address personal bankruptcy aspects.

The Chair: We'll ask you to follow the lead of Mr. Kent and try to divide that time in a good way.

Thank you very much.

Ms. Tamra Thomson: We shall indeed.

The bankruptcy and insolvency section of the Canadian Bar Association is very pleased to appear before the committee today. The CBA is a national organization representing 36,000 jurists across Canada, and the members of the bankruptcy and

insolvency law section are lawyers who deal with both commercial and personal bankruptcy matters in their practices.

The section has long been active in bankruptcy reform, as the government has brought in various bills over the years. The objectives of the CBA include improvement of the law and improvement of the administration of justice. It is in that spirit that we make the submissions to you today.

I have a note about the paper that you have before you. We have prepared a rather extensive technical brief. The timing of the hearings did not permit that to be translated, so we have prepared for the committee members an executive summary of the longer brief, and we have provided the clerk with the longer technical brief.

...

The Chair: Mr. Klotz, you're finishing. The last bat is to you.

Mr. Robert Klotz (Member of the Executive and Former Chair, National Bankruptcy and Insolvency Section, Canadian Bar Association): Thank you, Mr. Chair.

Most of my comments are intended to ensure that these amendments work effectively, without confusion, ambiguity, or unintended consequences. People, individuals who go bankrupt, often can't afford the cost of cleaning up the problems that ambiguity creates.

My comments will go in the order of the items, skipping some, in the executive summary.

Concerning consumer proposals, there's no provision for legal fees for the administrator to retain a lawyer to deal with any problems that might arise. As these proposals rise in dollar limit to $250,000 under this legislation, problems are going to arise, more so than now. Right now, the administrator has to dip into his own pocket to pay for any lawyer he retains. That doesn't make any sense.

As to undervalued transactions, on the personal level, there are some flaws that don't belong here. In separation agreements, for example, there is no defence of good faith. When people split up or divorce and enter into separation agreements, if there's a bankruptcy that follows--and this often happens--that separation can be attacked and overturned even if the spouse acted in good faith simply to protect his or her own interests or to protect the children. The test isn't right in this legislation.

There is also a possible adverse effect on intact families. The non-bankrupt spouse may face a judgment on behalf of the trustee for the support that she has been obtaining from her husband who proves to be insolvent. That has to be addressed.

There's a provision that's quite controversial that a discharge condition may be granted on the bankrupt's discharge, payable only to one creditor. The fundamental principle of bankruptcy is that all the unsecured creditors are treated equally. If you allow the court to give a remedy or payment just to one creditor, you risk upsetting the

process and corrupting that process, as only the squeaky wheel will get paid. That's not right.

On student loans, there's a movement that we appreciate and have recommended for many years to reduce the hardship there. In our submission, further movement is required. If the legislation stays at a seven-year non-dischargeability period, we at least propose that there be the availability of a hardship hearing one year after the date of bankruptcy. There shouldn't have to be a long wait just to get a hardship issue heard. We also recommend partial discharge.

Finally, not in the legislation is a suite of family law amendments that the Senate recommended that help the family. There are five amendments. Two of them protect support enforcement in bankruptcy. They cure a flaw in the existing legislation. The third provides for division of pension where one or both of the spouses are bankrupt. The fourth gives a remedy against malicious spouses who have hidden or maliciously dissipated their property to defeat the other spouse's property claims. The fifth addresses the problem of trustees suing the other spouse for property division.

There is, as far as I know, complete consensus on these proposals. There is no opposition to them. Both the bankruptcy section and the family law section of the bar association support these proposals. They have no adverse impact in any significant extent on creditors or trustees. There's no reason for them not to be in this bill. They should be inserted. It's my understanding that the wording is being developed and there won't be any significant impediment to inserting these provisions. It would be responsible to do so and would help Canadian families.

I have two last minor points. We strongly support the RRSP provisions; however, we wish the clawback period to be two years rather than one year. And finally, one other item that's not contained in the legislation, that was recommended by the Senate, is the repeal of implied reaffirmations, where people go bankrupt and then discover to their horror that they're still liable for their mortgage deficiency because they've made a few mortgage payments. That again is a consumer item. There is complete consensus on that.

Thank you.

The Chair: Thank you very much, Mr. Klotz.

Thank you all for your excellent presentations.

We're going to start with Werner Schmidt.

Mr. Werner Schmidt (Kelowna-Lake Country, CPC): Thank you, Mr. Chairman. ... To me the most significant aspect of this is justice. I want fairness to be done. I think the point was made here that a single creditor, for example, could be paid in an insolvency; I think the point was made by Mr. Klotz.

I asked myself how on earth it was possible that if an individual or a corporation had loans from a variety of creditors, a judge in his or her wisdom could say that one of them would be paid but the rest of them would not. Why would anyone create legislation that would create that kind of unfairness or injustice as a bill?

Mr. Robert Klotz: Right. This doesn't apply to corporations; they typically don't get involved in the discharge process. It's individuals who are emerging from bankruptcy.

Mr. Werner Schmidt: Let me ask specifically--are there individual or private corporations that would be treated the same way?

Mr. Robert Klotz: This would apply to all individuals. Often there are--

Mr. Werner Schmidt: As corporations? A private corporation--

Mr. Robert Klotz: Typically, when corporations go bankrupt, they stay bankrupt. If they want to revive, they file a proposal that addresses their debts equally, subject to priorities, but as I understand the rationale for the act, sometimes there are bankruptcies in which one creditor will hold 90% or 80% of all the claims, for example--a tax bankruptcy, some matrimonial bankruptcies, that sort of thing. That creditor opposes, and instead of getting 80% and having to pay trustees' fees and a superintendent's levy, they would just get paid directly. That's a problem, however.

The Chair: You'll have to wind up there, Werner.

Mr. Werner Schmidt: Oh, I'm sorry.

I'd like to also ask the question with regard to the request by some people that some of the items taken as security by high-risk lenders cannot really be converted into cash. They are nevertheless treated as security under a deal with the individual person. Those particular things are there; for example, furniture or in some cases a vehicle may be pledged as security. They can't really be converted into cash in many instances, yet there they are.

Why is it that these elements are allowed to become chattel to be pledged as security?

Mr. Robert Klotz: You'll find this item in the very last point of our summary. The technical name we give to it is non-purchase money, security interests, and exempt property. It's something the Senate recommended be eliminated. We in the bar association agreed that it should be eliminated.

The idea is that the last recourse lender lends $1,000 and takes security on the bed and the kitchen table and the household furniture. Lenders know that if they enforce that security, they will get absolutely nothing for resale value, but they use the threat or the terror of taking away all the household furniture as a way of essentially forcing payment of the loan. We proposed not to allow that kind of force or terror tactic.

Mr. Werner Schmidt: What would be the economic impact of eliminating that?

The Chair: Thank you, Werner.

Go ahead, Mr. Klotz.

Mr. Robert Klotz: I'm not an expert in that, but I believe it will perhaps make it more difficult to get that kind of loan, because that tough way of getting payment will no longer be available. Whether that kind of lending will still be available, I don't know.

The Chair: Thank you, Werner. Thank you, Mr. Klotz.

...

Mr. Lynn Myers (Kitchener-Conestoga, Lib.): Thank you, Mr. Chairman. I want to thank each and every one of you for appearing and presenting important testimony today. ... This question is to the Canadian Bar Association. I believe your organization generally supports the exemption of RRSPs from seizure during bankruptcy; I think that's understood. Bill C-55, of course, proposes it to be exempt; RRSPs should be subject to a clawback of contributions. In addition, Bill C-55 contemplates regulations that will impose a cap to the size of the protected RRSP and a lock-in of the remaining amount. Do you believe it is important to have this measure in place?

Mrs. Deborah Grieve: Absolutely.

Mr. Robert Klotz: Yes. The bar association is strongly in favour of the exemption, both at the federal level, through bankruptcy legislation, and also at the various provincial levels. That's happened in Saskatchewan, it's in place in P.E.I., and all the other provinces I think are starting to deal with it. Alberta has a law reform commission report on it. Ontario will look at it as soon as this bankruptcy legislation is in place.

Mr. Lynn Myers: That will prevent abuse, as far as we're concerned?

Mr. Robert Klotz: The idea is to have exemption that is similar to pensions, but different, because RRSPs are different from pensions. It is to have measures that will give fairness as between the two kinds of pension saving, having regard to the difference between the two kinds of vehicles.

We think this proposal does that, subject to our comment about the length of that clawback period--one year is too short; two years, subject to judicial discretion to increase, is just right, because we expect strategic behaviour. With a one-year period, a person makes a large contribution one year and a day before bankruptcy, waits the 12 months, files for bankruptcy, and there's very little you can do about it. That's because the cost of recovering it, if there's not an automatic recovery system in place, is just too great, and the risk is too great to litigate--and who wants to waste the money to litigate over relatively small amounts? "Small" in the bankruptcy world can be $2,000 or $10,000.

The Chair: Thank you.

Thank you, Lynn.

...

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair, and thank you to the panellists for appearing here today. ... I will move quickly to another question. The

student process I think is important. Mr. Klotz, explain again, in maybe a little more detail, about how you envision a year, say, of wrap-up time. What type of process is it? Why is it so important to have changes related to that?

Mr. Robert Klotz: The scheme of this legislation is to say that once you've stopped being a student, there's a seven-year period. If you declare bankruptcy within that seven-year period, your debt will not be extinguished. The amendment provides for hardship. Under existing legislation, which is a 10-year period, you can get a hardship hearing to extinguish that debt nonetheless, but you have to wait for that same 10 years.

There's a problem with people who deserve a hardship hearing, people who can't pay their loans because they don't have a job, because they're sick, because they never graduated, or because they graduated in some field in which there's no employment whatsoever. There are all sorts of reasons, and I haven't exhausted them. Those people...if you look at them after three years, or after five years, or after seven years, you know that they're good-faith people--that they're good Canadians, that they deserve to have that debt extinguished because of hardship. Under the existing legislation, they have to stay in purgatory for 10 years.

We propose that the hardship hearing should be available. I'm not saying it would be granted by the court--the courts are very stringent about this, or so it seems from the case law--but the ability should be there to have a hearing, to say you need mercy and are entitled to it. That should be available at an early stage, so that people can live their lives, start to rebuild, start to cope, or at least live with their suffering--if it's an illness, for example--without the harassment and without the pressure of debt. We're saying we should have that escape clause for those people who are entitled to mercy, and have it available at an early stage--that is to say, one year after the date of bankruptcy or at the same time the discharge hearing takes place. Allow them to put the two hearings in one. These people can't afford money; they can't afford the legal fees of the lawyers.

The Chair: Thank you, Brian.

Mr. Brian Masse: Thank you, Mr. Chair.

...

Hon. Marlene Jennings (Notre-Dame-de-Grâce-Lachine, Lib.): Thank you.

I'd just like to have your comments on three points.

One is the automatic clawback period for the RRSPs. I believe the Canadian Bar Association said they'd like to see it at two years. The personal insolvency task force, if I'm not mistaken, recommended three years, and I understand other professionals who work in the field of insolvency would like to see it at three years, or that at the very minimum the contributions in the 36 months preceding the date of bankruptcy would be required to be reported in the state of affairs or the section 170 report. I'd

like to know what, for instance, the Canadian Bar Association thinks about this, and also what the institute thinks.

Second, on the conversion of non-exempt property to exempt property--RRSPs, for instance, or the change of beneficiary in whole life insurance, as an example--would you agree it should automatically be deemed a transfer at under value, and thus reviewable, just like any non-arm's-length transactions?

Finally, do you agree that subsection 95(1) of the Bankruptcy and Insolvency Act should be amended so that courts would have the discretion to void the transaction? That would then allow trustees to recover property for the benefit of the estate.

The Chair: We'll see how well you can deal with those excellent questions as quickly as possible.

Mr. Robert Klotz: May I address that on behalf of the bar association?

On the first point as to the clawback, I was a member of the personal insolvency task force and was involved in the RRSP development of that proposal, which was adopted in the task force report. That was a three-year clawback. The bar association, when it considered that matter, was of the view that a two-year clawback was more appropriate. The Senate was of the view that one year was correct, and we in the bar association thought that was too short, for the reason I articulated just before. The current wording is "one year plus"-- I'll say one year, and the judge can extend it. We in the bar believe that if you replace one year with two years you will have the appropriate compromise.

Hon. Marlene Jennings: Two years plus--

Mr. Robert Klotz: Two years plus, and that just requires a little squiggle on the page, so we do recommend that.

That perhaps draws the proper consensus from all of the various conflicting reports and views.

Let me just pass for a moment on the conversion issue and deal with proposed section 96.1. That proposed section does contain a discretion, as I see it--it's the word "may". The judge may set these transactions aside or may impose liability, and that's both good and bad. "May" is a small word, but volumes and volumes have been written in the law reports about what that means. It's far better to have some idea of how the discretion should be exercised, particularly when we get into situations where we don't need to prove bad faith any more. People can be penalized, whether or not they were acting honestly, whether or not they knew that their transfers was insolvent, so that word "may" is carrying an awful lot of freight. That's a concern we've expressed.

The Chair: That's the institute version of--

Mr. Robert Klotz: As to the conversion issue, this has typically come up in the cases of exempt RRSPs that do exist now. Insurance-type RRSPs are exempt if the beneficiary is designated. If RRSPs become exempt under the current proposal, that

will no longer be on the table. It won't be an issue, so we'll strictly be dealing with insurance policies.

The case law in the Supreme Court of Canada says that you have to show bad faith if you want to set aside those things. Our current test eliminates the bad faith requirement. We didn't specifically focus on that in our submissions. Perhaps it ought to be looked at.

Mr. Andrew Kent: One supplemental point. On the transfers-at-undervalue concept, which actually came out of work that the institute did, it was focused on the commercial context. In the commercial context we're very comfortable with a basic outline, subject to some commentary in our materials.

Mr. Klotz makes a fair point that if it's going to be applied in the personal bankruptcies area, there are different rules that should apply to its use in that area. He's articulated a number of them today. We've developed it for use in the commercial context. If it's going to be applied in both, then there need to be changes that are applicable in the personal area and not in the commercial, because we would not want some of those changes made in the commercial area.

Ms. Marlene Jennings: Thank you.

...

The Chair: Okay. Thank you.

We'll invite each of the groups--not all three of you, but just one for each of the groups--to take just a couple of minutes to maybe include some things you haven't already mentioned.

...

The Chair: Mr. Klotz, your challenge is to be shorter than Mr. Kent, if you can.

Mr. Robert Klotz: That's a challenge.

Honourable members, I suppose the last point I'll end with is simply this. There are many efficiency issues that are quite important in the commercial context, but in the personal context, efficiency is still important, but also justice and compassion are important in the personal bankruptcy sphere. For example, when we take this issue of transfers at under value, I agree with Mr. Kent that even if some businesses might be perhaps wrongfully penalized if they commit some form of transfer shortly before a bankruptcy, businesses will generally recoup that loss. We have to be concerned about efficiency issues. When we start dealing with individuals, what's in this legislation will determine how people feel about what's right and wrong, how they'll feel about what's ethical and what's unethical, so we have to be concerned that issues like good faith, knowledge, and propriety are not covered by the undervalued transactions provisions.

Thank you very much on behalf of all of us for the hearing.