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Mr. Brent St. Denis

Standing Committee on Industry, Natural Resources, Science and Technology

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● (0900)

[*English*]

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.

Will Mr. Kent be speaking for the institute?

Mr. Andrew Kent (Director, Chair, Board of Partners and Chair, Debt Products and Restructuring Group, McMillan Binch Mendelson, Insolvency Institute of Canada (The)):

I will, sir.

The Chair: I believe the clerk probably suggested that you could try to keep your presentation to five, six, or seven minutes, and then we'll hopefully have lots of time for questions.

I invite you to start, Mr. Kent.

Mr. Andrew Kent: Thank you.

It's always hard for a lawyer to be short-winded but anyway.... I'm here today as a director of the Insolvency Institute of Canada, representing that organization.

My fellow members, Mr. Bélanger, Mr. Sellers, and Mr. McIntosh are here with me to help me.

For those of you who have never heard of the Insolvency Institute of Canada, it is, if you like, a think tank on business insolvency matters. There are 125 full members. It's a national organization. The members are the leading accountants and lawyers who practise in the insolvency area across the country.

Its members would be in all the high-profile cases you read about—the Stelcos, the Air Canadas of the world—but because it's a truly national organization, they are also involved in important matters that don't make the front page of the papers but arise all across the country.

We're here today as volunteers. We're not here today to represent the interests of our clients. We're here because we have had concern about the insolvency legislation of Canada for many years. We've actually been engaged in an effort for five years to promote reform.

We therefore welcome the fact that there is a bill to be considered before the House, but we are concerned about some of the details, which we'll come to, and we are grateful that the committee is taking some time to think about some of the issues that we and others have with the proposed bill.

I must say, personally, when I saw the bill I was a bit disappointed. We had been more ambitious in what we thought needed to be done, and we recognize the political realities of life, but there were things we would like to have seen in the legislation that are not there.

The first thing I want to say is that we would very much support an acceleration of the next review period. For those of you who do not know this, there has been a long history of delay and difficulty in getting our statutes amended. It is contemplated that there is to be a five-year review in this legislation. We would certainly ask that if it goes forward, the review period be shortened to three years.

The second thing is we are concerned about a number of the provisions of the bill: we're concerned because we think it will have a number of unintended effects; and we're concerned because we think there are inadequate checks and balances built into the legislation.

We have given to Industry Canada a quite detailed report on our views on the bill, which have a number of specific suggestions for improvement. There isn't the time today to go through those, but I wanted to start with a couple of examples simply to illustrate the point about why we're concerned about the bill.

Let's talk first about what I think politically is the part of the bill that's of most interest, which is the wage-earner protection. As technicians we have nothing really to say about the social policy question of whether it's right to use taxpayers' money to protect individual citizens from the risk of the lawyer failing and these individuals not being paid their wages.

Every study that's been done on this issue in Canada for the last 40 years has said that if something is going to be done, the right way to do it is through some kind of fund or accessing the tax base. So clearly the concept that's built into the bill on wage-earner protection is fully in accord with everything that's been done and all the studies that have been done on the issue over the years.

But there are a number of problems with the specifics of how it's being implemented. Just to pick one, in a typical business insolvency in Canada, a receiver or a trustee is appointed and there's an effort made to keep the business going, sell it, reorganize it. The last wage cycle is simply paid in the ordinary course. The employees simply get paid and the business carries on.

The way the bill is drafted, you won't do that any more. You won't actually pay those wages. You'll give the employees a bunch of information about how to fill in a bunch of forms that they'll send off to someone and eventually they'll get their money, but it will take whatever time it takes for the bureaucracy to process the information, decide whether or not the claim is valid, and pay it.

We look at this as a very specific example of an unintended consequence, a perverse result, because instead of encouraging people to be paid their wages on a timely basis, there are aspects of this bill that will actually discourage that from happening.

The reason I selected that example...and there are many like it in the bill, things that are well intended but for which there are difficulties in the execution and that in some instances will clearly have exactly the opposite effect of what was intended by the proponents of the legislation.

Another example I want to bring out is to recognize that the biggest impact insolvency legislation has is actually not on insolvent companies. It's actually on solvent businesses, because people look at insolvency legislation in ordering their affairs. It affects how people do things.

● (0905)

I thought a simple example would be a situation where someone wants to finance some equipment on the day after this legislation comes into force.

Imagine someone who has a business and wants to acquire a modest amount, by some people's standards, of about $200,000 or $300,000 worth of capital equipment. That person would go to a lender and ask for a loan of money to buy equipment for the business, the day after this legislation is in force. The lender would call up a lawyer and ask whether he has anything different to worry about today from what he worried about yesterday. Are there any changes in the risks being taken in giving this gentleman money for his business? A knowledgeable lawyer would first say that it's going to be unclear what will happen, but there are a number of very clear risks, and it's likely that all these things will eventually happen.

I'll give you three.

The first thing is if this gentleman gets into financial difficulty. When some people are in a corner, they do desperate things. One of the things he might do is sell the equipment. The difficulty with that for the lender is if he sells the equipment and turns it into cash, under this legislation, the lender no longer has first claim on that money. In fact, in the way the legislation works, the money would have to first be used to pay a whole bunch of other people. If the government was paid, the employees' wages would have to be used to pay back the government.

The second thing is that another thing this person might do if he got into financial difficulty is file for reorganization. When he files for reorganization, he can go to a judge, with no notice to the lender, and ask the judge to allow him to borrow new money to keep his business going. The judge can do that with no notice. The judge is not actually directed to think about whether or not that's fair to the lender. He's directed to consider various factors but not the question of whether that's fair to the lender of the equipment.

As the case goes forward, if he wants to sell the equipment, the judge can again authorize the equipment to be sold, and the lender's claim to the equipment is again not relevant in that consideration.

From the perspective of lenders, this legislation will create a lot of risk. If you have a business that can afford to borrow on an unsecured basis, maybe you don't care. But if it's on a secured basis, it will be very hard to address the risks that are entailed.

I speak for businesses now, not for lenders, and we think this will cause significant problems over time.

Given the time limit, I'll close by simply saying that we would appreciate it if the committee would consider amending the bill before it goes forward.

Thank you very much.

● (0910)

The Chair: Thank you, Mr. Kent. You'll have a chance during questions and answers to bring in anything that you've missed in your opening comments.

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 "optic" 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.

I'll now ask Ms. Grieve to address the commercial insolvency matters.

Mrs. Deborah Grieve (Chair, National Bankruptcy and Insolvency Section, Canadian Bar Association): Thank you, Ms. Thomson.

Thank you for inviting us to appear today.

The CBA is very pleased that insolvency reform is at the top of the agenda. Like the Insolvency Institute, we do encourage you to consider the changes we've submitted in our brief.

First of all, I'd like to comment on the wage-earner protection program; if I might, I'll call it the WEPP because it's easier to say. We support the creation of the WEPP. Historically, the CBA has been opposed to the creation of a super-priority, but as part of a fund with a super-priority...it seems to be a fair balance of the interests of the various stakeholders.

We do have a couple of comments, though, on things that will assist in improving the mechanism of the WEPP, and they specifically deal with the treatment of insolvency administrators. The remuneration and the potential liability of insolvency administrators can easily be changed, and we recommend that they be changed.

The insolvency administrators have an obligation to identify employees and to ensure that the program is administered. However, they'd often have to do so on incomplete or unavailable information. There are two things. One, there is provision that they be paid; however, there's no mechanism to ensure that they would be paid in priority to everyone else, and if there are insufficient funds, then they have to bear the risk of not being paid. This is inequitable for the person charged with this task. Two, there is a quasi-criminal offence in the event that the program is not complied with. This can be softened. These are changes that are easy to make.

Secondly, we welcome the provisions in the bill for enhanced disclosure. I'd like to speak briefly about the monitor. In restructurings the monitor is an intermediary, a stakeholder, supposed to be neutral and supposed to be a source of information for creditors. The way the practice has developed, in certain circumstances the monitor is seen to be associated overly much with the debtor. We support amendments so the monitor is distanced from the debtor and has more of an obligation to provide the access to information that's so necessary for creditors to make informed decisions.

The bill proposes the formation of a national receivership. Over the years interim receivership has grown and has developed in different ways in different parts of the country. The national receiver will accomplish similar objectives, but the concept of receivership does not exist in Quebec. These are easy changes to make simply to clarify the basis for appointment and the powers the receiver will have. We recommend that this be done.

I have one last point for now. We won't be able to get through everything.

The bill proposes a codification of certain practices that have developed and an attempt to clarify the rules. We would submit that in certain cases those rules are not sufficiently clear but can easily be tweaked to accomplish the objectives to improve the administration. We want clarity and certainty in order to have the process work efficiently.

For example, there is a disclaimer of contracts, a disclaimer of agreements. This happens in practice. The rules for disclaiming a contract should be slightly tweaked so as to make this clear: in the balancing of interests, should we favour the debtor and have the only requirement be that the debtor believes he or she has to disclaim an agreement, or should the counterparty, the party on the other side of the agreement being disclaimed, have more say and be able to go to court and make a pitch for not having that agreement disclaimed?

I'll be happy to discuss that further and in more detail. I don't want to run over my time.

● (0915)

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.

● (0920)

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.

Thank you very much for your clear, concise, short presentations. There's one common element that came through the whole thing. That is, there are changes that can be made, they're relatively easy to make, they haven't been made, and there isn't time to present all your cases in sufficient detail.

It really bothers me, Mr. Chairman, that we have before us a bill that has been the subject of study for years and where very reputable firms and people who deal with this on a regular basis have come forward with recommendations and are telling us, “Look, you didn't do this and you didn't do that. We heard about this, we heard about that, and it has not been dealt with.”

It bothers me immensely that we should have a piece of legislation before us that really isn't ready to be considered in any detail. We're dealing here with individual consumer debt, and all these bankruptcies are there.

You ask yourself, just exactly why are we in such a hurry to pass this bill at this time when it's pretty clear from the witnesses we've just heard that it's not complete?

The Chair: Are you asking me that, Werner?

Mr. Werner Schmidt: I want it to be on the record that we have before us a bill that is clearly incomplete, that hasn't been given sufficient study, and that hasn't been given the analysis it really should have.

The Chair: I think you're probably making certain assumptions based on what you read in the paper. However, we're probably all doing that, so—

Mr. Werner Schmidt: Well, that's true; we're all labouring under some of that sort of thing, but I also.... You heard it yourself here this morning—we don't have time this morning to deal with some of these things. I think that's unfortunate. However, Mr. Chairman, I want to also suggest that two parts to this bill are very significant. I made the point the other day that the wage-earner protection plan is a very significant part of this bill. I would like to see that go ahead, so that when we come in, it's there.

I would ask you, Mr. Chairman, if it's true that the legal counsel you received is that we cannot take out the wage-earner protection plan and deal with it and then deal with the other aspects of this bill later.

The Chair: My advice, Werner, was that the bill could not be split here, notwithstanding any legal advice either way, without an instruction from the House. So I could only encourage you to speak to your House leadership on that question. I'm not really qualified to answer on the legal side, but I know that from the procedural side, the House has to instruct us on it.

All I can suggest, Werner, is that you've laid out quite plainly the difficulty we all face right now. You've got it on the record. Did you want to try to deal with some of the concerns anyway, in the remaining three minutes you have?

Mr. Werner Schmidt: Yes, I clearly do, 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?

● (0925)

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.

Next we have Carole Lavallée, and then Lynn Myers.

[*Translation*]

Mrs. Carole Lavallée (Saint-Bruno—Saint-Hubert): Mr. Chairman, I quite agree with my colleague Mr. Schmidt because, in view of everything we're hearing this morning about prioritizing bills, the exercise we're engaged in this morning is not, of course, utterly futile. However, it is hard to ascertain the purpose of this morning's meeting.

I'll nevertheless put some questions to our guests. The first is for Mr. Kent. I'll have another one for Mr. Klotz, but, if I don't have the time to put it to him now, I'll do so in the next round.

Paragraph 3 of the brief you sent us reads:

> Also, there could be a significant negative impact on Canadian productivity and employment since businesses, particularly small and medium-sized businesses, will have a tougher time getting financing, and their costs could rise dramatically.

This is an argument that often comes up concerning prioritizing creditors. However, we frequently hear as well that, in businesses, mortgage creditors rank first, take the first millions of dollars, then nothing's left to cover the few tens of thousands of dollars on the payroll.

Perhaps it's easy to rank first a creditor that has a few tens of thousands of dollars in wages to pay. Then, rather than take $1 million, the bankers or mortgage creditors would have $900,000. That's an example I'm giving you.

On the other hand, it's also said that mortgage creditors have a number of income sources. So if they lost a few tens of thousands of dollars, they could easily recover it from their other clients, whereas, for an employee who earns, let's say, $500 a week, that's his sole source of income. I believe we have to show a little more compassion in our society and consider these kinds of situations, which can become dramatic.

So I'd like to know whether you've conducted studies, whether you have any figures or analyses showing there's still payroll money left after the mortgage creditors have taken what's owed them.

● (0930)

[*English*]

Mr. Andrew Kent: Thank you for your question.

I have to start with a comment. My grandfather worked in the coal mines in England—he was a Labourite—and my father, Tom Kent, was a social policy wonk in the Pearson era, so when I come at these issues, I don't come with a bias in favour of business; when I say these things, it's not to hurt employees, but people need to understand how the system works in practice.

Your comments are good comments, good sentiments, but what I'm trying to explain is how things will work out there in the business world in terms of employment and the growth of our economy.

If you look at a business, to take your example, you may ask what it matters if this secured lender—a big, rich bank—gets $900,000 instead of $1 million. Well, that bank, when you come to ask for the money in the first place, will say that if they're only getting $900,000 instead of $1 million, they'll give you $900,000 instead of $1 million. They'll give you $100,000 less. They'll say that to every business. They'll say it to the good businesses that walk in their door—not just the sick businesses, not just the bad businesses. All kinds of companies across the country will have $100,000 less. They'll be able to buy less inventory, hire fewer employees, and buy less capital equipment. That cost is spread right across the country; it touches all of us, and that hurts all of us.

No one is saying we shouldn't have compassion for the workers. No one is coming here today to say that the wage fund is a bad idea to protect payroll. Fortunately, all the statistics we know of and that Industry Canada knows of suggest that on a national scale, this is actually not a big dollar. It matters to the people who are touched by it, but on a national scale it's not a large number. Why? It's because in many cases people pay the workers anyway.

On the Canada 3000 file, we went to extraordinary efforts to pay the last payroll. It was about $5 million or $6 million. The people who did it were the professionals and one of our banks, which I won't name. The only people who objected, ironically, were federal government officials, because we bent the rules to do it.

We're not here today to say employees shouldn't be paid. We're here to say we should do it in a smart way. If you do it in a smart way, that's good, but if you do it in a dumb way, it will hurt us all.

[*Translation*]

Mrs. Carole Lavallée: Do you have any figures on creditor loans and payrolls?

[*English*]

Mr. Andrew Kent: As I say, the statistics are that on a national scale the wage losses run $20 million to $30 million a year on payroll. I've heard numbers as high as $50 million. It's very hard to get accurate statistics.

This bill would address that problem by making sure that in those cases in which people are not paid, there's money to pay them. No one is against that. It's the other parts of the bill—the way it's implemented—that we're worried about.

You'd be better off just to write the cheque and leave the rest of the bill out. You'd still protect the workers, but all this other stuff would hurt business, hurt a lot more jobs, and cost the country a lot more. That's our point.

We're not here to say you shouldn't protect the employees; we're here to say you should be smart about how you do it. We're concerned that although this legislation is well intended, it will have a negative consequence on a national basis.

The Chair: Thank you, Carole. Thank you, Mr. Kent.

Just before I go to Lynn, I've had a message that one of our witnesses for the second hour, the CLC, can't be here for good and valid reasons having to do with negotiations. So with the indulgence of the committee, we'll go a little bit over our allotted time with these witnesses. At the end we would allow you maybe five minutes each if you wanted to wrap up. In other words, you'd have an extension of your opening remarks to wrap up and you could include things that didn't come up in the questioning.

Is that agreeable to everybody?

Thank you.

Lynn Myers is next.

● (0935)

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.

Mr. Kent, I wanted to ask you something with respect to Bill C-55. It clarifies that neither a court nor a employer may unilaterally amend a collective agreement. Instead, the court may put the employer and the union at a table with the obligation to bargain in good faith. That's as I understand it. Only with agreement can the collective agreement be changed.

Why isn't this enough—or is it?

Mr. Andrew Kent: The difficulty is again one of practicality. Put aside the really big cases like Stelco, cases in which you can take two years to fool around with them, and the business can still carry on.

Many unionized businesses in Canada are much smaller. They can't survive that long in a restructuring process; if you're going to undertake a restructuring process, you need to have a process that has finality within a reasonable period of time, or people won't take the risk of even attempting it. The concern is that if there's not some mechanism that brings finality to it, some assurance of an arrangement in a reasonable time period, people will just give up.

An example that comes to mind is a company called Alloy Wheels International. It was a unionized auto parts company in Barrie, and the largest private sector employer at the time. It had been owned by Volkswagen and was sold to South African interests, and they had financial difficulties. They wanted to reinvest in the business, but they wanted to lay off some of the workers in a way that was not in accordance with strict seniority requirements, so they needed a concession from the union. They filed.

Now, unions often experience a lot of disinformation from management. Management tries to spin unions. There's a lot of hooey. Unions are used to people trying them on for size, so their initial reaction is to be cautious about how to respond. In this particular case, the union indicated it wasn't prepared to agree to these concessions, so within two weeks the owners gave up and walked away. It was very sad. There were very sad stories in the paper afterwards, in the Barrie press, about these people who lost their jobs and couldn't find other jobs.

That can't be a good consequence. I'm not taking sides for or against labour. I'm not saying it was their fault—maybe it was the South Africans' fault—but it's a bad result. It's not the result we want. Part of it is going to be that people like us will tell our clients, if they come to us with a mid-sized unionized company, that unless they can get an immediate positive response from the union, don't bother with these rules, because they are toothless. Just accept the fact that if you need something from the union, and it's a deal-breaker, and you can't get it very quickly and easily, just forget it—just liquidate the company. Stop.

Part of the problem for unions is they're bargaining machines. They're very good bargaining entities, and they're trained not to make concessions lightly. That's their raison d'être, and they do a good job for their people. They are also political organizations; they're elected, so it's hard for them to sponsor concessions and it's hard for them to switch gears quickly. In the absence of some mandatory framework to even allow them to back down a bit, people are just going to say it's too hard for them. They're just going to walk away, close the thing, and forget it. That's what's going to happen.

It's not that we're saying things should be imposed on workers. It doesn't have to be the same mechanism as in the U.S., but there should be a mechanism that's meaningful, that brings some certainty, so people will attempt to save these businesses.

Mr. Lynn Myers: Let me get some clarity on this notion of a receiver to be appointed under the BIA who would act nationally. Is that a good move?

Mr. Andrew Kent: It's much more efficient, so it avoids unnecessary costs involved in insolvencies. Given that many of our businesses now are on a national scale, there's no reason not to do it; it just makes the system more efficient. Anything that makes the system more efficient maybe hurts us, because we get smaller fees, but from a system perspective, it's better.

Mr. Lynn Myers: 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.

● (0940)

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.

We have Brian, Ed Komarnicki—welcome, Ed—and then Jerry.

Next is Brian, please.

Mr. Brian Masse (Windsor West, NDP): Thank you, Mr. Chair, and thank you to the panellists for appearing here today.

I think we all agree that people should be fairly compensated for the services they render to an employer in terms of their time and their energy. One of the things that's missing in this bill, a gap that's been identified, is that around 7% of Canadian employees are not covered at all. It's the point about working for less than three months; individuals who have worked, have contributed, and are due remuneration for that work will not be compensated in this bill.

I'd like comments from everyone in terms of that situation. Do you support eliminating it as a barrier? Do you have any suggestions to do so, if you do support that?

Mr. Andrew Kent: Mr. Bélanger, would you like to respond, since you worked on that issue?

Mr. Phillippe Bélanger (McCarthy, Insolvency Institute of Canada): In our submissions and in the lengthier portion of our recommendation, I believe our recommendations have been to the effect that the three-month limitation be dropped. There is no need for that rationale for unprotected employees during that period.

Mrs. Deborah Grieve: The Canadian Bar Association has not actually considered that position formally. There's obviously the tension of giving employees something to which they would not be entitled under normal provincial legislation, but these are perhaps the most vulnerable of employees. As social policy, do we wish to protect them even more than employees who have been employed for some period of time? That's the question.

Mr. Brian Masse: You're raising a good point. They actually are the most vulnerable employees; they're often part-time workers, often women, and often hold transient jobs as well. It's an important factor. You haven't taken a position on it; why has the bar association not taken a position on it? It is a glaring hole in the whole piece of legislation.

Mrs. Deborah Grieve: I can't really comment on—

The Chair: If you feel like you're on the spot with that one, you don't have to answer the question.

Mr. Brian Masse: It's a sincere question. It's a significant gap in the legislation. Why hasn't the association taken a position on it, or will you go back and take a position on it? I think it's important discourse.

Mrs. Deborah Grieve: I think it's fair to say we would have no objection to that. Certainly we'll go back and discuss it.

Mr. Edward Sellers (Member, Co-Chair of the Legislative Review Task Force and Partner of Osler, Hoskin & Harcourt LLP, Insolvency Institute of Canada (The)): Mr. Chairman, during the course of the deliberations with the joint task force struck between the Canadian Association of Insolvency and Restructuring Professionals and the Insolvency Institute of Canada, we talked about this issue. It was put to us as having been included in the bill as an anti-abuse provision, so that persons couldn't be loaded up onto the payroll close to the demise of a business and receive the benefit of payments under the WEPP.

Although it's not formally adopted by the Insolvency Institute of Canada because of the timing element in getting to the committee, the way we approached it was to say that it's not about the time you've been on the payroll, but more about why you've been put on the payroll. The gating issue, in our mind, more favourably should be posited as to whether you are related to the owners of the business or senior management—whether you got put on the payroll at the last minute, to gain the benefit of getting a contribution from the WEPP program—as opposed to looking at it as a hard stop date at three months, three weeks, two months, or whatever arbitrary date you choose. That was where the unfairness struck us as well.

● (0945)

Mr. Brian Masse: That's good. I'm glad you've identified it in that context. Unfortunately, as it sits right now, one of the most disturbing parts of the bill is that the most vulnerable at the end of the day are going to get punished because of the potential abuse by probably a smaller number of individuals. That has to be looked at.

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.

The Chair: Ed is next, and then Gerry.

Mr. Ed Komarnicki (Souris—Moose Mountain, CPC): Thank you, Mr. Chair. I have several questions, perhaps to Ms. Thomson and Mr. Kent.

I know that protection of workers is a compassionate issue, but we need to be careful sometimes that we don't make bad law. I've had a difficult time getting some numbers as to how this might affect businesses and workers in the end.

First of all, the bar association has talked a lot about process in codification of practices in the bill. What's happening in this bill as far as the wage-earner protection part of it is concerned is that it's interfering with secure transaction. It's been known to lawyers for years and years, the practice of secure transactions and commercial transactions.

I noted you didn't have any comment about interference with the concept that a first charge should be a first charge, and not something else, because essentially, the financial institutions will back off $2,000 times the number of employees in every transaction, whether or not you're bankrupt. It affects business and employees throughout.

Second, the wage-earner protection bill is a very important bill. I'm wondering if you see any difficulties with it being separated from this bill and dealt with on a stand-alone basis but tied to bankruptcy. That's the second point.

The third point is the numbers issue. It seems to me that the legislation is intended to have the Crown or the government recoup $2,000 per employee that's bankrupted, which we said is in the range of $20 million to $30 million. For the sake of $20 million or $30 million, we're putting in jeopardy, at risk, $2,000, or probably more like $3,000 because there are administrative costs, per employee across the whole country.

Now, has anybody done a study as to what that's going to do to credit? It seems to me if we have about 16.5 million employees—if we did, and I don't know that we do—and we multiplied that times $2,000, that's $33 billion taken out of operational funds to save $20 million or $30 million.

Has anybody looked at the consequences this will have on our nation? I mean, the concept of worker protection is fine, but for anybody who goes to a bank or a credit union, they will simply say, "How many employees have you got?" and they will back off, and that will become less of a source for financing. It'll affect every business, because they deal with accounts receivable, work in progress, inventory. Unless they have the cash, anybody, particularly starting up a business, will lose out. Most don't.

Has anybody done the numbers on that? Can this be separated? Why has the Canadian Bar Association not talked about the concept of first charge being disrupted or destroyed in this particular legislation?

● (0950)

The Chair: Who wants to start?

Ms. Grieve.

Mrs. Deborah Grieve: As I alluded to in my first comments, the Canadian Bar Association's position historically has been that we would prefer not to see a super-priority charge. I did say that there would be an impact, absolutely, on credit.

Do we have the numbers? No, we don't have the numbers. We are technicians. We are lawyers. We don't have the statistics.

As to whether the wage protection should stand alone, the wage protection program requires that the insolvency legislation be changed. There are many changes that need to be made in the insolvency legislation. We would recommend those changes be made.

Mr. Ed Komarnicki: Okay. Now, on the numbers and on the concept of the dollars being taken out, perhaps Mr. Kent can comment.

Second, an additional question might be whether it should be paid out of general revenues or maybe the EI fund.

Mr. Andrew Kent: Certainly, historically, the professionals have taken the view that paying it out of the EI fund would make sense rather than imposing the lien, for the reasons you've articulated. The math is complicated because there are many big businesses that can finance themselves without any secure loans at all. So you have to take them out of the factor. Then there are other businesses that rely on their house—when someone puts their house up to secure their business, and so forth. So it's hard math to do.

This is part of the problem. To give you a small example of how it can work, there was recent legislation that was passed to amend bankruptcy laws to deal with the financing of aircraft. This was done for peculiar reasons, which I won't get into today, but it basically gave financiers of aircraft special rights to take aircraft back in a short timeline. The estimates were that this would save the airlines 25 to 50 basis points on their financing of aircraft. So that's, for them, a significant cost delta. That's a very small thing, the assurance of timing.

It's very hard scientifically to prove the point you've made, which I totally agree with, that this will affect a lot of businesses, and to do this math. I know that Industry Canada itself has made efforts to try to do this math. As far as I know—and they can answer the question—they've never been able to really calculate it accurately.

But as to the effect you've discussed, there's no doubt it exists.

The Chair: Very short, Ed.

Mr. Ed Komarnicki: Until we get those numbers, I can't imagine us passing legislation without knowing how we're going to effect it.

But if you're going to pass this legislation, wouldn't you be wise to simply take the moneys out of general revenue and drop the questionable super-priority status?

The Chair: Thank you, Ed.

Final comment?

Mr. Andrew Kent: Fair enough.

The Chair: You got your answer I think, Ed.

I have Jerry next.

Hon. Jerry Pickard (Chatham-Kent—Essex, Lib.): Thank you very much, Mr. Chair.

I'd like to make a comment with regard to time. When this bill was introduced, we anticipated that the time of Parliament would be a little different than some opposition members are suggesting now. I guess they're making an assumption there will be less time.

It's interesting to point out as well that Werner and the Bloc spent so much time discussing time, and they're the ones who asked for super movement on this bill. It is the three opposition parties who want the increase in speed, so don't point fingers across the way.

May I go back to the people who are here today. Officials want to go through the proper process and make sure there is proper due diligence. There's no question that many of the issues you raised are very important. They are issues that we in the department have examined and ones for which we have felt it was important to listen to the witnesses, listen to the input, and then submit actual amendments that would take into account those perceptions or thoughts or ideas that have come forward.

That is the way we often deal with legislation. In this particular case, because of the complexity of all the issues, we thought this was the process we would like to see. I assure you that we are flexible, and we are looking very carefully at the issues you're bringing forth.

I do want to move to one of the aspects that I think is critical, though, and that is the super-priority. I know both organizations have suggested they don't like the idea of the super-priority. I know it has been suggested that $3,000 in lost wages to a worker could be handled in different ways. I understand at this point in time that many workers don't get that lost wage for a very extended period of time. It's our hope that the super-priority would shorten that time period.

Let's look at the lending ability and the kind of argument that was brought forward—that $1 million reduced to $900,000 concept. Is it not business that looks at risk? They don't take all the money from one factor in every contract they sign. A bank, for instance, looks at companies that are dealing...and maybe one in fifteen would go bankrupt.

So in lending, they're going to look at that shared risk concept, not individual by individual and take 100%. If they do it that way, they're damn greedy, and I'll point that out. I think it's a wrong concept; mathematically, it doesn't make sense.

If we do start talking about shared risk.... We talked about fifteen corporations and that one of them potentially could go bankrupt and therefore the dollars would be shared over fifteen possible corporations in a minor interest rate change. Those are the kinds of concepts that I believe business has always operated under. They're not hard and fast in taking it all from each person.

That's my view. Is there something wrong with my view of how business really operates out there?

● (0955)

Mr. Andrew Kent: It's a fair point that these things are not black and white. I accept your question as a valid question. Let me try to answer it without taking an hour, because it's a question that deserves an hour's response. The first thing is that the way Canadian business gets financed today is quite different than it was 5, 10, 15, 20 years ago. And the Canadian banks are much less significant providers of finance to Canadian business today than they were at that time.

So many of the lenders that you're speaking to are not Canadian. And they look at lending in a different way. There's a whole concept of what's called asset-backed lending, where the lender does a detailed liquidation analysis. And they say, okay, if we can get our money back, we'll lend that money; we won't worry too much about whether this business is going to succeed or fail, because if it fails there will be enough assets there to get us paid.

Take, for example, Eaton's, when it was refinanced in 1997-98, when it filed the first time. I acted for the lenders who financed its exit. It was very interesting because GE—they probably wouldn't like me mentioning that they were the lender—looked at it just that way. Other conventional Canadian lenders didn't want to do that deal because they looked at the business plan and said there was a high risk. GE did its liquidation analysis, got comfortable that it could get out if the thing didn't work, and they provided the money. What happened, of course, was both parties were right. The business didn't work in the end, but GE got out because its liquidation analysis was correct.

So in that environment your question has to take into account who's providing the money and what kind of lending it is. There are businesses where what you're saying is absolutely true; for others it's not.

The second thing you have to watch for in Canada right now is we're in a North American liquidity bubble. Money is very easily available right now. That will change, and in that environment these rules will bite more than they would at the moment.

The third thing is the party who suffers is not the lenders. If the lenders know the rules, they'll change the way they carry on business. They'll make money. They're not going to make dumb loans. The people who are hurt are my clients who need the money. I've had clients who have been right on the very edge, and losing $100,000 of credit would be enough to tip them over. Having the $100,000 of credit was enough for them to skate through. That's been true of many Canadian businesses. They go through dark days. There are many businesses today that are very successful but were very close to the edge at a point in time. Every dollar of financing matters.

I worked on the Saskatchewan Wheat Pool from 2000 to 2004. These rules might have made the difference of whether we could get sufficient liquidity into the pool in those days or not. It's fine now, but in those days it was skating.

● (1000)

The Chair: Thank you, Mr. Kent and Jerry.

Now, with your indulgence we're going to go overtime a little bit, because we just have one witness for the next hour. I'm going to try to get Robert and Marlene in for a couple of minutes each, if you could keep it brief. Then we'll let our witnesses take a few minutes each to include anything they felt was missed in these rounds.

Robert.

[*Translation*]

Mr. Robert Vincent (Shefford): Thank you, Mr. Chairman.

Mr. Kent, you mentioned at the start of your speech that your father was a miner. My father is a farmer, but I don't grow turnips. In your presentation, you also talked about your super-priority, economic prosperity, and you said that it had hurt the economy, that it hadn't been very beneficial and that employees should be paid in a smart way, and so on.

For you, workers aren't any more important than that. In your last presentation, you said your clients were important, that a difference of $100,000 was significant.

I see that your document states that collective agreements should be renegotiated when a business isn't doing very well. I find it hard to understand why collective agreements should be renegotiated. The administration of a company is the responsibility of the administrators, not the workers. If administrators don't do their work properly, why should the workers ultimately pay for it?

[*English*]

Mr. Andrew Kent: Thank you for your question.

First, the views that I'm expressing are the views of an organization. They're not personal views. These are views we developed through a democratic process. So I'm a spokesman for a collective view. On any particular point, it may not be my personal view, but I'm here as a spokesman, just to be clear.

Nobody wants the employees to suffer. The challenge in these things is you look at a sick business and you want to help those employees. What are you doing to the other businesses over here? It's keeping our eye on both issues at the same time. When I talk about losing $100,000 for a business, it's not to make the directors or the owners rich; it's the concern about whether the business survives to continue to employ people and provide services. So I look at it as watching both sides. If you change the rules here, it has an impact over here. You've got to look at both. So it's not to hurt any one employee, but to understand if you're going to help someone here, make sure you do it in a way that doesn't hurt the people over here. That's all.

[*Translation*]

Mr. Phillip Bélanger: I'd nevertheless like to add, with regard to collective agreements, that our recommendations are not that anyone should purely and simply permit collective agreements to be readily renegotiated. The problem raised with regard to the suggestions stated in the bill is that there is no finality to the process. We therefore think that eventually allowing the court to submit the parties to arbitration, which will have a certain finality, is a reasonable compromise in bringing the parties to an agreement.

The suggestions definitely are not that we should permit an easy renegotiation of collective agreements because a business has filed a notice of intention or has announced a restructuring under the Companies' Creditors Arrangement Act. So this isn't a suggestion that, strictly speaking, changes the power relationship between the parties. For the moment, the act merely states the fact that a business can send a notice of negotiation. However, if negotiations ultimately do not produce results, there's no end to the process. Thus, from a practical standpoint, our suggestion is this: if the parties do not agree, can't we put in place a process that is limited in time, such that, after a certain period of time, an adjudicator would be appointed before whom the parties would have to come to a conclusion?

Mr. Robert Vincent: Don't you think there might be abuses by employers wanting to renegotiate collective agreements on a broad scale on the ground that the administration is somewhat deficient and that they want to set aside a little money for a rainy day? So wages would be cut in order to set a little more money aside, and, if that were not enough, the equipment could be sold. As a result, the day a business declared bankruptcy and stopped paying everyone, it would have a little gold mine set aside and would engage in a little tax evasion here and there.

As for the workers, they'd be asked to renegotiate the collective agreements in order to get a little more money by cutting payroll in order to reinvest it and try to make a little more money. Otherwise, the company would be closed. In any case, if the employer managed to set aside $400,000 or $500,000, regardless of what happened to the workers, since the act will enable it to abuse them, that won't be a problem for employers.

Didn't you think that the first people to protect are the workers? They're not around to give their time and do volunteer work. It's important to do volunteer work, but not in industry.

● (1005)

[*English*]

The Chair: Merci, Robert.

We'll get to the answer.

[*Translation*]

Mr. Phillip Bélanger: My colleague Mr. Kent will want to make a comment on this subject. What we saw occurred in contexts in which there were no agreements and where a potential buyer for the business that wanted to keep the jobs said that, if an agreement or reasonable compromise couldn't be reached, not only with the employees, but also with all other creditors who had an interest in that business, it wasn't prepared to buy it. Ultimately, the business was wound up.

We're trying to send the message that this can have an effect on employees that is contrary to the one sought. If there's no agreement on a collective agreement enabling the business to continue its operations or to be sold in circumstances in which jobs are maintained, we're often simply faced with a wind-up. An auctioneer seizes the assets and there are no more jobs.

So the concern isn't for the business to be able to sit on a gold mine. The general concern is more to make it so each creditor has to make compromises, which, in some situations, also means the employees.

Le président: Thank you, Mr. Bélanger.

[*English*]

Mr. Kent, maybe you could address that in your final comments.

Mr. Andrew Kent: Yes, sir, I could.

The Chair: Marlene is next.

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 RSP 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.

● (1010)

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.

Mr. Kent, if you will start, your challenge is to do that in a couple of minutes.

Mr. Andrew Kent: Thank you.

I just want to speak to one point that comes out of the very good questions we're asked about abuse.

What has happened in our law, and this bill would continue that process, is that power has shifted across the table to management. Any time you give management this much power, it can be used for good or ill, and the risk of abuse grows as the power shifts across the table to management.

We're concerned that the bill is inadequate in making sure there is adequate control over governance, that the risk of abuse is too high. Many of our provisions are actually directed at this problem, either directly or indirectly at the risk of abuse. We support the giving of more power to the company to fix the problem, but we just think the need to make sure that management is doing the right thing increases if you give them that power and there are adequate checks and balances.

My final comment is this. When we first came up with our proposals, some of which are in the bill, Judge LoVecchio from Alberta—a very good judge—teased me that I'd become a socialist because of this power shift. It's a good thing as long as the checks and balances are there, and in a number of recommendations we're very concerned that they are not, and that speaks, in part, to the good question about collective bargaining units, but it speaks to many of the other powers as well.

Thanks very much.

The Chair: Good.

Who's going to speak for the bar?

Ms. Grieve.

Mrs. Deborah Grieve: Actually, on the commercial insolvency issues we'd like the efficiency and the changes that are in our submission. I think more weight should be given to Mr. Klotz's submissions at the moment for personal....

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.

The Chair: Excellent.

Thanks to both organizations and to colleagues for an excellent round. I'm sure we all feel we could spend more time on this, and who knows, but we're going to suspend for a minute.

We'll thank and excuse our witnesses, and we'll invite the RESP Dealers Association to the table.

We'll suspend for one minute.

● (1014)

(Pause)

● (1017)

The Chair: I'm going to lift the suspension and resume our November 17 meeting of the standing committee, continuing our study of Bill C-55.

I'm pleased to invite and have at the table, Peter Lewis, who's the chair of the government relations committee of the RESP—that's the Registered Education Savings Plan—Dealers Association of Canada.

You're by yourself, but we'll follow the same rules, Mr. Lewis. Could you keep your remarks to five, seven minutes? I would say one in ten witnesses actually ever does that; however, we try. It's an important area of this bill that I think you're going to cover, so we'd like to have time for questions.

We invite you to start, and thanks for being here.

Mr. Peter Lewis (Chair, Government Relations, Vice-President, Plan Administration, C.S.T. Consultants Inc., RESP Dealers Association of Canada): Thank you very much. It's a pleasure.

I'm here today as the chair of government relations for the Registered Education Savings Plan Dealers Association of Canada to talk to you about the government's decision not to exempt RESPs from bankruptcy proceedings under Bill C-55.

I'm concerned about the impact this will have on low- and moderate-income families, parents who are reluctant to start saving today for fear of facing bankruptcy tomorrow. As a parent of six children myself, I know what it's like to have hopes and dreams for the future of your children. I'm concerned about the message it sends when we as a society don't do all we can to safeguard that future.

My association represents the companies that specialize in RESPs. We provide roughly 50% of all RESPs in Canada to 1.3 million families. Our goals are simple. We want to encourage families, regardless of their income level, to save towards making the dream of post-secondary education a reality. RESPs are a tool that the Government of Canada recognizes as an important piece in the equation of financing for higher education. They are targeted tax sheltered savings programs that attract a matching federal grant called the Canada education savings grant.

We believe in the value of RESPs because we know from decades of experience that they work. In the last year alone, members of the association paid out over $150 million to close to 75,000 Canadian students. I often hear from parents and the students that having an RESP was key in their ability to be able to pursue higher education.

We believe that RESPs are important to families for three distinct reasons; first, they're a tool for parents to effectively communicate to their children that they expect them to go to higher education; secondly, they help align a child's vision towards higher education early and underscore the value of post-secondary education; and third, they help offset the cost of higher education. They help narrow the financial gap and reduce a student's reliance on other forms of financial aid.

Recognizing the value of these savings programs, starting this year the government is encouraging greater participation in RESPs with a focus on low- and moderate-income families. The Canada Education Savings Act, which received wide support in the House of Commons, enhanced the existing grant program and created the Canada learning bonds. This legislation will, in the words of the former Minister of Human Resources and Skills Development, “help families to turn their dreams for their children’s education into real savings”.

But those dreams can quickly fade if the financial circumstances of the family change. If an RESP investor declares bankruptcy today, the parents must pay the capital from their plan to the trustee. This in turn triggers repayment of grants to the federal government. In some cases it results in the collapse of the plan and the loss of accumulated income. Finally, the RESP contribution room and accompanying grant room are never restored, so the child cannot regain what has been lost.

In 2003, the Standing Senate Committee on Banking, Trade and Commerce recommended exempting RESPs and RRSPs from seizure in the case of bankruptcy. But Bill C-55 proposes exemptions for RRSPs and RRIFs, while RESPs, a vehicle intended to help a child embark upon one of the most important journeys of their life, have not been exempted.

We greatly appreciated your support in launching the Canada Education Savings Act, and we need your support to amend Bill C-55. This is an issue of interest to young families. Whether it's a family with the main breadwinner working in an auto plant in Windsor, or small business owners in Red Deer or Chicoutimi, it's an important issue to families.

Let's briefly compare RESPs and RRSPs. In 2004, families invested $2.1 billion into RESPs while investing $28.8 billion into RRSPs. The contribution limit for an RESP is $4,000 per year per child. In 2004, the maximum contribution to an RRSP was $15,500 per investor. The RESP is a savings program primarily for the benefit of a child, while an RRSP is a savings program primarily for the benefit of the investor.

We support the notion that RRSPs should be protected, but we also firmly believe that RESPs should be protected as well for three reasons. First, when an RESP plan holder declares bankruptcy, it's the child whose future is jeopardized, not the investor. Second, due to the relatively short window of time between opening an RESP and post-secondary education as compared to the longer window between an RRSP investment and retirement, there's less of an opportunity to recover after bankruptcy. Third, governments at all levels are actively encouraging low- and moderate-income families to open up registered education savings plans.

Most provincial governments now exempt RESP assets when they're going through the process of evaluating eligibility for social assistance. By not offering protection to a family's education savings when they're faced with financial hardship, Bill C-55 is inconsistent with government policy at both the provincial and the federal levels.

● (1020)

To put this into perspective, consider a case that recently came across my desk. A family in rural Newfoundland and Labrador had been saving $25 a month for the last decade for their daughter. Their daughter is 15 this year, but this year their family went through a bankruptcy. The creditors received back $2,000 or so and the Government of Canada received back $400 in Canada education savings grants. That's a seemingly small amount of money, but that seemingly small amount of money can mean the difference between this young Canadian being able to go to college or not.

We do understand the need to balance the interest of creditors against protecting the future of young Canadians. We're proposing that an exemption for an RESP be included in Bill C-55 that includes provisions to claw back contributions made to an RESP, and we believe the 12-month window is suitable. We would also suggest that you limit the protection to RESPs only for immediate family members, those being the children or grandchildren of the investor.

We strongly believe in the value of RESPs, and we believe the government was right to create greater incentives for low- and moderate-income families to save. We believe not creating an exemption for RESPs runs counter to the intent of the Canada Education Savings Act and urge you to amend Bill C-55 to adopt a balanced approach to protecting RESP assets, thereby helping to safeguard the future of young Canadians.

The Chair: Thank you, Mr. Lewis, for that succinct presentation.

I have John, Carole, and Lynn, I believe.

Mr. John Duncan (Vancouver Island North, CPC): Thank you very much.

I have a fully matured RESP for one of my children, and if I look at the investment I made at this point, I have to do some investigations that maybe I should have done as a consumer at the front end rather than the back end. One of the things that does concern me, outside your presentation, in a sense, is the fact that there is such a wide diversity of arrangements within the RESP community in Canada that what people think they're buying and what they're actually getting are often very much at odds. As someone who's part of the umbrella organization, I would make that kind of submission to you. I think there's lots of room to simplify or set some standards for your industry.

I received some forms to fill out on how to dispose of a fully matured plan where I had to extend it for a year. I did not understand what I was checking off, despite reading all of the material. I took time out of my busy schedule to do that. I made phone calls to the company, which still didn't satisfy me. I then phoned a friend in Vancouver who happens to be in the business and got another set of explanations, which gave me a little bit of comfort. But actually, to this day, I do not fully comprehend what I have, even though I've paid into it for about 14 years. That's just on a personal level.

On a committee level, I think what you're requesting does make sense from the standpoint that it's actually the child who is the beneficiary, and this money should be dedicated to the child. I don't think I have any philosophical question with your request. I guess the technical question is, do you have some suggested wording in order to achieve that or an amendment to the legislation?

● (1025)

The Chair: Thanks, John.

I'm trying to get everybody on, and I appreciate the short question.

Mr. Peter Lewis: We haven't any specific suggestions for wording other than that I would suggest it's a fairly simple amendment to change the section that exempts registered retirement savings plans and registered retirement income funds and also insert in the same section registered education savings plans.

The Chair: Did you get that, John?

Do you want to say that again?

Some hon. members: Oh, oh!

Mr. Peter Lewis: In my view, it's a fairly simple change to insert registered education savings plans into the same section that exempts retirement savings plans and RRIFs. I don't know if you want me to respond to your prior comments about the industry. I could certainly do that, but—

Mr. John Duncan: Oh, I would welcome a response—

The Chair: We'll have to keep it short because we want to focus on the bill, but go ahead if you want to.

Mr. Peter Lewis: I'll make a couple of quick comments. First of all, RESPs are somewhat complex. Some of that complexity, unfortunately, is due to the nature of the legislation that governs RESPs themselves. The RESP industry has done a lot to try to simplify things, and I'll certainly take your comments to heart and take them back to our association to say we need to do a better job of doing that, clearly.

The Chair: Thank you, John.

Mr. Lewis, we'll follow John's example.

Carole, Lynn, then Brian.

[*Translation*]

Mrs. Carole Lavallée: Mr. Lewis, what you're presenting is entirely reasonable. We find the conditions you set, that is to say recovery of premiums from the past 12 months and the fact that RESPs are intended more for children and grandchildren, quite reasonable.

I'm nevertheless going to tell you about a subject that may not be entirely your cup of tea, but is nevertheless similar. You said at the start of your presentation that you were very sensitive to the welfare of families and to the value of education.

Bill C-55 contains another component, which is called student loans. It's nice when families are well enough off to be able to save a little money in a registered education savings plan. That's impossible for some people. In that case, young people apply for and get loans for their education. Following their education, all kinds of things happen that require them to declare bankruptcy several years later.

Historically, when student loans are involved, some provincial governments have always objected to student loans being included in personal bankruptcies.

In September 1997, for all kinds of considerations that might be considered a little debatable today, people decided to include that in the act. Since some provincial governments objected to student loans being included in personal bankruptcies, the decision was made to put that in the act and a two-year time period was given for those loans to be included in a bankruptcy. Although we don't really know how, we wound up with an act providing for a 10-year period.

In Bill C-55, it is proposed that that period be shortened to seven years, but in an entirely arbitrary manner. In fact, there's no real reason why student loans can't be part of a personal bankruptcy. There's none historically. Furthermore, that period is entirely arbitrary; it could be five years, four years or three years, but, generally, most people we talked to — thus far this has been the case of everyone I've spoken to — who are affected by Bill C-55 agree that this clause should eliminate the time period. There's no valid reason to keep it. No analysis shows that students declare bankruptcy simply for the fun of it. No students have ever opted to file for bankruptcy, following studies that have taken several years, in order to rid themselves of the excessive burden of their student debt, even if it amounted to $50,000.

In any case, you know there are judges to determine the situation and prevent crazy applications from being accepted.

So I'd like to know whether you've thought about this component of the bill and what you think of it.

● (1030)

The Chair: Mr. Lewis.

[*English*]

Mr. Peter Lewis: As a dealers' association we have not taken a view with respect to the student loan issue, other than the view that anything you can do to increase the assets a student has going into post-secondary education will obviously reduce their reliance on other forms of financial aid. In practice, that would reduce the amount of student debt they would carry, and in principle, that should reduce any likelihood they would be faced with the prospect of bankruptcy coming out of their higher education.

I will express a personal view, which is that I believe the seven-year proposal is even still perhaps a little too long. I think it should be a little shorter. However, that's just a personal view and is not based on any particular research or anything I've done.

The Chair: Merci, Carole. *Parfait.*

Lynn, Brian, Werner.

Mr. Lynn Myers: Thank you, Mr. Chairman.

I wanted to ask you, sir, in terms of safeguarding against abuse, whether or not you thought that if an exemption existed with respect to RRSPs—and it would under the bill—it would be possible to prevent the bankrupt from accessing all the capital in an RESP after a discharge and using those moneys personally rather than for an education for a child.

Mr. Peter Lewis: Thank you.

It's actually an excellent question. That is probably the weakest point in my argument, that there is no locking-in mechanism within the RESP legislation as it stands today and it is therefore theoretically possible that a bankrupt could in fact access the capital from an RESP.

I'm not sure that is a probable scenario. There are a couple of things I would put on the table. First of all, I don't believe an RESP is a desirable target for somebody who is pursuing a strategic bankruptcy to try to shelter assets. Contribution limits are too low for you to be able to shelter significant assets in any way, and the complexity around the RESP process is also fairly high.

Added to that, if you have a situation where somebody did put funds into their RESP for their child or grandchild—again, this is speaking to the specific provisions we're proposing—and then later accessed the capital and pulled it back into their own personal hands, they would, by doing that, if they did that at a time the child wasn't pursuing education, forgo the grant they had now earned on that capital they'd put in. That grant room is room they would never be able to restore, so it is true that they could access the capital, but there is a price they would pay by doing that in the loss of access to a grant they would have received from the federal government.

● (1035)

Mr. Lynn Myers: Well, you say it's not probable, but it is something that certainly could happen.

Mr. Peter Lewis: It is something that could happen, that's correct.

Mr. Lynn Myers: Do you have any idea as to the current amount of money held in RESPs lost to bankruptcy?

Mr. Peter Lewis: There is approaching $16 billion in total assets held within RESPs. That includes the government grant.

The Chair: He wants the amount lost in bankruptcy.

Mr. Peter Lewis: No, I don't have those numbers. I can tell you, speaking on behalf of the organization I'm with, we deal with roughly 200 families per year who are going through bankruptcy out of 250,000 clients we have, so it's a fairly small percentage. The average account size in an RESP is typically below $10,000.

Mr. Lynn Myers: Just sticking to RESPs for a minute, I also wanted to ask you the following. That's created, of course, using after-tax income.

Mr. Peter Lewis: RESPs, yes.

Mr. Lynn Myers: Who owns the capital in the plan? Is it the contributor or the child? Does the beneficiary of the plan have a legal right to the capital? If not, how is an RESP different from a bank account?

Mr. Peter Lewis: The capital is owned by the contributor to the account. There are limited situations where a legal direction is signed directing that the capital be paid to the child. We deal with that, for example, in cases of marital breakdown where neither parent can agree on who should own this capital and they both jointly agree that it will be transferred to the child. It is certainly possible to direct that the capital become the property of the child, but it is currently the property of the investor.

Mr. Lynn Myers: Does the beneficiary of the plan have a legal right to the capital?

Mr. Peter Lewis: No, they don't.

Mr. Lynn Myers: Is it different, then, from a bank account in that sense?

Mr. Peter Lewis: The structure of an RESP provides a tax deferral mechanism for the growth of the income, so there is some difference in that perspective. It's also a targeted savings program in the sense that the major benefits of putting your money into an RESP occur when and if the child goes on to higher education, whereas with a bank account, obviously, that's not the case.

Mr. Lynn Myers: Thank you.

The Chair: Brian, Werner, Marlene.

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

You say there's a low risk for it being used as a shelter for bankruptcy, but maybe you can describe more specifically why that is. Second, what would be the optimum conditions for it to be one? What one scenario could happen that would make an opportunity for it to be a shelter?

Mr. Peter Lewis: There are a couple of reasons why I would suggest it's low-risk. First of all, there's a low contribution limit. Unless you happen to have numerous children—which I do—you don't have a great opportunity to shelter significant assets. For an average family with two children, the maximum they could put in within any one year is $8,000, so there's not an opportunity to shelter significant assets.

A second element is that it's a registered product. The contributor's social insurance number is attached to every transaction. It's not a product where you can easily hide your tracks, because every transaction is ultimately reported through to the federal government. It's not a type of savings vehicle where you could easily hide a specific pattern of activity.

Mr. Brian Masse: Was it 200 families you were noting?

Mr. Peter Lewis: Roughly 200 families a year.

Mr. Brian Masse: And the vast majority were at less than $10,000.

Mr. Peter Lewis: That's right.

Mr. Brian Masse: Are there any other similarities that would be relevant to this legislation in terms of those families? You're noting that with the cap, we don't have a lot in there, but is there anything else in the similarities from those experiences?

Mr. Peter Lewis: There's nothing identifiable that I could point out. We don't track income demographics, for example, of the families that are on our books, so I wouldn't be able to identify anything along those lines.

It is spread across the country. It is always young families, almost by definition.

Mr. Brian Masse: What's the growth of the industry right now in terms of contributions in the last five years, in terms of the average person contributing to the funds?

Mr. Peter Lewis: The average annual contribution into an RESP right now is about $1,200 per year per child. Our experience is that the typical family is putting in $500 to $600 per year into their RESP, although some will obviously maximize it at $2,000 to $4,000.

The growth has somewhat slowed down over the last couple of years. Obviously, after the introduction of the Canada education savings grant in 1998, there was a significant growth that occurred for a period of several years, largely because many financial services organizations that previously weren't in this business got into it. However, that growth rate has slowed down somewhat over the last few years, to a more stable level.

● (1040)

The Chair: Thank you, Brian.

Werner, and then Marlene.

Mr. Werner Schmidt: Thank you very much, Mr. Chairman, and thank you very much, Mr. Lewis.

I think one of the comments you made was that this protection might be included in the same section as the RRSP protection. I'm not sure how you would do that, because the RRSP instrument and the RESP instrument are very different financial instruments.

I'm looking at the amendments in the act now with regard to protecting the RRSP. There are some difficulties with it, but I'm not going to go there at the moment. That will be my second question.

My first question is, how do you propose that the RESP actually be included in the same way as the RRSP when they're very different financial instruments that are treated very differently in terms of the Income Tax Act?

Mr. Peter Lewis: I'm not sure the bill actually deals with some of the specific differences between RRSPs and RESPs in any way that would make it difficult to amend it.

Mr. Werner Schmidt: No, but you said it should go into that section. What I'm trying to figure out is how you would get it into that section when they are totally different instruments under the Income Tax Act.

Mr. Peter Lewis: They're different instruments, but so are retirement savings plans and RRIFs. They're all registered products under the Income Tax Act, so my assumption would be that, given that they are all registered products, they could all in fact be dealt with in the same way through the legislation.

Mr. Werner Schmidt: I don't agree with that at all, because I don't see how that's possible. They are very distinct, and in the legislative provisions for the RRSP and the RRIF, the registration is only one small part of that particular instrument. There are all kinds of other instruments as well.

Anyway, that's a technical question, and I seriously suggest that you reconsider putting it that way. Maybe that will work, but I don't see how that would work.

I'd also like to ask you about the RESP in particular, and also reference provinces and the provincial legislation that covers RESPs. Is there any connection between the RESP...? I've found other federal legislation and provincial legislation.

Mr. Peter Lewis: No, there's not. Currently the only element in which provinces get involved with RESPs is actually in the province of Alberta, where they have created their own provincial grant program to encourage families to save within RESPs, but there is no specific provincial legislation dealing with RESPs.

Mr. Werner Schmidt: If they have created their own programs, as in the case of Alberta, would you suggest that they also be exempt?

Mr. Peter Lewis: You could argue that the government grants already are exempt in the sense that the only thing that's subject to seizure is the capital within the RESP.

Mr. Werner Schmidt: That's not my question. My question is, would the capital assets that are owned by the investor be covered under a provincial plan, under the proposal of protecting it under the Bankruptcy Act?

Mr. Peter Lewis: The capital of the investor would in fact be covered. Any grant programs, federal or provincial, would not be.

Mr. Werner Schmidt: That's still not my question.

I think your point is that you want the capital that's in an RESP to be exempt.

Mr. Peter Lewis: Yes.

Mr. Werner Schmidt: Okay. And if there is a provincial plan, a provincial program—say, if they have grants—if they also have a plan that adds to that grant additional moneys that the investor puts in, would they be exempt?

Mr. Peter Lewis: The provincial grants operate within the confines of the RESP; it's not a separate program. The grant is put within the RESP itself, so the investor's contributions within the RESP are the same, regardless of whether they've been encouraged to do it by the provincial or federal grant program. It's all their own contributions in the one account.

Mr. Werner Schmidt: That's fair enough. Does that suggest the issue is not contaminated by provincial legislation in any way?

Mr. Peter Lewis: I don't believe so, no.

Mr. Werner Schmidt: That's very significant; I'm glad that's been clarified. I still think we need to do further investigation in that area because I'm not entirely sure it's correct. If that's the case, then my concerns are allayed. But if there is a contamination with the provincial legislation, I think there are some very serious problems in doing what you're suggesting.

● (1045)

The Chair: Thank you, Werner.

You didn't mean contamination in a bad way, in terms of the—

Mr. Werner Schmidt: Confusion.

The Chair: Yes, confusion. Okay.

I'll certainly get to Marlene and Carole, and Jerry is on the bubble.

Marlene, before I go to you, you're going to receive in your offices today a certificate of nomination for Dr. Suzanne Fortier to replace the retiring chairman of NSERC, Dr. Brzustowski. I'm going to ask you to look at that, and I'm going to ask you before or after the C-19 witnesses on Tuesday whether you want to see Dr. Fortier, or whether you're willing to pass the nomination on Tuesday or Thursday.

Do you need a clarification on this point, Michael?

Mr. Michael Chong (Wellington—Halton Hills, CPC): When would the appointment start?

The Chair: I don't have the letter with me, but I think it's coming up. Do we know, Jerry?

Hon. Jerry Pickard: He announced his retirement quite a while back, so I assume it would be almost immediately. What we're trying to do is get that position filled now. I believe it's a non-political issue. NSERC is really a scientific community, and they do a tremendous amount of work. We need the leadership there.

The Chair: She's on the council now. So all I'm asking is that you don't decide yea or nay. I'm just letting you know it's going to be in your offices, I think today. I'm going to ask you before or after the C-19 witnesses on Tuesday whether you're prepared to proceed with it or want to have her in.

With that, Marlene and then Jerry.

[*Translation*]

Mrs. Carole Lavallée: I'd like to add a comment to what you just said. I'll of course submit your question to Paul Crête. He will answer you, since that's usually his responsibility.

[*English*]

The Chair: Okay. *Parfait*.

Marlene.

[*Translation*]

Hon. Marlene Jennings: Thank you very much.

Thank you for your presentation. You said that, in actual fact, the average annual contribution to an RESP is $1,200. You also referred to an amount varying between $500 and $600 per child. In view of the fact that the maximum contribution is $4,000 a year, you said this isn't really a vehicle for abusing the system by filing for personal bankruptcy because $4,000 isn't a lot of money.

However, what is the limit for contributions for years in which a taxpayer contributed nothing or did not contribute the maximum amount? If the average contribution is only $1,200, that offers the opportunity to make a retroactive contribution of $2,800 per year per child. That may be interesting for someone who'd like to remove his assets from a bankruptcy anticipated in 12 or 18 months.

I'd like to hear your comments on the subject.

[*English*]

Mr. Peter Lewis: Sure. The current contribution limit is $4,000. There is no carry-forward provision. If I contribute less than $4,000 this year, I can't add that on to a contribution in future years. Four thousand dollars per year per child is the most I can ever put into an RESP.

Hon. Marlene Jennings: And you can't carry anything forward.

Mr. Peter Lewis: You cannot carry forward unused contribution room from previous years.

Hon. Marlene Jennings: So if the average is $1,200 and the maximum is $4,000, your point is that if someone sees that they have a good or a high risk of going into personal bankruptcy in the future, the fact that you're asking that it be exempt would really not make any difference to that bankruptcy, in the sense of it being an abuse.

Mr. Peter Lewis: In the sense of it being an abuse, there's certainly not a significant opportunity. There is always the potential opportunity there, but in our view, the social benefits of encouraging saving for higher education outweigh the potential risks of abuse that could occur.

● (1050)

Hon. Marlene Jennings: Thank you.

I have no further questions.

The Chair: I have Jerry next on my list.

Jerry, the last word goes to you.

Hon. Jerry Pickard: Thank you very much, Mr. Chair.

Peter, to argue against RESPs is almost like arguing against motherhood. However, bankruptcy is a system to divide the wealth in a fair way, with as little opportunity for abuse as possible. At least, that's the way I see it.

Let's say someone is thinking about bankruptcy right now, today, and he has five kids. Each child is entitled to $4,000, so he could throw $20,000 in today. In January, he could throw another $20,000 in. That's $40,000 that he has just banked and protected from bankruptcy. He can then draw it out two days later, and that's abuse. That's the problem we have.

That's an anomaly we have. Unless the RESP system is altered, that abuse is going to be there, because any bankruptcy lawyer is going to say, “Hey, John, put your money here and protect it, and put it there to protect it next year as well.” So the average of $1,200 isn't really what we're talking about; we're talking about the recommendation of a bankruptcy lawyer to put it in here.

John may not know about it, or Charlie, or whoever it is. They may not have a clue, but any lawyer who understands the system knows to pack all your money where it can't be touched. That's the difficulty. That's how the abuse occurs. I think responsible legislation has to make sure that abuse doesn't continue.

I know it's like arguing against motherhood on one side, but on the other side, that money is not part of the child's ownership, it is part of the person who put it in. The person who put it in can protect capital, which is the danger. This is why our experts who have looked at the whole system have almost solidly said this is the potential abuse.

Can you help me with my thinking around that? I think it's going to be straight on the board that way.

Mr. Peter Lewis: Sure.

I have a couple of comments. First of all, I think you need to also acknowledge that our RRSPs are also the property of the investor. The difference, of course, is the proposed locking-in mechanism around the RRSPs.

It's certainly easy to draw up examples of abuse. I have six children, so my opportunities are even greater than those of someone who has five. But that's not the norm, and I think that's one of the things that needs to be put on the table.

There are ways that you can try to limit the opportunities for abuse. Putting in place an appropriate clawback period is one way to do that.

Your example of somebody who can put in the maximum in December and the maximum in January is quite true. They could do similar things with their RRSP contributions and can have them protected. To me, the only difference is this issue of the locking-in mechanism and the fact that the RESP is something that someone can ultimately withdraw.

But again, there are penalties to withdrawing your capital from an RESP. First of all, as with all investments, there are fees typically associated with withdrawing capital. But even more so, if you've restricted this to only the children or grandchildren of the investor, by withdrawing the capital, they're also now forfeiting government grants of 20% that they have received for their child, and those could be substantial. They're forfeiting those, and they never get those opportunities back in the future.

So I'm not sure it's a slam dunk that somebody is going to look at this and say it's a great idea to put a lot of money into the RESPs and then just pull it back out a few days after you've been discharged for bankruptcy. I think the greater risk is that someone may put funds into bankruptcy at twelve months and one day prior to bankruptcy, and then ultimately leave it there and their child may not go to school and they may therefore actually gain access to it at some point in the future. To me, that's where the greater risk lies.

Hon. Jerry Pickard: I agree with much of what you're saying, outside the fact that if a person is going bankrupt—in your case or whatever it would be in anybody else's case—if they threw in $4,000 per child and drew it out three days later, they would have to forego the government support. If that program didn't exist, they would lose that $4,000 on a balance based across scale.

So what the government contribution is in or out of the system doesn't really matter; they are taking money out of the system and putting it in a secure place so that they have it, and anybody who is entitled to it loses that entitlement. It could be workers, it could be families, it could be other people. The difficulty is that the people who would be entitled to it are then put at risk.

● (1055)

Mr. Peter Lewis: That's a very fair comment, and I think the only response is that there is no airtight system here that will absolutely eliminate abuse. It's a matter of saying that if we believe it's important to encourage families to save for higher education—which the government clearly does, based on previous legislation—then we need to look at how we can protect it. I don't think simply excluding it from the legislation is the right approach.

Let's take a look and see how we can find a balanced approach. We've proposed a couple of ideas about trying to achieve that balance. Maybe it doesn't go quite far enough to get the balance you're looking for, but our view is that simply saying it's off the table altogether is not the right way to go. Let's put it back on the table and let's find a way to get the appropriate balance between protecting the interests of the creditors and protecting the interests of the families that are affected.

The Chair: Thank you, Jerry, Mr. Lewis, colleagues. We have a committee coming in after us, so I appreciate everybody's cooperation.

We're adjourned until Tuesday morning, with a whole bunch of witnesses on Bill C-19.

Thank you, and have a good weekend.

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