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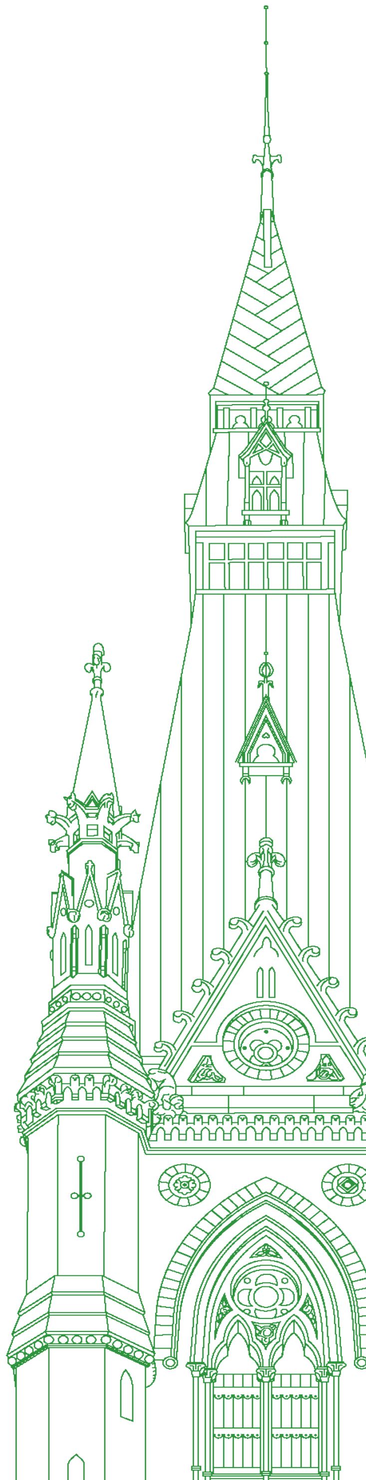

Chair: Mrs. Sherry Romanado

Standing Committee on Industry, Science and Technology

Thursday, June 10, 2021

● (1105)

[*English*]

The Chair (Mrs. Sherry Romanado (Longueuil—Charles-LeMoyne, Lib.)): Good morning, everyone. I now call this meeting to order.

Welcome to meeting number 45 of the House of Commons Standing Committee on Industry, Science and Technology. Today's meeting is taking place in a hybrid format, pursuant to the House order of January 25, 2021. The proceedings will be made available via the House of Commons website. So you are aware, the webcast will always show the person speaking, rather than the entirety of the committee.

The first hour will be spent on clause-by-clause consideration of Bill C-253, and then we will move in camera for the second hour to review our report.

To ensure an orderly meeting, I would like to outline a few rules to follow. Members and witnesses may speak in the official language of their choice. Interpretation services are available for this meeting; you have the choice at the bottom of your screen of floor, English or French audio. I'll remind you that all comments by members and witnesses should be addressed through the chair. Before speaking, please wait until I recognize you by name. When you are not speaking, your microphone should be on mute.

Pursuant to the order of reference of Wednesday, May 12, 2021, the committee is meeting to begin clause-by-clause of Bill C-253, an act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.

I'd like to now welcome our witnesses. Here to assist us today from the Department of Industry, we have Mr. Mark Schaan, associate assistant deputy minister, strategy and innovation policy sector; and Mr. Paul Morrison, manager, corporate, insolvency and competition directorate.

As this is the first time that INDU is doing clause-by-clause of a bill, I'd like to explain how today will go. I will introduce each clause and ask if any members have any questions or comments. If you do, please raise your hand, and we will keep track of the speaking order. I know that MP Lemire is in the room, so we'll try to make sure we can see him when he has his hand up.

[*Translation*]

Mr. Lemire, if I don't see your hand raised, please send me a message.

Thank you.

[*English*]

We will take care of the speaking order, and once we've finished any debate on a specific clause, I'll then turn it over to the clerk for the vote.

With that, I wanted to also introduce the legislative clerk who is with us in the room today, Monsieur Jacques Maziade.

Welcome to INDU.

Mr. Jacques Maziade (Legislative Clerk): It's nice to be here. Thank you.

The Chair: With that, we're going to start.

(On clause 1)

The Chair: You'll have in front of you your bill. Does anyone have any questions or comments with respect to clause 1?

MP—

Hon. Pierre Poilievre (Carleton, CPC): On a point of order, Madam Chair, I just wanted to make sure you got my amendment. We submitted it about an hour ago, I think. Some of the other members didn't get it circulated to them, which might be a function of the lateness with which I sent it, but I want to make sure it's there and that you have it, so that when the appropriate clause arises it can be discussed.

The Chair: I have not received it, but the clerk has, and it will be distributed shortly. It's on its way. I'll give you a confirmation when we get it, so that you know it's been received, okay?

Hon. Pierre Poilievre: Excellent, thanks so much.

The Chair: With that, we'll go to MP Jowhari.

You have the floor.

Mr. Majid Jowhari (Richmond Hill, Lib.): Thank you, Madam Chair.

Thank you to the witnesses, although I was hoping to hear testimony from them or an intervention from them giving a sense of, in their opinion, how big the issue is or whether they have any concerns.

Let me start by asking some questions, at least for me, for those who may have joined us for the very first time in our committee, and for those who are monitoring the committee.

The question is for either of our two witnesses. My understanding is that as of December 2019, we had about 1.23 million corporations in Canada. Of those, about 1.2 million were small businesses, which is about 97.9%. Another 1.9%, or 22,905 of them, were medium-sized businesses. Only about 2,978, which is 0.2%, were large businesses. The issue we are dealing with relates to the unfunded pension. How large is it? Who are the key stakeholders? What is the amount? How many people does it impact?

Either of you, Mr. Schaan or Mr. Morrison, can comment on that first, before I get to questions regarding the pension liability.

Mr. Mark Schaan (Associate Assistant Deputy Minister, Strategy and Innovation Policy Sector, Department of Industry): You bet. I'm happy to start, and then I may have some supplemental information from my colleague, Mr. Morrison.

Essentially, the issue we're talking about with respect to unfunded pension liabilities relates to corporations that have defined benefit pension plans. Just by way of quick reference, there are a number of ways in which companies provide additional retirement benefits to their employees, or future promises of income in retirement. Sometimes they're as simple as supporting individual employees in making their own contributions through things like RRSPs or other savings plans—a defined contribution mechanism.

What a defined contribution mechanism means is that in a pension plan that essentially says that the employee, perhaps, but often the employer, will make a contribution into a pension plan, the contribution is what is defined; that is, the employer will make a set contribution on every pay, which will then go into a fund. That fund will be invested with some sort of investment scheme, and whatever that investment scheme is able to ultimately provide is what will be made available to the individual at the time of their retirement.

A defined benefit pension plan, however, is one where the benefit is that which is defined, which is to say that a promise is made that upon retirement an employee will receive a percentage, usually, of their pre-retirement income, often with some sort of formula based on best years, which indicates that it will be paid in perpetuity until such time as their death.

What we're talking about is companies that offer this type of pension plan. That number has largely been going down. I don't have the exact figures in front of me, but when I'm done explaining I'll see if Mr. Morrison has information. Essentially, that number is relatively small, because it is a higher-risk mechanism of providing retirement income. Ultimately, the employer is hoping that investment returns will allow them to be able to continue to offer that benefit based on the full lifespan of their employee base.

Where we have an unfunded pension liability is essentially the differential between that which was promised and that which is required. That, we calculate in two ways. One is on a going-concern basis. In a defined benefit that means, are you actually earning enough from your investment returns and your ongoing cash requirements to be able to provide for the requirements of your pensioners at the time of their retirement? Right now, if I have 10 employees and I have five retirees, am I actually earning enough on the basis of what I have in my pension fund to be able to provide that?

Then there's also a wind-up basis, essentially. Is there enough, should the company actually go insolvent, to be able to meet the promises it made to all of its employees? That wind-up basis is a much bigger number, obviously, because you need to have enough in your account that if you were to go insolvent you would be able to pay out those promises.

The vast majority of defined benefit pension plans that are currently available in Canada are actually provincially regulated, because they are provincially regulated industries. The requirements for plan sponsors as to the amount they need to have in place vary enormously, everything from the Quebec government, which actually does not require a solvency basis accounting—so they do not require pension plans to account for what would be required if they went to insolvency—all the way through to the federal government, where we actually require plans to be 100% funded on a wind-up basis or on a solvency basis—

● (1110)

Mr. Majid Jowhari: Thank you, Mr. Schaan, but can you give me an understanding of how much this package is, how much of it is unfunded and how much is at risk? Are we in a position to be able to get a sense of that?

Mr. Mark Schaan: My information is that as of 2019 there were 4.3 million workers in total that were members of defined benefit pension plans. For federally regulated plans, those are, as I said, held at 100% solvency requirements. They then have to make up the difference between that which they have and that which would be required on a solvency or wind-up basis over five years—

Mr. Majid Jowhari: I apologize for interrupting.

I'm hoping that the translators also won't mind.

Okay. Now we know from a numbers point of view that there are 4.3 million people—

Mr. Mark Schaan: Yes, of whom 1.2 million, Mr. Jowhari, are in the private sector. The vast majority of those are actually in the public sector. In the private sector, 1.2 million have access to a defined benefit pension plan.

Mr. Majid Jowhari: There are 1.2 million in the private sector, which I assume is part of that 2,978, roughly, which is 0.2%.

Also, of the 1.2 million Canadian individuals who are impacted, how big is this from a dollar point of view?

● (1115)

Mr. Mark Schaan: That I would not have at the ready, because, obviously, those plans vary enormously in size.

To your earlier point, it is mostly larger employers that have defined benefit pension plans, although there are some organizations that offer only defined benefit pension plans, for instance, for their senior executives, so that—

Mr. Majid Jowhari: Senior executives always have a bonus package. I'm trying to figure out, for the average Canadian who works for these large corporations.... Of that 1.2 million, let's say that one million of them are not executives and don't have bonus packages. We don't have any idea of how big this basket is for the one million.

What I am trying to do is get an understanding of what the impact really is, and now I want to get into the clause. What is the specific effect of the insolvency proceeding, as it relates to clause 1?

Mr. Mark Schaan: This would provide a superpriority for the unfunded pension liability, and essentially that unfunded pension liability varies enormously, depending on the plan, depending on the company and depending on the particular facts. In some cases it can be very large.

In certain provinces where, for instance, a plan is held to having, in assets, only 85% of the value of the plan on a wind-up basis, you could then have as much as or more than 15% of the total value of the plan. For very large employers, we can look at some of those that have been through a CCAA process. For instance, in Stelco there were 20,000 pensioners, and that can end up being an awful lot of money and an awful lot of people.

In some of these cases—in the case of Air Canada, for instance—we've seen that the unfunded pension liability at the entry into their restructuring was very significant. If that had been in place, if there had been a superpriority at the time, it would potentially have dwarfed all the other available creditors and prevented a restructuring.

Mr. Majid Jowhari: Okay. This is great, because this is where I am trying to get.

I know there are a number of stakeholders, when I take a step back. I have the federal government, I have the provincial governments that have to work together as it relates to the regulator. There are the employees and the employer. Really, those two—the corporation and the employee—are the ones I want to focus on.

As it relates to the employer, what advantages and what disadvantages is this clause going to have on their ability to get credit? What is the impact, from a percentage and from a dollar perspective on the employee, and what risk are they being exposed to?

The government works with the regulations. I really want to understand, from the two key stakeholders, the business as well as the individual, the employee, what their risks are and who is at more risk because of this.

Mr. Mark Schaan: On the degree of risk, I'll come at this in two ways. The degree of risk varies, as I said, depending on the regulation that the pension plan itself is subject to. Obviously, if the pension plan isn't required to be fully funded on a solvency basis, that creates greater risk for workers, because there's not enough that's actually being held in assets to be able to make those payouts in the case of an insolvency.

Where those pension regulations are stronger and require greater degrees of funding, that obviously places less risk on the employee in that case.

Your question, though, is in terms of where the risks would go with a superpriority and what the potential impacts would be.

If there was a superpriority, the theory is obviously there's less risk for workers, because they will be paid first, so that unfunded pension liability would be there. In some cases, though, that unfunded pension liability actually would still not be fully serviced by the assets on hand of the organization. In one of the insolvencies that covered over 24,000 pensioners that went through in 2004, the unfunded pension liability in that case was $1.8 billion. That would have significantly dwarfed the assets that were on hand of the individuals, so they still wouldn't have been fully paid, even with a superpriority.

However, because there wasn't a superpriority, that restructuring ultimately brought all of the other creditors to bear, and that entity was able to restructure and allow for those 24,000 pensioners to emerge into a viable entity that could still continue to make pension contributions and ultimately pay out pensions.

If you're a lending institution and there's a superpriority in place, it means that superpriority gets paid out before you do as a secured creditor. There's a couple of potential behaviours that you would keep in mind to ensure that you'd mitigated your potential risk.

One is, obviously, that you potentially charge a higher premium to the cost of credit, because now there's a possibility that you will not actually be paid on a secured basis because there's someone who ranks above you in—

● (1120)

Mr. Majid Jowhari: I apologize, if I may interrupt you.

I'll draw a parallel with...let's say I have a mortgage and I renew it every five years, or if it's a variable I renew it annually or every two years. During each renewal, they still ask for the same documents, the same financials, to make sure I still can service the debt.

Is there a procedure you'd suggest that these large corporations put in place, so that on a regular basis, whether it's annually, quarterly—the same way I think all the executives get some of their bonuses, on a quarterly basis or an annual basis—they would be able to monitor that portion of the pension and be able to highlight risk, which would reassure the financial institution you're talking about that they're still tracking, their investment is solid, and they still would be able to fulfill the commitment that they had made?

Mr. Mark Schaan: That's called an actuarial evaluation. An actuarial evaluation is required under federal pension regulations on an annual basis where you are less than 100% solvent on a wind-up basis.

That actually does continue to calculate the unfunded pension liability and then requires special payment. We actually require the gap between a fully-funded pension on a solvency basis and that which is within the account to be paid through special payments over the course of the subsequent five years.

We then require—

Mr. Majid Jowhari: I apologize for interrupting.

What is the concern that the financial institution has, because they're getting—

Mr. Mark Schaan: The concern is that they may know what that unfunded pension liability is, but if that unfunded pension liability is going to be paid ahead of them in an insolvency, that obviously creates increased risk for their ability to be paid back, which means they're going to calculate that into the risk premium they charge, or they won't lend at all.

One of the other fears we have is if there actually is an unfunded pension liability and there is a superpriority for that, one of the potential strategic behaviours that might actually come from lenders is not to assert pressure on the company to fully fund their pension, which is what some people theoretically imagine would happen, especially since that often would mean that you'd be taking it out of working capital, but instead that those lenders will call their loans, and they'll call their loans early to ensure that they get paid, therefore putting the company into liquidation.

Mr. Majid Jowhari: Yes. Thank you.

This is my last question, because I want to be cognizant of my other colleagues who have their hands up. When we look at this clause in summary, in bullet points, how is this clause 1 different from the existing law and how would it change the current law?

That's my last question.

Mr. Mark Schaan: Clause 1 creates the superpriority for unfunded pension liabilities in Bankruptcy and Insolvency Act restructuring. Essentially, what happens right now is that unfunded pension liabilities are treated as unsecured creditors alongside other unsecured creditors, like small and medium-sized enterprises and other suppliers that have aided with and provided services that have yet to be paid for by the organization.

In the current scheme, superpriorities are afforded in a couple of categories. First of all, we provide a superpriority for unpaid wages, up to a cap of $2,000. We also provide for a superpriority for unpaid payroll taxes—employment insurance and CPP. That's to ensure that employees can actually get their last bit of pay and that doesn't actually go unpaid. We actually have a program federally that doesn't even require the employee to participate in the insolvency process. We take their spot in the insolvency through the wage earner protection program and provide that piece for them.

We then have preferred claims. Preferred claims are relatively rare. There are a small number of them. They exist in a couple of instances.

Next there are secured creditors, which are those who actually lent on the basis that they were insured against assets and that those assets would be utilized to provide them with the security of their loans, and then there are unsecured creditors. In this particular case, they would take that unfunded pension liability in their restructuring and provide for it at the same level at that very early stage. As we've indicated, in certain situations that can actually wipe out available assets for other sources of creditors, or other scales of creditors, and potentially prevent a restructuring from existing.

● (1125)

Mr. Majid Jowhari: Thank you.

I'm going to yield the rest of my time to the chair to assign. I'm hoping one of my colleagues will ask the question of what this does to our competitiveness, especially for large corporations—the corporations we talked about, those 3,000 corporations—especially if they are international corporations. What would it do to their competitiveness, especially among the G7, the G20 and the OECD?

I'm going yield the rest of my time to the chair to assign accordingly.

Thank you.

The Chair: Thank you very much.

Before I go to MP Jaczek, MP Erskine-Smith, MP Généreux, MP Poilievre and then MP Ehsassi, I just wanted to confirm to you, MP Poilievre, that we've received the amendment and it has been circulated. Thank you for that.

MP Jaczek, you have the floor.

Ms. Helena Jaczek (Markham—Stouffville, Lib.): Thank you so much, Madam Chair.

Thank you to the witnesses for being here today.

We've heard testimony over the last couple of sessions from individuals representing groups of pensioners in the defined benefit category, Mr. Schaan. You've certainly, through the questions Mr. Jowhari asked you, given us a sense of the size of that group of people, which is rapidly diminishing in terms of businesses employing a defined benefit plan system for their employees. I know that in my own riding there are so many people working in the gig economy or working on contract, and of course they don't have any type of pension at all.

I want to follow up a bit on the defined contribution type of pension plan, which is certainly increasingly common. In terms of that, what type of protection is given to pensioners in the face of an insolvency or a potential insolvency?

Mr. Mark Schaan: One thing that's important to note at the outset is that pension funds are held in trust and are sacrosanct. They cannot be used for alternative purposes. That's true both for defined contribution pension plans and for defined benefit pension plans. When a company is taking a pension contribution off every paycheque, it's going into a dedicated account that actually continues to accrue value through the investment scheme that it's put through.

In the case of a defined benefit pension plan, whatever is in the plan is absolutely sacrosanct, as we indicated. It can't be used for other purposes. In the case of a defined contribution plan, that means that essentially the risk is being shared between the employer and the employee, so in an insolvency what is available to the individual employee is whatever was invested to date.

There isn't an unfunded portion, because essentially the way that a defined contribution plan works is that the contribution has been defined; it has been made every single time and, as we indicated, any unfunded pension contributions for the previous period of work need to be remitted as a superpriority, so whatever is in that fund is available and then gets distributed. Normally that happens as a purchase of annuities.

There are some mechanisms that have existed in a couple of insolvencies where potentially they've been allowed to be converted into other investment-accruing vehicles, but essentially, for a defined contribution plan, you have very strong protections in place, because there wasn't any expectation other than the fact that the market would return what the market returned. In the case of a defined benefit plan, that's not the case, obviously, because what was defined was the benefit, and that requires a certain level of market return to be able to get to that level.

Ms. Helena Jaczek: Essentially, then, this particular bill doesn't really affect pensioners who have a defined contribution plan. In their contribution to the investment vehicle, they must be aware there is some risk in terms of the vagaries of the market or whatever. Presumably they understand that.

Is there anything in this bill that adds any protection for them?

● (1130)

Mr. Mark Schaan: No. This bill is aimed at a couple of elements. It's aimed at unfunded pension liabilities; it's aimed at terminated group insurance plans and it's aimed at severance pay. Defined contribution plans aren't treated under this bill, because essentially a defined contribution already has a superpriority for any unremitted payments into the plan for that last little period leading up to the insolvency. Then, as I said, it's subject to the vagaries of the market—in terms of investment returns—as to what ultimately those individuals will receive upon retirement.

Ms. Helena Jaczek: Thank you.

My riding is in Ontario. You alluded to the fact that in Ontario there are already certain legislative provisions that provide considerable protection. In your view, would it perhaps be more reasonable to ensure that every province institute its own regulations more in line with what Ontario has, rather than institute this particular bill?

Mr. Mark Schaan: I won't presume to speak for the provincial approach to pension regulation. I can say why we've approached it the way we have at the federal level. We believe pension funds ultimately should be 100% funded on an insolvency basis because we see real risks: Insolvencies can't necessarily be fully predicted. By requiring plan sponsors to be at 100% funding, we anticipate and allow for the possibility that the firm might ultimately go insolvent, and that therefore there are sufficient funds in place to allow for the promise they've made.

For provinces that don't require that level of funding, we didn't introduce that at the federal level, in part because we thought it introduced significant undue risk to workers and pensioners. It raised the possibility that you could have an insolvency that would lead to an unfunded pension liability of a significant nature.

We see real value in solving the problems of unfunded pension liabilities while the firm is actually in a position to be able to address them—that is, while they're operating and ongoing. Doing it in the case of an insolvency is extraordinarily difficult. By definition, there are insufficient funds to be able to pay those to whom there are obligations. Therefore, you are then ultimately making strategic decisions and policy mandate decisions about who should be paid and in what regard.

We also wanted to be mindful of the fact that we are very supportive of the desire for incentive to restructure and allow for entities to emerge as a going concern and continue to make the contributions that ultimately will lead to greater security.

Ms. Helena Jaczek: Thank you very much. Of course, I understand the sensitivity around the federal-provincial situation.

Madam Chair, those are all my questions. Thank you very much.

The Chair: Thank you very much.

Next we have MP Erskine-Smith.

Mr. Nathaniel Erskine-Smith (Beaches—East York, Lib.): Thanks very much, Chair.

I have four questions. First, you mentioned that contributions are a deemed trust. We heard testimony, and I think the Supreme Court has upheld this general view, that pensions are deferred wages. Just from a principle rationale, before we get into the details of this bill, forget superpriority: Why wouldn't all pensions be a deemed trust when they're deferred wages?

Mr. Mark Schaan: You ask an important question. Essentially, we see it as deferred compensation, not necessarily wages. We see compensation as a promise made in a way similar to the promises made by that same organization in a number of different domains. The promise, upon receipt of a service, to pay for that service is also akin to that, which is where you find other unsecured creditors.

In an insolvency process we need to be able to look at all those who, essentially, have IOUs and promises held, and figure out a mechanism by which to provide for an orderly treatment of those. While we've deemed what's in the fund as absolutely sacrosanct, what is not in the fund is held to be akin to that, which is other creditors and their unpaid bills as well.

● (1135)

Mr. Nathaniel Erskine-Smith: With regard to the federal policy, you've mentioned today a few times that we require 100% funding on an insolvency basis for the sake of pensions. That's in relation to not only the contributions, which would be in deemed trust, but also this promise of return as it relates to DB pensions. Is that right?

Mr. Mark Schaan: I'm not sure I follow the second half of that.

Mr. Nathaniel Erskine-Smith: On an insolvency basis, you just said to me that you treat them on an unsecured basis alongside other creditors. However, you're telling me that the federal policy is that there needs to be 100% funding of pensions on an insolvency basis.

Mr. Mark Schaan: Yes. The regulatory obligation is to be at 100% funding on a wind-up basis. However, when that is not the case, we require special payments to be made over the course of the subsequent five years to be able to make up that gap.

While there is a 100% requirement, not all pension funds are going to be at 100% on a wind-up basis at all given moments.

Mr. Nathaniel Erskine-Smith: I understand that, but the overall policy.... My point is that in the answer to my first question, you effectively said that contributions are deemed trust, because those are deferred wages, and that this other is deferred compensation, so it's unsecured. However, actually, federal policy is that they should all be funded on a wind-up basis. We want to make sure that pensions, regardless of whether they are contributions into the pension or just the return that is promised to them in an unsecured manner right now.... All of that we want to see funded on a 100% basis.

Mr. Mark Schaan: We see strong funding levels within pensions as an important parameter to ensure the continued vitality of the promise. We then treat the missing portion, essentially, as a creditor alongside other classes of creditors in the case of an insolvency.

The goal of the policy is strong, well-funded pensions. The reality of an unfunded pension liability in insolvency is that it's an unfunded credit that needs to be paid, and it needs to be paid alongside the other creditors.

Mr. Nathaniel Erskine-Smith: I take your point, but the federal regulatory policies—

The Chair: My apologies. Sorry, MP Erskine-Smith. I hate to cut you off, but the bells are ringing.

In order for us to continue, I would require unanimous consent to continue, so I'd like to know if I have unanimous consent to continue while the bells are ringing. Do I have unanimous consent?

I see Majid Jowhari shaking his head.

MP Jowhari.

Mr. Majid Jowhari: No, Madam Chair. I know this is the crisis season.

I am logged in, and I am ready to vote. I don't know what the vote is, but I'd like to get caught up on it before I go to vote. I need that time.

Thank you.

The Chair: Okay, we will suspend for the vote.

If everyone can please make sure they're logged back on as soon as the vote is called, we'll then continue.

MP Erskine-Smith, I'll make a little note that you still have the floor.

With that, I'll suspend.

● (1135)

_____________________(Pause)_____________________

● (1220)

The Chair: Welcome back, everyone.

I'm not sure if MP Erskine-Smith had finished. He had the floor, so I'm going to turn it over to MP Erskine-Smith.

Had you finished?

Mr. Nathaniel Erskine-Smith: Not quite. I just wanted to pick up from where I left off. In the federal policy the idea is that through regulation we ensure that there will be funds in an insolvency to fulfill pensions 100%, and provinces have different thresholds—lower thresholds in some cases, and no threshold in the case of Quebec. To get at what we want, which is protecting pensioners, that would be the policy that would do the most.

Is that fair to say?

● (1225)

Mr. Mark Schaan: Yes. I think our view is that the moment at which it is most easy to influence the security of pensions is when the firm is up and running and operational. That's why we require firms, while operational, to be dedicating capital towards the requirements of their pension obligations.

Mr. Nathaniel Erskine-Smith: Understood. Given, though, that this is a concern—this is obviously federal policy, as I say, to protect pensioners, at least as it relates to federally incorporated companies.... When we look at provincial governments that aren't doing the same thing, and we say we still care about pensioners, it's consistent with our policy rationale, because we want to see 100% funding for pensioners. Superpriority isn't something we are opposed to in principle—we want to protect those pensioners—but your argument is instead, we're concerned in practice that it would lead to fewer restructurings and that would actually make pensioners worse off.

Is that your fundamental rationale for not supporting this bill?

Mr. Mark Schaan: Yes, we think there are unintended economic consequences that come to bear as a function of a superpriority. One is a heightened cost of credit. The second is an incapacity for companies to continue to operate. The third is that, if it were to come to pass in the choice between a liquidation or a restructuring, it potentially would tilt the balance towards a liquidation, because there would be a pursuit by creditors of as much security of their owed capital as possible.

Mr. Nathaniel Erskine-Smith: Two questions follow from that, and then I'm done. The heightened cost is less concerning to me because pensioners should be fully paid, and if it means that businesses have higher costs in the marketplace to fulfill their obligations to their employees, so be it.

I do share the concern about unintended consequences. I wonder, with the two remaining questions that I have, first, isn't it the case...? I'm counsel for a union, let's say, and the company is in receivership. I don't want the company to go bankrupt if it's going to make my folks worse off, but the superpriority gives me a position of leverage in negotiation. I can always negotiate away from that position, but why would we be opposed to a stronger position that they can negotiate from?

Surely we would be confident in counsel and a restructuring process that is looking after the best interests of pensioners to say, if it truly is the case, the facts on the ground in that particular matter show that forcing the company's hand and maintaining our superpriority over all of our claims is going to send it into insolvency and it will be unable to restructure. Surely we can make that decision, as pensioners, collectively, through counsel, in our best interests. If it is in our best interest to claim now, we'll claim now; if it's in our best interest to take a discount to ensure the company continues to be a going concern, so be it.

Why wouldn't we want them to have that negotiating position?

The Chair: I'm not sure if Mr. Schaan is having a technical problem because he looks like he's frozen.

There you go, he's back.

Mr. Nathaniel Erskine-Smith: Mark, did you catch enough of that?

Mr. Mark Schaan: Just the last little bit of it. I think the premise of your question was—

Mr. Nathaniel Erskine-Smith: Why wouldn't we want them to have a position they can negotiate from? We are presuming that they're incapable of protecting themselves, by saying they're not entitled to superpriority because of unintended consequences. They can always negotiate away from that. They can always negotiate away from that position in their own best interests.

Mr. Mark Schaan: I guess I'd offer a few thoughts on that. One is that one of the goals of having as few rules in place at the time of restructuring.... Well, I'll put it this way. A CCAA restructuring has a number of guardrails and safeguards put in place to ensure the preservation of a fair process that has integrity for all participants.

One of the premises of it, though, is that we walk in with a relatively blank slate to try to encourage an outcome that will ultimately allow for the company to emerge. We don't predetermine in the restructuring process who has an advantage, because at the end of the day, the restructuring is ultimately what's better for everybody. We don't put in place a significant number of impediments to that; we look for parties to come together for creative solutions.

The protection that's afforded to pensioners, to other members and to other unsecured creditors is essentially the mechanism by which you have to achieve to be able to get out of the restructuring, and that is that 50% of the total number of creditors in every class needs to approve the ultimate settlement agreement, and two-thirds of the value of each creditor class need to approve the restructuring agreement as well.

That is the fundamental preservation of the integrity, so we give everybody leverage, including for an unfunded pension liability. It's a very significant leverage, because if that's a very large, unfunded liability, that's a very significant portion of their class, which means that they carry weight in articulating the restructured outcome.

One of the challenges is, if you put that in place at the front and say, “Hey, guys, I hold all of the cards. I'd rather come through a restructuring perspective, but I could also just walk away right now and get paid,” the assumption that it will somehow lead to other, better outcomes, presumes that they will seek that restructured entity, and we have to remember that there are very different interests even within that class. You have active workers, who have an unfunded pension liability for continued capacity for their retirement security in the future, and you have existing retirees with varying degrees of life expectancy that's to be proved. Obviously, their negotiating position and their desire for payment now versus payment of a restructured entity are highly varied.

I would simply suggest that the theory here suggests that they always have the capacity to be 100% paid and that they'll use that appropriately. If it ends up that they just want a liquidation, that's okay, but if they want a full restructuring, we also need to think about those unintended consequences.

As to your point earlier about the fact that you weren't necessarily concerned about access to credit, one of the things that we have to recognize is that access to credit is what allows for the working capital that allows for this organization to continue to be operational and make pension obligation contributions. That access to capital and the cost of that capital factors in to the capacity of the entity to be able to continue to run, make profit, and then ultimately make determinations of payments into their pension plan.

● (1230)

Mr. Nathaniel Erskine-Smith: Thanks for that.

There are two very quick things, and then my last question.

One, there are secure creditors over and above those with unfunded pension liabilities who, in many cases, would have less interest in the company proceeding as a going concern. They're just interested in getting their money back in many cases. The interest of the pensioner would be, in many cases, not only getting their money back, but they certainly don't want to see the company go down if it means that it's going to negatively impact their pension going forward. I think, as you look at classes of creditors, you'll find that pensioners, more than most creditors, are interested in the company continuing as a going concern.

The second thing I would say that relates to unsecured creditors, and I think this gets to the fundamental point, is that, if we think that employees, those who have worked a lifetime for a business, are *sui generis*, I think they are. They shouldn't be treated the same as other unsecured creditors who have obligations to any number of third party businesses.

My last question is in relation to a cap. We heard some testimony from the Canadian Federation of Pensioners related to better striking the balance, and they pointed to other jurisdictions that do better at striking a balance in relation to having a superpriority or some preferred status, but subject to a cap. In Canada, we seem to have had this conversation as only between superpriority for everything or, in your view today, no superpriority because of unintended consequences.

If we are to address your concerns in supporting this bill, potentially, do we not address them by virtue of a cap? What are your thoughts on that?

Mr. Mark Schaan: There are a number of considerations that are both fact-specific and recommendation-specific. Is it a capped superpriority? Is it a capped preferred claim? For some of the considerations around international, I think it's worth noting that no one has a superpriority. No other country in the world has a superpriority, so to the questions earlier about competitiveness, we actually have a superpriority for unfunded pension contributions that were due off employment from their most recent wages. We don't have a superpriority for unfunded pension liabilities. It is worth noting that the recognition of international examples is that no one actually has such a system. There are some that have looked at some of these preferred claims.

On the questions of caps, again, it would depend on whether you're talking about a capped superpriority or a capped preferred claim, and on whether or not that would be a capped claim in restructuring or a capped claim in insolvency. Those have very different functions, as indicated. If there's a capped preferred claim in restructuring, it would still rank below secured creditors in an insolvency, which would prompt secured creditors to potentially seek a liquidation to ensure they had greater access to their assets.

It's also worth noting that in some cases even a capped claim potentially has two consequences. One is whether or not it would still have the capacity to scupper the chances of a restructuring. In a given example, if we look at a recent restructuring of a steel company, a capped preferred claim for unfunded pension liabilities when there are 20,000 pensioners, even at $20,000 per pensioner, would still result in significant losses for pensioners.

In that example, 20,000 pensioners would have a claim of $400 million. The capped preferred claim would likely have to be paid as part of the CCAA restructuring plan to be effective, because otherwise, essentially, we're going to prompt the insolvency, as we indicated. Secured creditors would have no reason to support a CCAA plan that would pay unfunded liability in full and reduce their potential recovery. In this particular case, the liquidation value of the entire entity was $400 million. Secured creditors would prefer a BIA liquidation that would pay secured claims first.

The capped preferred claim could result in some recovery for pensioners after secured claims, but the loss would be very significant. In this particular instance, what we ended up seeing was actually a restructured entity with a continued going concern company that was making pension obligations.

I'd have to see very specifically what the proposal on caps was and how exactly it was noted. I'll just note that caps themselves don't necessarily take away from some of the theoretical considerations, as well as real-life considerations around whether or not they will still lead to liquidations and not restructurings, increase the cost of capital and see more entities potentially fail to survive and therefore actually place pensioners and workers at risk.

● (1235)

Mr. Nathaniel Erskine-Smith: Thanks, Mark.

Those are all of my questions.

The Chair: Our speaking order is MP Généreux, MP Poilievre, MP Ehsassi, MP Duvall. That is the list I have.

[*Translation*]

Mr. Généreux, you have the floor.

Mr. Bernard Généreux (Montmagny—L'Islet—Kamouraska—Rivière-du-Loup, CPC): Thank you, Madam Chair.

I'll turn to the two witnesses.

Mr. Schaan, I gather from your comments that Bill C-253 isn't perfect. Compared to other bills introduced on the same issues or for the same reasons over the past 20 years, is this one better, in your opinion?

Could the entities regulated by this bill be spared the potential consequences of the legislation?

In Bill C-253, that isn't the case. However, the guaranteed amounts that you just mentioned, which total $50,000 U.S., in the United States, are they guaranteed, not only by the entity or company and the funds set aside for retirement, but also by the government?

Do any governments in other parts of the world guarantee these types of amounts?

[*English*]

It's okay for one of you two to answer.

[*Translation*]

Mr. Mark Schaan: Thank you for your question.

Regarding the first question, it's difficult to compare this bill to past bills. However, what sets it apart is some innovative aspects.

I'll continue in English, because there are technical terms.

[*English*]

Mr. Bernard Généreux: That's fine.

Mr. Mark Schaan: This one has a few interesting pieces to it. One is that it has a superpriority for pensions, but it also has a preferred claim for terminated group insurance plans. It has a preferred claim for severance pay in BIA liquidations, which is also relatively novel. It has some aspects that go beyond what some other bills have aimed to do, in the sense that it has a very wide definition of, potentially, employee pay, which would include, for instance, executive bonuses and a number of other zones that potentially are different from previous attempts in this space.

As I said, I'm not one to compare, and I can't speak from a government perspective or a public service perspective. I can just say that the consideration we have here is that our goal is to return as much value back to workers and the economy as possible. We think the strongest way to do that is to ensure that as many businesses as possible, where possible, continue operations and continue to offer their pension plan. We see real risks in this bill to the capacity to be able to do that.

If it wasn't for the fact that we've seen strong restructuring that has actually allowed for pensions to be able to continue.... I can look to a number of recent examples. We have now a well-funded Air Canada pension plan as a function of restructuring, which has allowed for that pension to continue to be open and providing for its workers. Some of the potentials of that, given the unfunded pension liability at the time of its restructuring, may have actually resulted in a liquidation. We've seen that in a couple of other zones, like Stelco. This is the challenge.

● (1240)

[*Translation*]

Could you repeat your second question?

Mr. Bernard Généreux: Are the amounts guaranteed by governments?

[*English*]

Mr. Mark Schaan: Thank you.

What you're speaking of, in the United States and United Kingdom cases, is sometimes referred to as a pension benefit guarantee fund. It is essentially a fund that's funded by a plan's sponsors collectively—all plan sponsors—to be available in the case where a plan sponsor is incapable of being able to pay out their full amount.

Mr. Bernard Généreux: It's like a pool.

Mr. Mark Schaan: Yes.

A portion of contributions is actually required, based on the size of the plan, to be remitted to the pension benefit guarantee fund. It exists in the United States. It exists at the federal level. It exists in the United Kingdom and it exists in Ontario.

Mr. Bernard Généreux: Does it guarantee the full, 100% of the amount? I guess not.

Mr. Mark Schaan: No. They vary. Each of those three schemes varies. Ontario has a scheme upon which it essentially guarantees a portion of the first payments—

Mr. Bernard Généreux: Could it be a balance beside what's already in the plan?

Mr. Mark Schaan: Essentially, if there's an unfunded pension liability—for instance, in Ontario, it goes up to $18,000, but it's on a percentage basis, so it essentially makes up the difference. On the first thousand dollars, for instance, it guarantees all of the difference up to that, and then it has a trailing amount that goes on to a cap of $18,000.

It's worth noting a couple of things about pension benefit guarantee funds, just in general terms. One is that because defined benefit pension plans are relatively uncommon these days—they are less and less common—you have a decreasing pool of people able to insure them. If you are using additional contributions from plan sponsors to make up that pool, that pool is increasingly small, which is why when you have a very large insolvency, you have the potential to use up the entirety of the pool.

That actually happened in the Nortel situation, for both the U.S. Pension Benefit Guaranty Corporation and the U.K. Pension Protection Fund, such that essentially the fund was broke. It had insufficient funds to be able to pay out its requirements, and it needed recapitalization. The problem, of course, with recapitalization is that it then requires you to go back to those same plan sponsors that are having difficulty making their pension obligations, to provide additional funds to make up for that pool.

I would note that one of the considerations of a pension benefit guarantee fund in a federal context is that the vast majority of defined benefit pension plans are regulated by provincial pension regulators, so if there were a federal fund that essentially said it would make up for part of this gap, we could potentially have a federal government with obligations to make up for gaps while not controlling the actual requirements of plan solvency, for instance. In provinces where you have very low solvency requirements and where funds are essentially allowed to grow very large unfunded pension liabilities, we potentially would have this backstop mechanism but no “frontstop” mechanism to ensure pension health, so that is one of the challenges.

It should be very clear that pension benefit guarantee funds are not superpriorities. They are additional means by which to make up for pension gaps and unfunded pension liabilities where a plan sponsor has insufficient funds, but they are in some ways separate from the insolvency system and separate in the consideration of the rank or the priority order in which creditors are dealt with in an insolvency.

● (1245)

Mr. Bernard Généreux: Thank you very much.

The Chair: Next we have MP Poilievre.

You have the floor. Go ahead.

Right after you, we have MP Ehsassi and MP Duvall.

Hon. Pierre Poilievre: Thank you very much.

Thank you, Mr. Schaan, for your appearance here. Obviously, you're extremely knowledgeable about your file, so thank you for what you do.

I'm going to go through a bunch of the contentions in this bill, on both sides.

You deal, I'm sure, with corporate and industrial stakeholders. You must interact with industry to do your job properly. Is that a fair comment to make?

Mr. Mark Schaan: It is. Yes.

Hon. Pierre Poilievre: Where the hell are they? We haven't heard anything. I was expecting that the business community was going to be storming into this committee, warning us about the dangers of this bill, and we have heard nothing, frankly.

Mr. Mark Schaan: Yes. I obviously can't speak to that.

We have had representations in the past. When we pursued legislative amendments to the BIA and CCAA process, I guess two years ago, as part of the retirement security project, we ran consultations across the country and certainly had strong feedback from plan sponsors and from associations of plan sponsors, alongside very strong representations from workers, from unions, from think tanks and from academics. Certainly in previous consultations there has been active consideration by a number of parties as to what warrants good retirement security in pension and insolvency policy.

I can't speak to why they didn't storm in today or earlier and make their representations.

Hon. Pierre Poilievre: I think it was the great Rabbi Hillel who said, “If I am not for myself, who will be for me?” We're told there are these people who are so worried about this bill, but they're not speaking up. I think we had one or two witnesses with concerns; the rest were in favour of it. My office made a point, in the interest of balance, to ask that the clerk invite the Chamber of Commerce and the Business Council. I understand they didn't even bother to accept our invitation. Presumably, they represent the employer. There was another organization, I think it's called FETCO, which is responsible for federally regulated employers. Did I miss it? Did we hear a peep from them? I don't think we did.

If all the plan sponsors are so worried about this bill, I don't know why they didn't come and say so. Right now, if we're relying on the evidence presented at the committee, the testimony was overwhelmingly in the other direction. I appreciate that you've come here with a lot of very intelligent insights into the statute, the bill and the technical consequences of passing it. Frankly, you're the only one doing that. I suppose that's a compliment. The industry has been asleep at the wheel.

On that point, the argument that some people have made in the past against this bill and this idea is that it would raise the cost of capital. Businesses would have a harder time raising loans if members knew they would be knocked down the bankruptcy liquidation food chain. I have to say that I find that to be a strength of the bill, because it would force CEOs in the present day to ensure their pension is properly funded to be able to go to the markets. If lenders were consistently telling the CFO and the CEO, “Well, we're not going to lend to you because we're worried that we're going to be behind a pension liability,” that would be a wonderful incentive for those executives to eliminate that liability, by ensuring they put enough funds into the pension entity.

What do you say to that?

● (1250)

Mr. Mark Schaan: I think a lot depends on the relative market prospects, the operational considerations of the entity in question, and then the duration. Sure, in pure market theory, if the only chance for me to get 100% paid was if the pension was 100% funded, I would press for the pension to be 100% funded so that I get 100% paid. The alternative, though, is that if I believe there is some other mechanism by which I could get 100% paid, I might pursue it.

Notably, if I know that you have a large unfunded pension liability, I may make a couple of other choices. One is I may charge you a lot for that capital, which may force you into a liquidation because you may not be able to access it at that price. The second is I might try to be the first. This is one of the principles of our insolvency system. We have what we term a “prevention against the race to the courthouse”. That's why we make all the creditors come together, line up and figure out exactly where they fit and how they go. Then we treat them, class by class, in that consideration.

One of the fears is that you might incentivize a race, not to the courthouse but to call in your loan, in that if you actually had an existing liability with the entity, if you thought you could go before your competitors and if you knew they had other secured lenders and you could potentially get your piece of the pie back before they went insolvent, you would do that. You would try to get paid, but that would force the entity into liquidation sooner and potentially prevent the restructuring we were hoping for.

While in theory this could put on pressure, we also potentially need to look at time frame and amount. As we noted, pension regulations vary enormously from jurisdiction to jurisdiction, so in some cases, that pension liability is going to be [*Technical difficulty—Editor*] up, but what's the time frame in which you're going to put pressure on me to make it back? I can only really make it back to the degree to which I either have sufficient excess working capital that I can defer to my pension obligations rather than my working capital, or I have market returns that potentially need to generate that mix.

One potential unintended consequence of that pressure is that I actually pursue a much riskier investment scheme with those pension funds in order to make back that portion. Your pressure on me when you say, “Mark, you need to be 100% funded in two years or I'm calling my loan,” means I'm suddenly saying, “Oh man, I need to make up that gap,” so I race out and make very risky investments that may or may not pay off but will ultimately lead to the outcome you are seeking as my creditor.

I think we'd have to consider a number of these factors when we look at whether it will apply pressure from lenders towards the good outcome of a fully funded pension, or whether we will see unintended consequences. These could include early liquidations, races to call in loans, and potentially riskier mechanisms and stewardship of pension funds by plan sponsors to be able to meet the requirements of their lenders.

Hon. Pierre Poilievre: Right, but I guess what I have a hard time believing is that it would be in the interest of management to throw away pension funds on extremely risky lottery-type investments. That would more likely reduce the overall value of the pension fund and make it harder still to raise money under this bill.

I think what it would actually do is force management to get the pensions in order now. If you're a CEO, and your lenders are all telling you, “Listen, the big obstacle to lending to you is that you don't properly fund your pension fund,” the first thing you're going to do is try to find a way to fund your pension plan, because it's in your interest or else you can't borrow. Then your shareholders are going to say, “Mr. CEO, why can't you borrow any money? Why won't anybody lend to you?” and then you'll have to say to them, “Well, it's because I didn't fund my pension plan and that comes first in a liquidation.”

That's the incentive I think this bill creates, and I think that's a positive—

● (1255)

Mr. Mark Schaan: I guess that depends on whether or not we think that lenders are going to be that singular. One thing is that if I'm a lender, I'm actually going to look at your full P and L and I'm going to say, yes, you have an unfunded pension liability. That makes me scared because I might not get paid, but if you're going to divert working capital, which is actually the means by which you are in profit, to go and fund your pension liability, I'm also not going to love you and be super interested in funding you because now actually the means by which you earn, which is ultimately the mechanism by which I'm going to get paid after you've paid that pension liability, is also now in jeopardy. You'd want a balanced approach from the entity.

Hon. Pierre Poilievre: That's right, but what you're really saying, Mr. Schaan, is that absent this bill, the business would invest in working capital instead of in the solvency of the pension fund.

Mr. Mark Schaan: It depends, I guess, on two things. One is the degree to which there is actually excess capital, and that is very much fact-specific, depending on the company. The second is their pension regulations. We don't give them that luxury in federally regulated pension plans. They have to be 100% funded, and then they make special payments over the subsequent five years to make up that gap.

That's not the case in all regulated pensions, so if I know I only have to be at 85% funded on a solvency basis, that 15% I can play with. I can make decisions about that. We don't give that luxury. We don't think that's something that's dispensable in a federally regulated context, but that's not necessarily the case.

If you actually see some of the companies—

Hon. Pierre Poilievre: I'm sorry, the 85% rule that exists in certain provinces, is that what you're referring to?

Mr. Mark Schaan: That's right.

Hon. Pierre Poilievre: I don't want them to have 15% of the pension fund as play money. That's what I'm trying to avoid.

Mr. Mark Schaan: In my consideration, I think one of the things we need to look at is the degree to which pension obligations are actually requiring of that, rather than trying to fix it in insolvency. To go back to one of my initial comments, fixing a policy problem at the tail end is much harder than trying to fix it at the front end when you actually—

Hon. Pierre Poilievre: I know. I guess what I'm saying—and I guess we'll have to agree to disagree on this—is that this bill would actually force them to fix it on the front end, because it would require that they get the money in place as soon as they go to bond markets. If you're doing a bond issuance and you're a CEO, all these extremely sophisticated analysts are going to tear apart your balance sheet, and they're going to say that, on the liabilities side, there's this pension thing, and they're only 84% or 85% funded in the pension thing, and they're getting away with it because they're in this province that allows it. As a bondholder, I would have to come behind that liability, so I'm going to make it known that I'm not bidding on these bonds because their pension is not properly funded. The CEO is then going to be in a present-day position where he has to get the pension in order if he wants to raise money and grow the company.

I think that's actually a positive market discipline to impose on CEOs who are promising pensions to workers and deferring their wages into those pension funds. It's not a bad thing that the CEO is put in that position; it's a good thing. That's the first point, I guess, that I would make.

The next point I would make is that you continue to raise the concern that if companies had to properly fund their pension funds before paying out other creditors in the case of a bankruptcy, they would be inclined to go bankrupt or fall into insolvency. What if we gave them three years for the coming into force of this bill, so that they could use that time to get their act together and replenish their pension funds, eliminate liabilities and present a positive balance sheet to markets when they raise money?

Mr. Mark Schaan: I'll offer a couple of considerations to that without weighing in one way or the other. I'll just say that our federally regulated pension obligations right now make special payments over five years. That's what we see as a reasonable planning window to allow people to make back up their current deficit, because oftentimes that deficit is not necessarily a function of their own making. It's the market returns. It's a number of factors. I believe there was a proposal at some point to make special payments in a certain province only three years, and there was push-back to the effect that three years was seen as insufficient.

The second is that there's nothing in a restructuring context right now that prevents that from happening with the consent of the pension regulator and the workers' union. In fact, that's exactly what happened in the case of Air Canada, where there was an agreement in the restructuring to forgo pension payments for a period of time to allow for the company to get back on its footing after the financial crisis and the complete decimation of air travel. That ultimately led to a restructured entity that came back.

● (1300)

The Chair: My apologies, Mr. Schaan. I don't want to interrupt you or MP Poilievre, but I'm receiving a note from the clerk that there is a hard stop at one o'clock because of a lack of translation services.

Hon. Pierre Poilievre: Is there no way that we could requisition other services?

The Chair: Unfortunately, we can't continue, from what I'm understanding from the clerk. We're going to have to stop there, but what I can do is....

MP Poilievre, you still have some questions outstanding, so I can keep the list. I have you, MP Ehsassi and MP Duvall on the list to speak, and what we can do when we pick this back up is start with you, MP Poilievre. I don't want to cut you off, but we're being told by the table that we have to adjourn.

Hon. Pierre Poilievre: Okay.

Thank you.

The Chair: With that, I'll work with the clerk to see when we can work with the schedule on this so that we can continue.

I want to thank the translators.

I also want to thank the witnesses for being here today. That was incredibly pertinent and helpful testimony that's going to assist us with this bill. I would like to thank you all again.

I want to do a special little shout-out to all of our staff members, who have been working incredibly hard, to the whip staff and the House leader staff. You are helping us do what we are doing, and I know we ask a lot of you. I just want to give a special shout-out because you are the unsung heroes of the Hill that we don't often recognize. Thank you so much for what you're doing.

With that, I will call this meeting adjourned.