

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
66	BIA s.81.1	Unpaid Suppliers

Proposed Wording

81.1 (1) Subject to this section, if a person (in this section referred to as the “supplier”) has sold to another person (in this section referred to as the “purchaser”) goods for use in relation to the purchaser’s business and delivered the goods to the purchaser or to the purchaser’s agent or mandatary, and the purchaser has not fully paid for the goods, the supplier may have access to and repossess the goods at the supplier’s own expense, and the purchaser, trustee or receiver, or the purchaser’s agent or mandatary, as the case may be, shall release the goods, if

(a) the supplier presents a written demand for repossession to the purchaser, trustee or receiver, in the prescribed form and containing the details of the transaction, within a period of 15 days after the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

(b) the goods were delivered within 30 days before the day on which the purchaser became bankrupt or became a person who is subject to a receivership;

.....

(4) If a notice of intention under section 50.4 or a proposal was filed in respect of the purchaser after the delivery of the goods to the purchaser and before the purchaser became bankrupt or became a person who is subject to a receivership, the 30-day period referred to in paragraph (1)(b) is the 30-day period before the filing of the notice of intention or, if there was no notice of intention, the filing of the proposal.

(5) A supplier’s right to repossess goods under this section expires if not exercised within the 15-day period referred to in paragraph (1)(a), unless the period is extended before its expiry by the trustee or receiver, or by the court.

.....

(12) The following definitions apply in this section.

“person who is subject to a receivership” means a person in respect of whom any property is under the possession or control of a receiver.

“receiver” means a receiver within the meaning of subsection 243(2).

Rationale

Trade suppliers are generally smaller and unsecured creditors in an insolvency proceeding. It is onerous for them to participate in the process on a cost/benefit analysis. Further, they are sometimes subject to abusive practice. Unethical managers who, aware that their business is careening towards insolvency, may be tempted to order excessive supplies just prior to a BIA filing with the intention of using the supplies to pay secured creditors. The trade suppliers had no recourse against such action until the addition of section 81.1.

Currently, the provision to protect unpaid suppliers creates a 30-day window for period from delivery to repossession of goods. For example, if 20 days after delivery of goods the purchaser commences proceedings under the BIA, the supplier has 10 days to repossess the goods that were not paid for. This causes some difficulty because the unpaid supplier may not have sufficient time to act. The reform is intended to create a standardized period for unpaid suppliers to act. Essentially, the reform will extend the window from 30 days to 45 days – an unpaid supplier may repossess goods delivered any time in the 30 days prior to a bankruptcy and has a period of 15 days after such filing to do so. The 15-day period should provide suppliers with a sufficient period to act to defend their interests.

Subsection (1) amends the current legislation in two respects. First, it provides for the situation where the debtor places the goods with an agent – for example, a warehouse. Courts have found that the current legislation does not account for this situation; therefore, the supplier has no recourse to repossess the goods. Second, the reform provides a supplier with the right to request repossession of goods within a set period of 15 days after the debtor becomes bankrupt or a receiver is appointed in respect of property of the debtor.

Subsection (4) is intended to provide application of the provision in the situation where a debtor initially proceeds by way of the proposal provisions of the BIA rather than bankruptcy or a receivership. Effectively, the 30-day period referred to in subsection (1) would be the 30 days prior to the commencement of proceedings under the BIA. The intention of the provision is to prevent against abuse by debtors who could initiate a proposal and, after 30 days, proceed to bankruptcy. Without the provision, unpaid suppliers would have no recourse to repossess their goods against debtors who proceed by way of a proposal or notice of intention.

Subsection (5) has been included to provide greater flexibility to extend beyond the 15-day period provided for in subsection (1). The trustee or receiver may extend the period unilaterally or an application may be made to the court by any interested party to extend the period in circumstances the court considers it appropriate to do so.

Subsection (12) has been added to provide definitions of terms used in the section.

Present Law

81.1 (1) Subject to this section, where a person (in this section referred to as the "supplier") has sold and delivered goods to another person (in this section referred to as the "purchaser") for use

in relation to the purchaser's business, and the purchaser has not fully paid for the goods, the supplier may have access to and repossess the goods at the supplier's own expense, and the purchaser, trustee or receiver shall release the goods, if

- (a) the supplier presents a written demand for repossession to the purchaser, trustee or receiver, in prescribed form and containing the details of the transaction, within a period of thirty days after the delivery of the goods to the purchaser;
- (b) at the time when the demand referred to in paragraph (a) is presented,
 - (i) the purchaser is bankrupt, or
 - (ii) there is a receiver, within the meaning of subsection 243(2), in relation to the purchaser;
- (c) at the time when the demand referred to in paragraph (a) is presented, the goods
 - (i) are in the possession of the purchaser, trustee or receiver,
 - (ii) are identifiable as the goods delivered by the supplier and not fully paid for,
 - (iii) are in the same state as they were on delivery,
 - (iv) have not been resold at arms' length, and
 - (v) are not subject to any agreement for sale at arms' length; and
- (d) the purchaser, trustee or receiver does not, forthwith after the demand referred to in paragraph (a) is presented, pay to the supplier the entire balance owing.

.....

(4) Where a notice of intention under section 50.4 or a proposal was filed in respect of the purchaser after the delivery of the goods to the purchaser and before there was a receiver, within the meaning of subsection 243(2), in relation to the purchaser or the purchaser became bankrupt, the period between

- (a) the earlier of the filing of the notice of intention or proposal, and
- (b) the earlier of the first day there was a receiver, within the meaning of subsection 243(2), in relation to the purchaser or the day the purchaser became bankrupt shall not be counted in determining the end of the thirty day period referred to in paragraph (1)(a).

(5) A supplier's right to repossess goods pursuant to this section expires if not exercised within ten days after the purchaser, trustee or receiver presents the supplier with a written notice admitting that right, unless the ten day period is extended by mutual agreement.

Senate Recommendation

Senate recommendation #23, which called for the repeal of the unpaid suppliers right to repossess goods, was not followed. The Senate's concern was that the legislation was not working as envisioned and, therefore, should be removed. For the reasons discussed in "Rationale", the removal of the provision was not considered the most effective approach.

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An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
67	BIA s.81.3 and 81.4	Unpaid Wages in Bankruptcy/Receivership

Proposed Wording

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the six months immediately before the date of bankruptcy is secured, as of that date, to the extent of \$2,000, by security on all the current assets of the bankrupt on that date.

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six month period referred to in that subsection, are deemed to have been earned in those six months.

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the six months immediately before the date of bankruptcy is secured, as of that date, to the extent of \$1,000, by security on all the bankrupt's current assets on that date.

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

(5) If the trustee disposes of current assets covered by the security, the trustee is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets, and is subrogated in and to all rights of the clerk, servant, traveling salesperson, labourer or worker of the amounts paid to that person by the trustee.

(6) For the purpose of this section and section 81.4, "compensation" includes vacation pay but does not include termination or severance pay.

(7) A claim referred to in this section is proved by delivering to the trustee a proof of claim in the prescribed form.

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months immediately before the first day on which there was a

receiver in relation to the person is secured, as of that day, to the extent of \$2,000, by security on all the person's current assets that are in the possession or under the control of the receiver.

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six-month period referred to in that subsection, are deemed to have been earned in those six months.

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months immediately before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000, by security on all the person's current assets that are in the possession or under the control of the receiver.

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2.

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets, and is subrogated in and to all rights of the clerk, servant, traveling salesperson, labourer or worker of the amounts paid to that person by the receiver.

(6) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

(7) The following definitions apply in this section.

“person who is subject to a receivership” means a person in respect of whom any property is under the possession or control of a receiver.

“receiver” means a receiver within the meaning of subsection 243(2).

Rationale

The reform is intended to create a limited super-priority in a bankruptcy or a receivership in favour of employees for unpaid wage claims. The super-priority is limited because the charge applies only to current assets – cash, accounts receivable and inventory.

The super-priority is created in situations where the debtor became bankrupt or became subject to a receivership to ensure comprehensive protection of unpaid wage claims. Without similar protection in either case, debtors with large unpaid wage claims would be encouraged to choose that proceeding which did not include the super-priority.

The discussion below references section 81.3 – the bankruptcy provision – but it mirrors section 81.4 – the receivership provision.

Subsection (1) sets out the basic application of the section. The language used mirrors the current provisions of the BIA, which have been interpreted and accepted by the courts.

Subsection (2) mirrors the current provisions of the BIA to capture commissions payable to salespersons.

Subsection (3) mirrors the current provisions of the BIA to capture disbursements made by employees and refundable to them by the debtor.

Subsection (4) creates the ranking of the charge created by the section. While the charge is granted a super-priority to almost all other creditors, it is subject to the rights of unpaid suppliers to repossess their goods, the rights of unpaid fishers, farmers and aquaculturists to a secured charge over the consideration received by the debtor for goods provided by the fisher, farmer or aquaculturist and deemed trusts.

Subsection (5) provides that a trustee who disposes of current assets is personally liable to unpaid employees in the amount of the consideration received for the current assets. The trustee is granted a right of subrogation to the claims of employees paid by the trustee pursuant to the section.

Subsection (6) defines “compensation” to exclude termination and severance pay. It is a codification of current practice.

Subsection (7) sets out the process for an employee to make a claim under the section.

Present Law

Section 136 of the BIA currently provides for a preferred priority for unpaid wage claims. There is no law that creates a super-priority.

Senate Recommendation

The reform follows Senate recommendation #20.

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Bill Clause No.	Section No.	Topic
67	BIA s.81.5 and 81.6	Unremitted Pension Contributions

Proposed Wording

81.5 (1) If the bankrupt is an employer who participated or participates in a prescribed pension plan for the benefit of the bankrupt's employees, the following amounts that are unpaid on the date of bankruptcy to the fund established for the purpose of the pension plan are secured by security on all the assets of the bankrupt:

- (a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
- (b) if the prescribed pension plan is regulated by an Act of Parliament,
 - (i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and
 - (ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*; and
- (c) in the case of any other prescribed pension plan,
 - (i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and
 - (ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament.

(2) A security under this section ranks above every other claim, right, charge or security against the bankrupt's assets, regardless of when that other claim, right, charge or security arose, except

- (a) rights under sections 81.1 and 81.2;
- (b) amounts referred to in subsection 67(3) that have been deemed to be held in trust; and
- (c) securities under sections 81.3 and 81.4.

(3) If the trustee disposes of assets covered by the security, the trustee is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

- (a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
- (b) if the prescribed pension plan is regulated by an Act of Parliament,
 - (i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and
 - (ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*; and
- (c) in the case of any other prescribed pension plan,
 - (i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and
 - (ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament.

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

(3) If the receiver disposes of assets covered by the security, the receiver is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

(4) The following definitions apply in this section.

“person who is subject to a receivership” means a person in respect of whom any property is under the possession or control of a receiver.

“receiver” means a receiver within the meaning of subsection 243(2).

Rationale

Pension rights may form a significant portion of a wage earner's compensation from its employer, although it is deferred income. When the employer undertakes a restructuring under the proposal provisions of the BIA, debts, including those owed to a pension fund, may be compromised. For wage earners, a diminution of pension benefits would have a negative impact

on future income levels.

The intention of the reform, as set out in subsection (1), is to create a super-priority for claims related to unremitted pension contributions outstanding when a employer becomes bankrupt. The amounts subject to the section are (1) contributions deducted from employees' salaries but not remitted to the pension fund, (2) contributions owed by an employer for the cost of benefits offered under the pension plan, excluding amounts payable to reduce an unfunded pension liability, and (3) contributions owed by an employer to a defined contribution plan. Claims not included under the super-priority are claims related to special payments ordered by a pension regulator to liquidate an unfunded liability and claims related to unfunded liabilities directly.

The super-priority is created in situations where the debtor became bankrupt or became subject to a receivership to ensure comprehensive protection of unremitted pension obligations claims. Without similar protection in either case, debtors with large unremitted pension obligations would be encouraged to choose that proceeding which did not include the super-priority.

Subsection (2) provides that the charge ranks in priority to all other claims except the rights of unpaid suppliers to repossess goods, the rights of unpaid fishers, farmers and aquaculturists to a secured charge against inventory, deemed trusts and the rights of unpaid employees to receive a limited super-priority charge under the BIA. Unlike unpaid wage claims, however, the super-priority is not limited to specific assets but rather is a charge against all of the assets of the debtor.

Subsection (3) provides that a trustee who disposes of assets covered by the super-priority charge is personally liable to pension fund for the amount of the consideration received for the covered assets. The trustee is granted a right of subrogation to the claim of pension fund pursuant to the section in an amount equal to the amount paid by the receiver to the pension fund.

The nature of pension regulation in Canada also affects aspects of the section - pensions may be regulated federally or provincially. The section must capture kinds of pensions described in the federal and provincial legislation. Prescribing pension plans that will be subject to this section provides greater flexibility to ensure that the appropriate pension plans are captured.

Present Law

None.

Senate Recommendation

Senate recommendation #21 advised that priorities relating to pension obligations not be improved. For the reasons discussed in "Rationale", the Senate recommendation was not followed.

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Bill Clause No.	Section No.	Topic
68	BIA s.84.1	Assignment of Agreements

Proposed Wording

84.1 (1) The court may, on application by an insolvent person or a trustee, make an order assigning the rights and obligations of the insolvent person under any agreement to any person, specified by the court, who has agreed to the assignment.

(2) The applicant must give notice of the assignment, in the prescribed manner, to every party to the agreement.

(3) Subsection (1) does not apply in respect of rights and obligations

(a) under an eligible financial contract within the meaning of subsection 65.1(8);

(b) under a lease referred to in subsection 65.2(1);

(c) under a collective agreement; and

(d) that are not assignable by reason of their nature.

(4) In deciding whether to make an assignment, the court must consider, among other things,

(a) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(b) whether it would be appropriate to assign the rights and obligations to that person.

(5) The court may not make the assignment if the court is satisfied that the insolvent person is in default under the agreement.

Rationale

The intention of the reform is to protect and enhance the assets of the estate of a bankrupt or an entity undergoing a restructuring by allowing that person to assign existing agreements to third parties for value.

Subsection (1) requires that court approval be obtained because there may be valid concerns that the party to whom the debtor wishes to assign the agreement may not be appropriate. The court can act as a disinterested third party to make a determination of the appropriateness of the proposed assignee based on the facts of the particular case.

A court hearing will only be required in circumstances where a counter-party refuses to agree to

an assignment or an assignment to a particular third party. Subsection (2) is intended to ensure that the counter-parties to the agreement have an opportunity to present their interests to the court.

Subsection (3) excludes certain agreements from the application of the section. Paragraphs (a), (b) and (c) refer to agreements that have obtained special treatment under the BIA and assignment would be contrary to that treatment. Paragraph (d) provides the court with the opportunity to extend the exclusion provision to include agreements that it considers non-assignable due to the agreements nature. The last paragraph is intended to provide flexibility to the court to review each agreement in light of the circumstances to determine whether or not it would be appropriate to allow the assignment.

Subsection (4) provides the courts with legislative guidance as to when an agreement may be assigned. The guidance is limited to enable the court to exercise its discretion to address individual fact situations.

Subsection (5) provides balance between the interests of the debtor and counter-parties to an agreement that is to be assigned. It would be unfair that the estate benefit financially by an assignment at the same time that a counter party is required to take a loss. If the agreement is in financial default, the counter-party would only have a claim against the debtor in bankruptcy.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #31.

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An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
68	BIA s.84.2	Ipso Facto Clauses

Proposed Wording

84.2 (1) No person may terminate or amend any agreement, including a security agreement, with an individual bankrupt, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the bankrupt, by reason only of the bankruptcy.

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend the lease by reason only of the bankruptcy or that the bankrupt has not paid rent in respect of any period before the date of bankruptcy.

(3) No public utility may discontinue service to an individual bankrupt by reason only of the bankruptcy or that the bankrupt has not paid for services rendered, or material provided, before the date of bankruptcy.

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the date of bankruptcy; or

(b) requiring the further advance of money or credit.

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(6) The court may, on application by a party to an agreement, declare that this section does not apply, or applies only to the extent declared by the court, if the applicant satisfies the court that the operation of this section would likely cause the applicant significant financial hardship.

Rationale

Contracting parties attempt to ensure that they deal with reputable and reliable co-parties. An extension of the principle may result in the inclusion of a clause stipulating that a future event that creates doubt as to the reliability of the co-party, may be a cause to terminate the agreement. The difficulty with such clauses is that they ignore the fact that the bankrupt may be fulfilling the agreement's terms and may continue to do so.

The intention of the reform is to ensure that agreements in good standing be respected by all parties. Therefore, the individual bankrupt, who is attempting to obtain his or her “fresh start”, will not be unreasonably evicted from their home, denied basic and essential services or denied other benefits to which they would otherwise be entitled.

The co-party will not be forced, however, to provide free services or materials to the bankrupt. Except as described in subsections (2) and (3), the bankrupt is required to pay for all services or materials provided to them. In addition, the co-party is not required to provide credit but may demand immediate payment. As such, the relationship between the bankrupt and the co-party remains balanced.

Subsection (1) prohibits the termination of an agreement with an individual bankrupt solely because of the fact of the bankruptcy. The intention of the reform is to provide protection for the bankrupt’s interests. The co-party maintains the right to terminate an agreement with the bankrupt for any other reason but the bankruptcy filing. The reform will enhance the estate of the bankrupt while not harming the interests of the co-party to the agreement.

Subsection (2) stipulates that a landlord may not evict a bankrupt only because of a bankruptcy or there is an amount for past rent outstanding prior to the bankruptcy. The provision applies only in respect of individuals – permitting a landlord to evict an individual only because of a bankruptcy or past obligations would cause a serious hardship on the individual. Balance in the relationship is restored, however, by requiring the bankrupt to pay rent on an on-going basis.

Subsection (3) stipulates that a public utility may not discontinue service only because the bankrupt owes for services rendered or material provided prior to the bankruptcy. The bankrupt is required to make payment for services and materials provided after the date of bankruptcy or the public utility would be entitled to discontinue service. Because public utilities provide essential services, permitting it to terminate service because of a bankruptcy or because an amount is outstanding would cause serious hardship to the individual bankrupt. Balance in the relationship is restored, however, by requiring the bankrupt to pay for on-going service.

Subsection (4) clarifies that the individual bankrupt is still required to comply with the terms of the agreement and that the co-party is not required to extend credit to the bankrupt. The provision extends the fairness principle to the co-party.

Subsection (5) clarifies that parties may not contract out of the constraints imposed by this provision. Because the provision applies only to individual bankrupts, the intention of the subsection is to ensure that when an individual is in an unequal bargaining position – for example, with a telephone service provider or other large, quasi-monopolistic enterprise – the individual would not be effectively forced to sign an unfavourable contract or be denied an essential service.

Subsection (6) provides that a party may seek court approval to terminate an agreement with the bankrupt only because of the fact of the bankruptcy where the party can satisfy the court that the party would otherwise suffer a serious financial loss. The intention is to reserve flexibility in the system.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #16.

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An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
69	BIA s.86(2)(a)	Crown claims

Proposed Wording

86. (2)(a) to claims that are secured by a security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

Rationale

Subsection 86(2)(a) was amended to comply with the Federal government's Harmonization Program aimed at changes to federal legislation to reflect the appropriate civil and common law terminology.

Present Law

86. (2)(a) to claims that are secured by a security or privilege of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body

Senate Recommendation

None.

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An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
70	BIA s.87(1)	Crown security

Proposed Wording

87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

Rationale

Subsection (1) was amended to simplify the language.

Present Law

87. (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered, before the earliest of

- (a) the date a petition is filed against the debtor,
- (b) the date the debtor makes an assignment,
- (c) the date the debtor files a notice of intention under section 50.4, and
- (d) the date on which a proposal is filed,

pursuant to a prescribed system of registration.

Senate Recommendation

None.

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Bill Clause No.	Section No.	<u>Topic</u>
71	BIA 91	Preferences and Transfers at Undervalue

Proposed Wording

Preferences (Title)

Rationale

Section 91 of the BIA, which deals with settlements is replaced by another concept in clause 73, section 96.1 – transfers at undervalue. The term “settlements” was eliminated from the title.

Present Law

Settlements and Preferences (Title)

Senate Recommendation

None.

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Bill Clause No.	Section No.	Topic
72	BIA s.94	Assignment of Book Debt

Proposed Wording

72. Section 94 of the Act is repealed.

Rationale

The assignment of book debt registration requirement is now dealt with under provincial regimes.

Present Law

94. (1) Where a person engaged in any trade or business makes an assignment of his existing or future book debts or any class or part thereof and subsequently becomes bankrupt, the assignment of book debts is void against the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

(2) This section does not apply to an assignment of book debts that is registered pursuant to any statute of any province providing for the registration thereof if the assignment is valid in accordance with the laws of the province.

(3) Nothing in this section renders void any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
73	BIA s.96 and s.96.1	Undervalue Transfers and Preferences

Proposed Wording

96. If the transfer, charge, payment, obligation or judicial proceeding referred to in section 95 has the effect of giving a creditor who is not at arm's length a preference over other creditors, the period referred to in subsection 95(1) is one year instead of three months.

96.1 (1) If a debtor has entered into a transaction with another party, the court may, on the application of the trustee, inquire into whether the transaction was a transfer at undervalue and whether or not the other party was at arm's length with the debtor.

(2) If the court finds that the other party in the transaction was at arm's length with the debtor and that the transaction was a transfer at undervalue, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the debtor or against all those persons for the difference between the actual consideration given or received by the debtor and the fair market value, as determined by the court, of the property or services concerned in the transaction, if

(a) the transaction occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy; and

(b) the debtor was insolvent at the time of, or was rendered insolvent by, the transaction, and the debtor intended to defeat the interests of creditors.

(3) If the court finds that the other party in the transaction was not at arm's length with the debtor and that the transaction was a transfer at undervalue, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the debtor or against all those persons for the difference between the actual consideration given or received by the debtor and the fair market value, as determined by the court, of the property or services concerned in the transaction, if the transaction occurred during the period

(a) that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy; or

(b) that begins five years before the date of the initial bankruptcy event and that ends one day before one year before the date of the initial bankruptcy event in the case where

(i) the debtor was insolvent at the time of, or was rendered insolvent by, the transaction, or

(ii) the debtor intended to defeat the interests of creditors.

(4) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services concerned in the transaction and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor in the transaction, and the values on which the court makes any finding under this section are the values so stated by the trustee unless other values are proved.

Rationale

The proposed reform is a complete framework for challenging transactions that may diminish the value of the insolvent debtor's estate, reducing the amount of money available for distribution to the creditors. These types of transactions are called preferences and transfers at undervalue. A preference occurs when an insolvent debtor pays one or more creditors at the expense of other creditors. A transfer at undervalue is a transaction in which the consideration received by a person is conspicuously less than the fair market value of the property or services sold or disposed of by the person in the transaction. This improved framework will provide fairness and predictability when dealing with these types of transactions in the insolvency system.

Section 96, regarding preferences, clarifies that there is no requirement to prove that the debtor intended to prefer a non arm's length creditor. The clarification recognizes the difficulty and expense required to prove intent. The timeframe for looking back on preferences with a non arm's length creditor remains one year. Other amendments to this section modernize the language.

Section 96.1 deals with transfers at undervalue. Subsection 96.1 (1) enables the trustee to apply to the court so that the court may determine as a question of fact whether the transaction was a transfer at undervalue and whether or not the other party was at arm's length with the debtor in relation to the transfer.

Subsection 96.1 (2) deals with the situation where the court has found the transaction to be a transfer at undervalue and that the parties were dealing at arm's length. In these cases, if the court determines that the transaction occurred within one year of the bankruptcy, the debtor was insolvent at the time of the transaction, and the debtor intended to defeat the interests of the creditors, the court may then grant judgment to the trustee against the other party to the transaction. The judgment may be for the difference between the actual consideration given and the fair market value as determined by the court.

Subsection 96.1 (3) deals with the situation where the court has found the transaction to be a transfer at undervalue and that the parties were not dealing at arm's length. In these cases, if the court determines that the transaction occurred within one year of the bankruptcy, the court may grant judgment to the trustee for the difference between the actual consideration given and the fair market value as determined by the court. However, in cases where the transaction occurred prior to the one year before the bankruptcy and up to five years before the bankruptcy, the court must find that the debtor was insolvent at the time of the transaction or that the debtor intended to defeat the interests of the creditors before it may grant judgment in favour of the

trustee against the other party to the transaction. The judgment may be for the difference between the actual consideration given and the fair market value as determined by the court.

Subsection 96.1 (4) provides that the trustee in making the application to the court shall state what the trustee believes to be the fair market value of the property and what the value of the actual consideration was. The court will base its decision on the values given by the trustee unless other values are proven to the court.

Present Law

96. If the transfer, charge, payment, obligation or judicial proceeding mentioned in section 95 is in favour of a person related to the insolvent person, the period referred to in subsection 95(1) shall be one year instead of three months.

Senate Recommendation

The proposed reform follows the Senate Committee's recommendation.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
74	BIA s.97 (1)	Transfers at Undervalue

Proposed Wording

97. (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

Rationale

This is a technical amendment replacing the term “reviewable transactions” with “transfers at undervalue.”

Present Law

97. (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting settlements, preferences and reviewable transactions:

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
75	BIA s.98.1	Assignment of Book Debts

Proposed Wording

98.1 (1) If a person engaged in any trade or business makes an assignment of their existing or future book debts, or any class or part of those debts, and subsequently becomes bankrupt, the assignment of book debts is void as against, or, in the Province of Quebec, may not be set up against, the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

(2) Subsection (1) does not apply to an assignment of book debts that is registered under any statute of any province providing for the registration of assignments of book debts if the assignment is valid in accordance with the laws of the province.

(3) Nothing in subsection (1) renders void or, in the Province of Quebec, null any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Rationale

This proposed reform is a re-numbering of an existing section and a modernization of the language.

Present Law

94. (1) Where a person engaged in any trade or business makes an assignment of his existing or future book debts or any class or part thereof and subsequently becomes bankrupt, the assignment of book debts is void against the trustee with respect to any book debts that have not been paid at the date of the bankruptcy.

(2) This section does not apply to an assignment of book debts that is registered pursuant to any statute of any province providing for the registration thereof if the assignment is valid in

accordance with the laws of the province.

(3) Nothing in this section renders void any assignment of book debts due at the date of the assignment from specified debtors, or of debts growing due under specified contracts, or any assignment of book debts included in a transfer of a business made in good faith and for adequate valuable consideration.

(4) For the purposes of this section, "assignment" includes assignment by way of security, hypothec and other charges on book debts.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
76	BIA s.100	Transfers at Undervalue

Proposed Wording

76. Section 100 of the Act is repealed.

Rationale

The concept of reviewable transactions has been replaced with a new general cause of action for undervalue transfers.

Present Law

100. (1) Where a bankrupt sold, purchased, leased, hired, supplied or received property or services in a reviewable transaction within the period beginning on the day that is one year before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, the court may, on the application of the trustee, inquire into whether the bankrupt gave or received, as the case may be, fair market value in consideration for the property or services concerned in the transaction.

(2) Where the court in proceedings under this section finds that the consideration given or received by the bankrupt in the reviewable transaction was conspicuously greater or less than the fair market value of the property or services concerned in the transaction, the court may give judgment to the trustee against the other party to the transaction, against any other person being privy to the transaction with the bankrupt or against all those persons for the difference between the actual consideration given or received by the bankrupt and the fair market value, as determined by the court, of the property or services concerned in the transaction.

(3) In making an application under this section, the trustee shall state what in his opinion was the fair market value of the property or services concerned in the transaction and what in his opinion was the value of the actual consideration given or received by the bankrupt in the transaction, and the values on which the court makes any finding pursuant to this section shall be the values so stated by the trustee unless other values are proven.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
77	BIA s.102(3)	Information and Notice

Proposed Wording

102. (3) In the case of the bankruptcy of an individual, the trustee shall set out in the notice, in the prescribed form, information concerning the financial situation of the bankrupt and the obligation of the bankrupt, if any, to make payments required under section 68 to the estate of the bankrupt.

Rationale

The proposed reform is a technical amendment to correct the the fact that the notice will include whether or not the bankrupt is obligated to make surplus income payments. The proposed wording is also designed to streamline the system and improve its efficiency by eliminating unnecessary notifications.

Present Law

102. (3) In the case of the bankruptcy of an individual, the trustee shall

- (a) set out in the notice, in the prescribed form, information concerning the financial situation of the bankrupt and the obligation of the bankrupt to make payments required under section 68 to the estate of the bankrupt; and
- (b) forthwith advise the official receiver, and any creditors who have requested such information, of
 - (i) any material change relating to the financial situation of the bankrupt, and
 - (ii) any amendment made under subsection 68(4) to the amount that the bankrupt is required to pay to the estate of the bankrupt.

Senate Recommendation

The proposed reform follows the Senate Committee's recommendation.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
78	BIA s.104 (1)	Creditor Meetings

Proposed Wording

104. (1) Meetings of creditors other than the first shall be called by sending a notice of the time and place of the meeting together with an agenda outlining the items for discussion with a reasonable explanation of what is expected to be discussed for each item, not less than five days before the time of each meeting to each creditor at the address given in the creditor's proof of claim.

Rationale

The amendment is intended to encourage more creditors to participate in the process by providing them with information they need to make informed decisions.

Present Law

104. (1) Meetings of creditors other than the first shall be called by sending a notice of the time and place thereof not less than five days before the time of each meeting to each creditor at the address given in the creditor's proof of claim.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
79	BIA s.105(4)	Minutes of creditors' meeting

Proposed Wording

105. (4) The chair of any meeting of creditors shall, within a reasonable time after each meeting, cause minutes of the proceedings at the meeting to be prepared. The minutes shall be signed by the chair or by the chair of the next meeting and shall be retained as part of the books, records and documents referred to in section 26 relating to the administration of the estate.

Rationale

The reform is intended to increase the integrity of the insolvency system by mandating that the minutes of creditors' meetings are prepared relatively soon after each meeting and by mandating that the minutes be retained as part of the records of the estate.

Present Law

105. (4) The chairman of any meeting of creditors shall cause minutes of the proceedings at the meeting to be drawn up and entered in a book kept for that purpose, and the minutes shall be signed by him or by the chairman of the next ensuing meeting.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
80	BIA s.109 (1), (6) and (7)	Voting at the meeting of creditors

Proposed Wording

109. (1) A person is not entitled to vote as a creditor at any meeting of creditors unless the person has duly proved a claim provable in bankruptcy and the proof of claim has been duly filed with the trustee before the time appointed for the meeting.

.....

(6) If, in respect of the vote on any particular matter at a meeting of creditors, the chair is of the opinion that the outcome of the vote was determined by the vote of a person who did not deal with the debtor at arm's length at any time within the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy, the chair shall redetermine the outcome of the vote by not including the votes of all such creditors, and that new outcome, as redetermined by the chair, is the outcome of the vote, unless an application is made to the court within 10 days by one of the creditors whose vote was not included and the court, if it decides to include the vote of the applicant, determines another outcome for the vote.

Rationale

The reform to subsection (1) is a technical amendment to modernize language use.

The reform, as set out in subsection (6) is intended to simplify and streamline the voting process at creditors' meetings. Parties not at arm's length were barred from voting unless they obtained court approval to vote prior to the meeting. The provision will be amended to allow parties not at arm's length to vote at the meeting, ensuring that the meeting is not delayed while the party seeks court permission to vote, and only if the votes of non-arm's length parties affect the outcome will court approval be required.

Subsection (7) was repealed because matters dealt with within that subsection were moved to subsection (6).

Present Law

109. (1) A person is not entitled to vote as a creditor at any meeting of creditors unless he has duly proved a claim provable in bankruptcy and the proof of claim has been duly lodged with the trustee before the time appointed for the meeting.

(6) Except as otherwise provided by this Act, a creditor is not entitled to vote at any meeting of creditors if the creditor did not, at all times within the period beginning on the day that is one year before the date of the initial bankruptcy event in respect of the debtor and ending on the date of the bankruptcy, both dates included, deal with the debtor at arm's length.

(7) A creditor who is not entitled to vote at a meeting of creditors by virtue of subsection (6) may with leave of the court vote at the meeting of creditors when all the creditors who have dealt with the debtor at arm's length do not together represent at least twenty per cent in value of the claims against the debtor.

Senate Recommendation

The reforms meet the objectives of the Senate recommendation while simplifying the voting process for the trustee. The Senate recommendation was:

The Bankruptcy and Insolvency Act be amended to provide voting rights to non-arm's length creditors who have been dealing with the debtor at non-arm's length in the year prior to the bankruptcy, if they represent together more than 40% of the value of the total claims. In the event that the non-arm's length creditors vote changes the outcome of the vote, any interested party should then seek leave of the Court to have the vote included.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
81	BIA s.110(1)	Voting

Proposed Wording

110. (1) No person is entitled to vote on a claim acquired after the date of bankruptcy in respect of a debtor unless the entire claim is acquired.

Rationale

The reform is a technical amendment to clarify that the claim must be acquired prior to the date of the bankruptcy, as defined. The definition for the date of the bankruptcy includes specific, measurable triggers that should make it easier to determine if the claim was acquired at the proper time.

Present Law

110. (1) No person is entitled to vote on a claim acquired after the bankruptcy of a debtor unless the entire claim is acquired.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
82	BIA s.113(1), (2) and (3)	Voting

Proposed Wording

113. (1) If the trustee is a proxyholder for a creditor, the trustee may vote as a creditor at any meeting of creditors.

(2) The vote of the trustee — or of the partner, clerk or legal counsel of the trustee, or of the clerk of the legal counsel of the trustee — as proxyholder for a creditor, shall not be counted in respect of any resolution affecting the remuneration or conduct of the trustee.

(3) The following persons are not entitled to vote on the appointment of a trustee — and except with the permission of the court and on any condition that the court may impose, the following persons are not entitled to vote on the appointment of inspectors:

- (a) the father, mother, child, sister, brother, uncle or aunt, by blood, adoption, marriage or common-law partnership, or the spouse or common-law partner, of the bankrupt;
- (b) where the bankrupt is a corporation, any officer, director or employee thereof; and
- (c) where the bankrupt is a corporation, any wholly owned subsidiary corporation or any officer, director or employee thereof.

Rationale

The amendments to subsections (1) and (2) eliminate the possibility that a person could be both trustee and creditor in the same file as this would be a conflict of interest and contrary to the Code of Ethics for trustees. The language is also modernized.

The amendment to subsection (3) is intended to allow related parties to vote on the appointment of inspectors, who act as representatives of the creditors, in appropriate circumstances – for example, where the majority creditors are related parties.

Present Law

113. (1) Where the trustee is a creditor or a proxy for a creditor, he may vote as a creditor at any meeting of creditors.

(2) The vote of the trustee or of his partner, clerk, legal counsel or legal counsel's clerk, either as creditor or as proxy for a creditor, shall not be reckoned in the majority required for passing any resolution affecting the remuneration or conduct of the trustee.

(3) The following persons are not entitled to vote on the appointment of a trustee or inspectors:

- (a) the father, mother, child, sister, brother, uncle or aunt, by blood, adoption, marriage or common-law partnership, or the spouse or common-law partner, of the bankrupt;
 - (b) where the bankrupt is a corporation, any officer, director or employee thereof; and
 - (c) where the bankrupt is a corporation, any wholly owned subsidiary corporation or any officer, director or employee thereof.
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Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
83	BIA s.116(1)	Appointment of inspectors

Proposed Wording

116. (1) At the first or a subsequent meeting of creditors, the creditors shall, by resolution, appoint up to five inspectors of the estate of the bankrupt or agree not to appoint any inspectors.

Rationale

The amendment to subsection (1) clarifies that creditors are not required to appoint inspectors. This accords with the current practice. In many files, creditors are not interested in appointing or acting as inspectors. Concurrent amendments to the Act provide the trustee with the authority to act unilaterally where inspectors are not appointed.

Present Law

116. (1) At the first or a subsequent meeting of creditors, the creditors shall appoint one or more, but not exceeding five, inspectors of the estate of the bankrupt.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
84	BIA s.118	Inspectors

Proposed Wording

118. If the inspectors fail to exercise the powers conferred on them, the trustee shall call a meeting of the creditors for the purpose of substituting other inspectors and for the purpose of taking any action or giving any directions that may be necessary.

Rationale

The reform is a technical amendment intended to reflect concurrent amendments, which clarified that creditors are not required to appoint inspectors.

Present Law

118. Where there are no inspectors of the estate of the bankrupt or where the inspectors fail to exercise the powers conferred on them, the trustee shall call a meeting of the creditors for the purpose of appointing inspectors or substituting other inspectors, taking such action or giving such directions as may be necessary.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
85	BIA s.120(3)	Duties of inspectors

Proposed Wording

120. (3) In addition to the other duties that are attributed to them under this Act, the inspectors shall from time to time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

Rationale

The reform is intended to clarify that inspectors have duties, in addition to those set out in this provision, pursuant to the Act.

Present Law

120. (3) The inspectors shall from time to time verify the bank balance of the estate, examine the trustee's accounts and inquire into the adequacy of the security filed by the trustee and, subject to subsection (4), shall approve the trustee's final statement of receipts and disbursements, dividend sheet and disposition of unrealized property.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
86	BIA s.124(5)	Proof of Claims

Proposed Wording

86. Subsection 124(5) of the Act is repealed.

Rationale

The requirement that the creditor set out whether the claim is secured or preferred is removed as many creditors lack the knowledge to make this determination. It is a duty of the trustee to determine the status of claims.

Present Law

124. (5) The proof of claim shall state whether the creditor is or is not a secured or preferred creditor.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
87	BIA s.126(1) and (2)	Proof of claim

Proposed Wording

126. (1) Every creditor who has filed a proof of claim is entitled to see and examine the proofs of other creditors.

(2) Proofs of claims for wages of workers and others employed by the bankrupt may be made in one proof by the bankrupt, by someone on the bankrupt's behalf, by a representative of a federal or provincial ministry responsible for labour matters, by a representative of a union representing workers and others employed by the bankrupt or by a court-appointed representative, and that proof is to be made by attaching to it a schedule setting out the names and addresses of the workers and others and the amounts severally due to them, but that proof does not disentitle any worker or other wage earner to file a separate proof on his or her own behalf.

Rationale

The language use in the English version of subsection (1) was modernized.

The reform to subsection (2) authorizes the court to appoint a representative to file claims on behalf of employees. The amendment is intended to create greater efficiency by ensuring that in all cases there is a person to file the claims. In some cases, especially in bankruptcies where there are few assets, no party is willing to complete the task because it is unlikely that the person will be compensated for the work.

Present Law

126. (1) Every creditor who has lodged a proof of claim is entitled to see and examine the proofs of other creditors.

(2) Proofs of claims for wages of workers and others employed by the bankrupt may be made in one proof by the bankrupt or someone on behalf of the bankrupt or by a representative of a federal or provincial ministry responsible for labour matters or a representative of a union representing workers and others employed by the bankrupt, by attaching thereto a schedule setting out the names and addresses of the workers and others and the amounts severally due to them, but that proof does not disentitle any worker or other wage-earner to file a separate proof

on their own behalf.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
88	BIA s.136(1)	Priorities

Proposed Wording

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

.....

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

Rationale

The reforms related to unpaid wages and unremitted pension contributions effectively create a super-priority for those amounts. Because secured creditors may find that their security is compromised by the operation of the super-priority, a preferred claim will be created to provide the secured creditor with better relief than they would otherwise be entitled to under the current priority scheme. Without the preferred claim, a creditor that should be secured would be treated as an unsecured creditor.

Paragraph (d) effectively mirrors the current provision.

Paragraph (d.01) creates a preferred claim in favour of secured creditors whose security was defeated by the operation of new sections that create a super-priority in favour of unpaid wages.

Paragraph (d.02) creates a preferred claim in favour of secured creditors whose security was defeated by the operation of new sections that create a super-priority in favour of unremitted pension contributions.

Present Law

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

.....

(d) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during the six months immediately preceding the bankruptcy to the extent of two thousand dollars in each case, together with, in the case of a travelling salesman, disbursements properly incurred by that salesman in and about the bankrupt's business, to the extent of an additional one thousand dollars in each case, during the same period, and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six month period, shall be deemed to have been earned therein;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

Senate Recommendation

The reform follows Senate recommendation #20.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
89	BIA s.137(1)	Postponement of claim

Proposed Wording

137. (1) A creditor who, at any time before the bankruptcy of a debtor, entered into a transaction with the debtor and who was not at arm's length with the debtor at that time is not entitled to claim a dividend in respect of a claim arising out of that transaction until all claims of the other creditors have been satisfied, unless the transaction was in the opinion of the trustee or of the court a proper transaction.

Rationale

The reform is a technical amendment reflecting concurrent amendments that replaced provisions relating to “reviewable transactions” with “transfers at undervalue”.

Present Law

137. (1) A creditor who entered into a reviewable transaction with a debtor at any time prior to the bankruptcy of the debtor is not entitled to claim a dividend in respect of a claim arising out of that transaction until all claims of the other creditors have been satisfied unless the transaction was in the opinion of the trustee or of the court a proper transaction.

Senate Recommendation

None.

BRIEFING BOOK

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts.

Bill Clause No.	Section No.	Topic
90	BIA s.140.1	Equity claims

Proposed Wording

140.1 A creditor is not entitled to claim a dividend in respect of a claim arising from the rescission of a purchase or sale of a share or unit of the bankrupt — or in respect of a claim for damages arising from the purchase or sale of a share or unit of the bankrupt — until all claims of the other creditors have been satisfied.

Rationale

Investors in a business willingly engage in the taking of risk – the risk of profit or loss based on the business' operations. When the investor has been fraudulently misled into investing in a business, and has suffered a financial loss, that investor has a legal action against the company, the directors and others who were party to the deception. When the company is in financial distress, however, there may not be the means to make good the losses suffered by investors.

The intention of the reform is to put shareholders at the bottom of the priorities list. Section 140.1 provides that claims arising from the purchase or sale of equity of the bankrupt are subordinated to all other claims.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #40:

The *Bankruptcy and Insolvency Act* be amended to provide that the claim of a seller or purchaser of equity securities, seeking damages or rescission in connection with the transaction, be subordinated to the claims of ordinary creditors. Moreover, these claims should not participate in the proceeds of a restructuring or bankruptcy until other creditors of the debtor have been paid in full.