

July 15, 2014

Mr. Paul Halucha
Director General, Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th floor, East Tower
Ottawa, Ontario K1A 0H5

Dear Mr. Halucha,

The Canadian Federation of Independent Business (CFIB) is a non-partisan, not-for-profit political advocacy organization representing the interests of 109,000 small- and medium-sized enterprises (SMEs) across Canada. We are writing to provide feedback on the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA) consultation. Specifically, we wish to offer feedback on measures that can help provide better protection for small businesses in bankruptcy proceedings.

SMEs: Canada's economic engine of growth

SMEs are the drivers of the Canadian economy and the largest job creators. Nearly ninety-eight per cent of all businesses in Canada have fewer than 50 employees and more than 60 per cent of the private sector workforce is employed by SMEs, which in turn produce almost half of Canada's economic output. A thriving small business sector is an essential component of a healthy economy, and efficient and fair bankruptcy legislation is a critical component of a well-functioning SME sector. Unfair bankruptcy legislation can lead to lost jobs for Canadians, as small businesses struggle to recover revenue lost at the hands of a bankrupt client. Stronger bankruptcy legislation can help provide much needed protection and fairness to Canada's small businesses, allowing them to continue to expand and employ millions of Canadians across the country.

CFIB involvement in the review of bankruptcy legislation

CFIB has been actively engaged on this issue for several decades. In 2003, we submitted comments to the Federal Standing Committee on Banking, Trade and Commerce and provided several key recommendations to help strengthen the legislation and level the playing field for small businesses involved in bankruptcy proceedings. While we acknowledge that small improvements to the legislation were a step in the right direction, in reality, these changes did not provide effective protection for small business owners and there remains much room for improvement. Federal bankruptcy laws are still largely unfair towards SME owners because the current legislation is outdated, complex, and does not look after their interests.

Unpaid supplier's rights

There is a widespread perception among SMEs that debates over changes to bankruptcy legislation have been dominated by specialists (lawyers and academics) who largely look after the interests of their clients, often secured creditors. However, the majority of actors involved in bankruptcy proceedings are unsecured creditors, often small businesses, who are not adequately protected under the current legislation. Small business owners who are suppliers to other companies are often left out of bankruptcy proceedings, or go through a very difficult and time consuming process to receive any form of financial compensation from a bankrupt client. While CFIB is not asking the government to consider SMEs as “super-priority creditors” in bankruptcy proceedings, there are still many areas of improvement to encourage fairness for all creditors.

To help address this issue, we recommend that when small businesses become unpaid suppliers, they be given consideration during the debtor's bankruptcy proceedings. Trustees must also work to avoid the perception that they act largely on behalf of the secured lenders. This will ensure that debtors are held accountable to both secured and unsecured creditors, resulting in better protection for small business owners.

Protection for unfinished goods

In certain situations, when a client goes bankrupt, small business creditors may retrieve their goods; however, other times they cannot. For instance, some small businesses that repair or refurbish equipment or furniture often accept contracts without upfront payment and are not paid until the job is completed. However, if the client declares bankruptcy before payment is rendered, the small business often cannot be compensated for their time, or retrieve their merchandise, since the goods belong to the bankrupt firm. In addition, if work has already been performed on the goods or is in the process of being performed, the small business is obligated to complete the contract and ship the goods, all the while knowing payment will never be received.

This is undoubtedly an area of great frustration for small business creditors caught in contractual obligations with insolvent clients. CFIB recommends that the rules and requirements surrounding unfinished goods be examined to increase protection and provide greater flexibility for small business creditors involved in these circumstances. For instance, suggestions include measures which would allow the small business creditor to exit a contract without completing the job, or to repossess merchandise when the client declares bankruptcy. Any effort to improve current rules and increase protection for small business creditors would be greatly welcome.

Protection for goods purchased on credit

Small business owners have also experienced debtors accumulating goods purchased with credit prior to bankruptcy proceedings to increase their asset base, at the expense of the small business. This means that the client places an order with the small business, knowing full well they will never be able to cover the cost. To make matters worse, the small business must pay the non-refundable sales taxes to the government once the client takes possession of the good. Upon bankruptcy, the debtor's assets are liquidated, and the small business, now an unpaid supplier, often emerges empty handed without receiving any form of payment. That is why CFIB recommends that the ownership of goods purchased on credit remain the property of the small business supplier unless

the goods are paid in full. This would in turn help negate the debtor's claim against any unpaid assets at the expense of the small business owner.

Extending the repossession period

As it currently stands, once goods are in the possession of the debtor for 30 days, unpaid suppliers have no claim on the goods, regardless of the amount of money owing. The 30-day provision was initially intended to provide small creditors with enough time to complete the process required to repossess goods in the event of client insolvency. However, it has become clear that the 30-day period is not a realistic time frame to complete all necessary requirements, and should therefore be extended to a more manageable amount of time. Another suggestion is to review the provision so that the 30-day period begins once the debtor has officially declared bankruptcy, not before, to ensure the small business supplier is given ample time to submit the claim. CFIB therefore recommends an extension of the 30-day repossession right to provide further flexibility to small creditors submitting repossession claims.

Simplifying and clarifying repossession rules

Many small businesses feel that current repossession rules are very vague and complex and tend to work against unsecured creditors. For instance, if a box of unpaid goods is simply opened or the goods are even slightly altered, the small business cannot repossess the goods. These rules are extremely unreasonable and should be improved to allow greater flexibility in these circumstances. Moreover, CFIB recommends clarifying and simplifying repossession rules to help increase fairness in the process. This should include a requirement to provide timely and accurate information to the small business owner, to avoid unnecessary delays or interruptions due to a lack of information. All parties involved would greatly benefit from a simplified repossession process with fewer associated red tape hurdles.

Payment protection for SMEs: the case of fruit and vegetables producers

SME owners who produce fresh fruit and vegetables are a very tangible example of suppliers who do not have enough protection in the event of client bankruptcy. A majority of Canada's fruit and vegetable producers are small businesses with average sales of less than \$85,000 per year.¹ These SMEs are hit particularly hard when a buyer declares bankruptcy because the perishability of the product means that repossession of shipments is typically impossible. CFIB agrees with the Fresh Produce Alliance that a deemed trust mechanism will be an effective tool to help small businesses recover payments when a buyer declares bankruptcy and will also provide much needed security to fruit and vegetable producers.

Conclusions and Recommendations

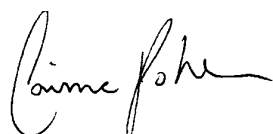
CFIB supports the strengthening of the BIA and CCAA to ensure full financial protection for small business owner suppliers in the event of customer insolvency. Increased protection can be improved through the following measures:

¹ Fresh Produce Alliance, 2014

- Unpaid suppliers must be given consideration during bankruptcy proceedings;
- Review rules and requirements surrounding unfinished goods to increase protection and fairness for small business creditors;
- Ownership of goods purchased on credit should not pass on to their debtor until the goods are paid in full;
- Extension of the current 30-day notice period for the repossession of goods;
- Clarification, simplification and more flexibility of repossession rules for unpaid goods;
- Increased accountability to small businesses who become unpaid suppliers; this means providing timely and accurate information from the start of the bankruptcy proceedings; and,
- Establishing a deemed trust mechanism to provide security and increase fairness for buyers and sellers of fresh produce in case of buyer bankruptcy.

We appreciate the opportunity to provide feedback on the administration and operation of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*. We hope that the current review will bring positive change to bankruptcy proceedings and increase fairness for small business owners involved in the process. Should you or your colleagues have any further questions, please do not hesitate to contact me at 613-235-2373.

Sincerely,

A handwritten signature in black ink, appearing to read "Corinne Pohlmann". The signature is fluid and cursive, with the first name being the most prominent.

Corinne Pohlmann
Senior Vice-President, National Affairs