

Bankruptcy and Insolvency Act Companies' Creditors Arrangement Act

Bill to Amend—Second Reading—Debate Continued

On the Order:

Resuming debate on the motion of the Honourable Senator Eggleton, P.C., seconded by the Honourable Senator Tardif, for the second reading of Bill S-216, An Act to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act in order to protect beneficiaries of long term disability benefits plans.

Hon. Percy Mockler: Honourable senators, I would like to take a trip back through time, and refer to the English version of the debates of this chamber from 1872. We heard Senator Olivier speak so eloquently about this in French.

We have always taken past debates into account, in an attempt to improve Canadian institutions and in an attempt to ensure that what we propose in this chamber truly reflects what I would refer to as the great debates.

In 1872, the Honourable Mr. Sanborn rose in this chamber to speak about insolvency laws. He said:

. . . the insolvency laws of England, of the United States, and of France, [are] all widely different from one another.

(1600)

The Honourable Senator Sanborn went on to say, on page 97:

. . . if we swept away the regulations now in force in the country we would throw open the door to fraud, and disorganize trade . . .

I would like to focus on the words "disorganize trade" in the context of Bill S-216.

[English]

It is an honour for me to rise in debate on Bill S-216. I have never and will never doubt that each and every one of us, no matter where we sit in this great chamber and regardless of the fact that we have been appointed by different prime ministers, have a common denominator, and that common denominator is to make Canada a better place to live, a better place to raise our children, a better place to work and a better place to reach out to the most vulnerable.

As my mother told me when I was growing up, people do not care who we are until they know what we care for.

[Translation]

Honourable senators, as I take part in this debate on Bill S-216 to amend the Bankruptcy and Insolvency Act in order to better protect long-term disability benefits, I would like to begin by thanking Senator Eggleton for drawing our attention to this important matter.

There is no doubt in my mind that we all share his concern for the financial well-being of beneficiaries of long-term disability plans. We have great sympathy for the challenges that long-term disability beneficiaries face when their employer commences insolvency proceedings — as in the debate from 1872 that I just quoted — under the Bankruptcy and Insolvency Act, also known as the Companies' Creditors Arrangement Act.

Prime Minister Stephen Harper's government recognized the importance of this issue in the Speech from the Throne and stated that it would explore ways to better protect workers when their employers go bankrupt.

Honourable senators, we will ensure that any steps we take will address the concerns of long-term disability beneficiaries and will not have unintended adverse consequences either for other creditors or for the productivity and competitiveness of all Canadian employers.

[English]

Honourable senators, I want to thank the Honourable Senator Eggleton for bringing this matter to our attention. No doubt we all share his concern for the financial well-being of beneficiaries of long-term disability plans. We have great sympathy for the challenges that long-term disability beneficiaries face when their employer commences insolvency proceedings under the Bankruptcy and Insolvency Act, BIA, or the Companies' Creditors Arrangement Act, the CCAA. Such proceedings can have a significant impact on both current and former employees who are facing the prospect of a reduction of their LTD benefits at a particularly vulnerable point in their lives, through no fault of their own. Our government recognized the importance of this issue in the Throne Speech when it stated that it would explore ways to better protect workers when their employers go bankrupt.

As the chamber of sober second thought, we must be mindful that any steps we take are effective in addressing the concerns of LTD beneficiaries and do not have unintended adverse consequences either for other creditors or for the productivity and competitiveness of Canadian employers.

Honourable senators, a fundamental principle of the insolvency system is that of balance and fairness. We must always strive for balance and fairness, regardless of where we come from. The insolvency system must balance competing interests among the creditors of an insolvent business. Each creditor wants to be paid as much as possible from the limited funds available from the assets of the insolvent firm.

While Bill S-216 purports to improve the protection of long-term disability beneficiaries in bankruptcy, it would attempt to achieve this goal by altering the existing balance between

creditors and the insolvent company by requiring the payment of long-term disability claims before other creditors and restructuring under the CCAA and the BIA, creating a preferred claim for these amounts in bankruptcy under the BIA.

In the context of the CCAA and BIA restructuring, Bill S-216 would create the equivalent of a super priority, meaning that such claims would be paid ahead of the claims of secured creditors. In a bankruptcy under the BIA, Bill S-216 would provide for LTD claims to be paid after the claims of secured creditors but before the claims of unsecured creditors such as suppliers and contractors. I am concerned about that, honourable senators.

The implications of changing the priorities for payment in the insolvency system must be carefully considered and not undertaken hastily. I repeat: The implications of changing the priorities for payment in the insolvency system must be carefully considered and not undertaken hastily, without weighing and analyzing the potential consequences of such a change.

Honourable senators, as we consider this bill, we need to examine not only to what extent it will achieve the goal of better protecting the interests of claimants such as LTD beneficiaries but also what could potentially be the effect on all creditors. I believe that the BIA and the CCAA are fundamental components of Canada's marketplace framework legislation, as was indicated in the quote I read from the Hansard of 1872.

(1610)

As such, before changes are made to the priorities given to various claims, we need to have a greater awareness of these potential repercussions and potential changes. For example, before changing the priorities in insolvency, we must assess the impact of the costs and also the reduction in the availability of credit to Canadian employers. A significant adverse effect on credit could, in turn, affect competitiveness of the Canadian business world and Canadian businesses in an increasingly globalized marketplace. I am concerned. We must all be concerned.

Honourable senators, another issue we should look at is whether the difference in treatment of long term disability claims and restructurings in bankruptcy that Bill S-216 provides for can result in fewer successful restructurings, which is important, and more liquidation of otherwise viable companies. Lately, we have had such examples in New Brunswick.

For example, we should ask ourselves: Will secured creditors have an incentive to push an employer into bankruptcy over restructuring if there are large LTD claims? If the regime proposed by Bill S-216 were to be adopted, those are such questions. Yes, I am concerned. It goes without saying that it is in the public interest to promote the restructuring of otherwise viable companies in insolvency, as it results in better protection of jobs and greater return for creditors. We need to take care to ensure that Bill S-216 will not tip the balance toward liquidation of companies when a viable restructuring remains the greatest possibility.

Another point, honourable senators, is that while Bill S-216 aims at protecting LTD beneficiaries or bankrupt employers, before we make such a change to the BIA or CCA we need to look at whether that goal will be met. For example, do we know whether, in the context of a bankruptcy,

a preferred claim will result in significant return for LTD beneficiaries? What if there are large secured claims that rank ahead of the LTD claim?

I also point out a transitional provision clause in Bill S-216. Although it is a transitional clause, it is an important clause. This clause moves away from the principle that amendments to legislation will apply to future situations so as not to interfere retroactively with existing rights. The transitional clause provides that the proposed amendments will apply to all.

[Translation]

Honourable senators, before any changes are made to the priority structure, I think we should consider the impact such a change would have on costs and the reduction in the availability of credit to Canadian employers, no matter where we live. A significant reduction in credit could, in turn, make Canadian companies less competitive in an increasingly globalized marketplace.

[English]

Honourable senators, the treatment of self-funded LTD benefit claims in bankruptcy deserves serious consideration so that we avoid creating economic harm unintentionally. As honourable senators can see from my remarks, changing the BIA and the CCAA is not without ramifications and we should consider these ramifications carefully.

Honourable senators, our government, the government of the day of Mr. Harper, is consistent with our Speech from the Throne commitment, which is exploring comprehensive and holistic solutions to the problem of uninsured LTD benefits when an employer goes into bankruptcy. Further response will be carefully balanced to protect LTD benefits in insolvency, while continuing to protect the health of our economy as a whole.

[Translation]

Honourable senators, the treatment of self-funded long-term disability claims in the event of bankruptcy deserves serious — I repeat, serious — consideration so that we avoid doing unintentional economic damage. I am sure that is not what our colleague Senator Eggleton wants.

As you can see from my remarks, any change has ramifications, and we must consider them carefully and seriously.

[English]

In conclusion, honourable senators, we must be mindful that any steps we take are both effective in addressing the concern of long-term disability and, at the same time, do not have unintended adverse consequences either for other creditors or for the productivity and competitiveness of Canadian employers.

I believe a committee should undertake this type of careful analysis. The Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act are both fundamental components of Canada's marketplace framework legislation. Before changes are made to the priorities given to various claims, we need to have a greater awareness of these potential repercussions. We should be careful in committee when assessing the impact of these changes.

Honourable senators, our government recognizes the importance of this issue in our Speech from the Throne, when the government stated that it will explore ways to better protect workers when their employers declare bankruptcy.

Honourable senators, let us think together because we have the same common denominator: To make Canada a better place to live, work, raise our children and reach out to the most vulnerable.

Hon. Art Eggleton: I wish to put a question.

The Hon. the Speaker *pro tempore*: Will the Honourable Senator Mockler accept a question?

Senator Mockler: Yes.

Senator Eggleton: I appreciate Senator Mockler's desire to have this bill properly examined and to make sure we know what the ramifications are, as he pointed out. That is something that can be well answered at committee. This bill deals only with LTD, which has a limited financial impact.

The one thing I was confused about is where the senator thought this bill was placed these creditors in the list. What I have recommended here is preferred creditor status. They would be placed in a position where, for example, outstanding wages are placed but still behind secured creditors, which are banks and government loans, and still behind super priority, which includes the Canada Revenue Agency and various other creditors. It is well down the list from the preferred status.

(1620)

Honourable senators, the only other thing I want to point out is the transitional provision. The purpose behind the transitional provision is not to go back in history but to deal with those things that are presently in the process. That particularly answers the question of the 400 Nortel people, because there are 400 very sick people out there who have cancers and various other illnesses diseases. If we do not do something like this to help them, we will be letting Nortel off the hook and putting the taxpayer on the hook because they will have to go on to the social service and social welfare system.

In light of that preferred status, can you see your way to support this, certainly to see it go to committee where we can further examine these various ramifications?

Senator Mockler: Honourable senators, our government recognized the importance of this issue and included it in the Speech from the Throne. Our government is exploring ways to provide better protection to workers when their employers enter bankruptcy.

With regard to the company that has been mentioned by the Honourable Senator Eggleton, there is no doubt in my mind that each senator in this great chamber wants to help the most vulnerable. However, I ask Senator Eggleton to stand together to bring it to committee so that we can assure Canadians in all walks of life that there are no ramifications.

[Translation]

Hon. Claude Carignan: I am very pleased that Senator Mockler recognizes the fundamental importance of this bill for those who are ill.

I believe that this bill seeks to deal with the following problem: when someone becomes disabled or suffers from a long-term disability while working for a major corporation that has decided to self-fund the disability benefit, and if this company goes bankrupt, the disabled person finds himself with no income. This is a serious problem because, unlike someone who can find another job, the disabled person cannot seek employment or turn to another insurance company.

I invite the committee to study this issue seriously and with a great deal of compassion and to also explore other types of solutions. Preferred claims can have unfortunate consequences and the capital of the bankrupt entity may be insufficient to cover future benefits.

For example, one of my high school friends, who suffers from multiple sclerosis and is an engineer with Nortel, is caught in this exact situation. Imagine the amount of the future benefits or the overall amount of such a preferred claim.

Perhaps we should examine the solution of obliging companies that self-fund the benefits to secure a guarantee in the event of bankruptcy, or simply require them to use an established insurance company to cover future liabilities.

Senator Mockler: I thank Senator Carignan for the question and for clarifying this aspect of Bill S-216. It is for this reason that I am requesting the collaboration of honourable senators on both sides of the chamber. In order to eliminate all claims against benefits and to help those most affected, any changes to the Act must be made with a view to protecting these individuals. However, we must keep in mind the repercussions on competitiveness and on the restructuring of Canadian corporations. This is very important because without Canadian corporations there will not be programs to help the most vulnerable.

Hon. Roméo Antonius Dallaire: Would Senator Mockler agree to take another question?

Senator Mockler: Yes.

Senator Dallaire: Honourable senators, when the senator talks about long-term disability benefits, does that mean people would receive benefits beyond age 65?

Senator Mockler: Honourable senators, that is a very good question that could be studied during review of the bill if it were referred to a committee.

Senator Dallaire: With regard to the argument not to jeopardize companies that face the significant economic implication of taking on such plans, I would simply like to point out to the senator that it is his government that is responsible for implementing the New Veterans Charter.

This new charter is funded by the Canadian government, which is a large entity and does not really have to worry about insolvency. Under the charter, veterans with disabilities — who lose an arm, both arms, a leg, or the like — will lose all their benefits when they turn 65.

Perhaps the Canadian government has a problem with the concept of the long term or with the spirit of the law for veterans. In other words, when veterans are injured in combat and they lose a limb, it is for life and we should be able to help them for life.

Senator Mockler: That is another debate and it does not concern Bill S-216. I ask honourable senators to consider Bill S-216, in order to ensure that any amendments will reflect the needs of the people suffering with a long-term disability and so that we can protect the most vulnerable.

Senator Dallaire: I think that before telling the industry what to do, the government should lead by example and protect its own who are suffering from a disability for life.

(1630)

I meet those people regularly and Canadian veterans are quite pleased with the way the current government is looking after their well-being. On this side of the chamber, we will continue to work for the most vulnerable, regardless of who they are, honourable senators.

[*English*]

The Hon. the Speaker *pro tempore*: Further debate?

Are honourable senators ready for the question?

Is it your pleasure, honourable senators, to adopt the motion?

(Motion agreed to and bill read second time.)

Referred to Committee

The Hon. the Speaker *pro tempore*: Honourable senators, when shall this bill be read the third time?

(On motion of Senator Eggleton, bill referred to the Standing Senate Committee on Banking, Trade and Commerce.)

