

# Business Edge

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## Mixed reviews for bankruptcy legislation

### Bill C-55 puts employee rights before creditors

By Jack Kohane - Business Edge  
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Going broke in Canada may never be the same.

In amending the current Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA), Bill C-55 (also known as the Wage Earner Protection Program Act, or WEPP) proposes substantial reforms to this country's insolvency

"The bill hits many of the right things, but there are also lots of flaws in it," says Gary Lifman, a partner with insolvency restructuring consultants A. Farber & Partners in Toronto. "Because it was a hurried document, this new bankruptcy legislation has been controversial from the start."

Bill C-55 was fast-tracked through the last Parliament and received Royal Assent on Nov. 25, just as the recent federal election was called. However, because the election was about to be called, Bill C-55 went forward with the understanding that it would not come into force before June 30 at the earliest.



The legislation is under review by the Senate's committee on banking, trade and commerce. It is not known what changes the committee might propose and it is not expected that it will report before June 30.

But in its present form, Bill C-55 will bring changes in wage earner protection, collective bargaining agreements, wage claims priority, pension claims priority, debtor-in-possession financing, sale of assets and corporate governance.

Current insolvency acts, Lifman says, don't provide clear direction to the parties involved. The bill codifies what already exists, consolidating legions of existing case laws.

Although the bill places emphasis on restructuring of viable, but financially troubled, companies as an alternative to bankruptcy, Lifman says that in the new system, terminated employees will get up to \$2,000 in back wages before some suppliers and secured creditors are paid.

He predicts that ranking employee rights ahead of secured creditors will make it far tougher for teetering enterprises to raise their operating capital.

By introducing the WEPP, and a "limited super priority" for lost wages and vacation pay (officers, directors, managers, owners and workers employed three months or less are not eligible for payment under the program), a new bureaucratic organization created that steps into the shoes of the employee, he says. "As C-55 currently reads, it raises more concerns than it answers," Lifman adds.

Nationally in 2005, the number of new cases filed with the Office of the Superintendent of Bankruptcy (OSB), an agency of the Government of Canada, rose by 0.8 per cent to almost 112,000. This slight increase follows the 0.4-per-cent decrease recorded in 2004.

In 2005, consumer insolvency increased 1.6 per cent, bringing the number of new consumer files to more than 102,000. At the same time, business insolvency declined for the fourth year in a row, with a decrease of 7.2 per cent. The number of new business

filed with the OSB totalled 9,147.

In 2005, gross domestic product (GDP) rose by 2.9 per cent, compared with an increase of 2.7 per cent in 2004. Strong demand (consumer spending, business investment and government spending), accompanied by increased exports, responsible for the growth in GDP.

The increase in the value of exports is largely attributable to the price of raw materials, particularly petroleum products, giving the value of exports of manufactured goods saw little change in 2005.

Unlike in 2004, when all regions saw decreases in business insolvencies, only three of six regions posted decreases in 2005. The largest decline was in Alberta, which fell by 22.4 per cent, while the largest increase was Ontario with 5.8 per cent.

In 2005, four of six regions saw an increase in the number of new insolvency cases filed. The Atlantic region experienced the highest growth, with an increase of 8.6 per cent, followed by Ontario, an increase of 3.6 per cent, the Manitoba/Saskatchewan region with two per cent, and Quebec, 0.6 per cent. Alberta had a decline of 13.3 per cent and B.C. fell 2.4 per cent - the only regions that experienced decreases.

Last year, eight major economic sectors posted a decline in the number of new business insolvency cases, with the largest decreases recorded in transportation and communications, down 12.7 per cent; and wholesale and retail trade, down 11.1 per cent. Manufacturing, down 10.6 per cent; accommodation and food services, down 9.7 per cent.

"In general, good economic conditions, such as GDP growth and low interest rates, played a role in the decrease in business insolvency recently recorded," says Richard Archambault, a senior economist with the OSB. "On the other hand, the increase in the exchange rate could have negative impact on export-related business. Ontario could be more vulnerable than other regions. Alberta's performance is closely related to the oil price."

Archambault foresees 2006 mirroring 2005 nationally and regionally.

Will the passing of C-55 influence these trends?

"It's too early to say," says Vern DaRe, adjunct law professor at the University of Western Ontario and a bankruptcy and insolvency lawyer at Gardiner Roberts in Toronto. He adds that Bill C-55 represents the latest phase in Canada's recent insolvency reform. The legislation was previously amended in 1992 and 1997.

"Given the precarious minority state of Parliament, there's no guarantee the bill will pass as originally presented," DaRe says.

For unionized workers, Bill C-55 makes it clear that a collective agreement cannot be unilaterally amended during restructuring proceedings.

"There had been some debate in the past whether a business reorganizing itself under the BIA or CCAA could or could not amend union contracts when the union does not agree to the changes and the existing contract is hurting reorganization efforts. Under the new legislation, the answer is no," DaRe says.

Recent high-profile and highly charged restructurings at Stelco and Air Canada have had direct bearings on the proposed changes in Bill C-55. "Particularly because labour representatives were unhappy by the courts' attempts to override employment agreements," says John Sandrelli, an insolvency and restructuring lawyer with Fraser Milner Casgrain and Vancouver chair of the Insolvency and Workout Group.

"The WEPP is not as well thought out as it could have been in addressing the concerns of all those involved in a restructuring. We'll wait on what the bill's final wording will be," he says.

Sandrelli adds that whatever Bill C-55's ultimate form, it is not top of mind for businesses in Western Canada. "We've been having a good, sustained economic run. It's definitely not front and centre in this part of the country."

DaRe says he does not believe the bill will come into effect on June 30 and that it may not even come into effect this year.

"Only time will tell whether a sober second look will bring in new ideas to the legislation during the interim period," he says.

Overview of Bill C-55

\* Wage Earner Protection Program (WEPP) An employee who is terminated, and is owed wages earned in the six months immediately preceding a bankruptcy or receivership, can file a claim with the federal government for compensation. Under the new bureaucratic organization will be created that will pay employee claims to a maximum of \$3,000.

\* **Collective Agreements** If the insolvent employer cannot obtain the union's agreement to amend the collective bargaining then the insolvent employer can apply on five days' notice to the court for permission to give a notice to bargain to the union. If the parties agree to amend the collective agreement, then the union will have an unsecured claim for an amount equal to the value of the concessions granted by the union. The court will issue the order allowing a "notice to bargain" to be given to the union only if the court is satisfied that: (i) changes to the CBA are necessary to make a viable proposal; (ii) good faith efforts to renegotiate have been made; and (iii) the failure to issue the order is likely to result in irreparable harm to the insolvent employer.

\* **Debtor-in-Possession financing** The courts can order the granting of security over the insolvent person's property in connection with debtor-in-possession (DIP) financing, to rank in priority over the claims of any existing secured creditors of the debtor.

Only the debtor may bring an application for an order authorizing DIP financing. The court must consider the debtor's cash statement in determining the amount of financing to approve.

\* **Corporate governance** The courts can (on the application of anyone concerned in the matter) order removing any director of an insolvent company involved in proceedings under the Bankruptcy and Insolvency Act (BIA) or the Companies' Creditors Arrangement Act (CCAA) if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal or plan being made or is likely to act inappropriately as a director in the circumstances.

- Source: A. Faber & Partners

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