Practitioners continue to debate the merits of Bill C-55 before it comes into force ...

By Bruce Leonard

In case you missed it, Canada passed new bankruptcy legislation on the eve of Parliament's being dissolved in November. The legislation was rushed through Parliament and the Senate in haste despite dozens of amendments that had been offered, including many that were suggested by the drafter of the legislation. In a political compromise to get the legislation passed, it was agreed that the new bankruptcy legislation will not become effective until at least June 30. The delay was an acknowledgment on the part of both the Liberals and the Conservatives that the legislation was premature and should be considered further by Parliament to fix the problems it was expected to create.

It is still too early to tell whether the necessary changes to the new legislation will actually be made. In the tradition of hastily passed legislation, we should probably expect the worst. That is, the badly needed changes will not be made and that the worst new insolvency legislation in a generation will be inflicted on the Canadian public and the Canadian economy. This article highlights some of the more obvious problems with the legislation so that everyone affected will have the opportunity to begin to prepare for it, if they can.

The most obvious financial dislocation will be provided by a super-priority for arrears of wages which gives wage claims priority over secured creditors holding security on current assets (viz, banks). A similar super-priority has been created for arrears of pension contributions which will have priority over secured creditors on assets of the debtor as a monitor in the company's CCAA proceedings, a practice that is "imparing" the prospects of a successful reorganization and to replace them with those who won't. The courts have also been given the rather weird jurisdiction to replace a director who is "acting inappropriately" as a director, whatever that means. Directors, consequently, will need to avoid "inappropriateness" at all costs, whatever it is. That will be a debate about the jurisdiction of the federal government to control the corporate governance of provincially incorporated companies on the grounds of "inappropriateness." Again, the evils that these changes are intended to banish are not readily apparent to the naked eye.

After several years of Sarbans-Oxley in the United States and enormous lawsuits and settlements based on allegations of conflict of interest and disregard of corporate obligations and duties, the government inserted a tiny bit of transparency into Canada's bankruptcy system. The current system does not prohibit multiple, or, even, conflicting, roles. Most systems do not stand for this kind of multiple representation but the Canadian government is apparently satisfied with most of them and the only significant change made to increase transparency in the bankruptcy process in Canada was to remove the ability of a company's auditors to act for its creditors.

To date, nine countries have adopted the Model Law as a monitor in the company's CCAA proceedings, a practice which, mercifully, was already in decline before the legislation was introduced. Canada's bankruptcy legislation will still lack even an "inappropriateness" requirement that the bankruptcy process will benefit the only relative transparency, Canada has a long way to go, even. Consequently, the courts will have the power to remove directors who are "imparing" the prospects of a successful reorganization and to replace them with those who won't. The courts have also been given the rather weird jurisdiction to replace a director who is "acting inappropriately" as a director, whatever that means. Directors, consequently, will need to avoid "inappropriateness" at all costs, whatever it is. That will be a debate about the jurisdiction of the federal government to control the corporate governance of provincially incorporated companies on the grounds of "inappropriateness." Again, the evils that these changes are intended to banish are not readily apparent to the naked eye.

After several years of Sarbans-Oxley in the United States and enormous lawsuits and settlements based on allegations of conflict of interest and disregard of corporate obligations and duties, the government inserted a tiny bit of transparency into Canada's bankruptcy system. The current system does not prohibit multiple, or, even, conflicting, roles. Most systems do not stand for this kind of multiple representation but the Canadian government is apparently satisfied with most of them and the only significant change made to increase transparency in the bankruptcy process in Canada was to remove the ability of a company's auditors to act for its creditors.

To date, nine countries have adopted the Model Law as a monitor in the company's CCAA proceedings, a practice which, mercifully, was already in decline before the legislation was introduced. Canada's bankruptcy legislation will still lack even an "inappropriateness" requirement that the bankruptcy process will benefit the only relative transparency, Canada has a long way to do, but, evidently, no legislative desire to do so.

Internationally, it is claimed that Canada has adopted the UNCITRAL Model Law on Cross-Border Insolvency, which provides an international set of procedures for recognition of foreign insolvency proceedings and foreign insolvency representatives. To date, nine countries have adopted the Model Law including, most recently, the United States, and the U.K. is poised to do so. The folks in Ottawa, for inexplicable reasons, took it upon themselves to devise their own form of Model Law which doesn't resemble any other adaptation of the Model Law anywhere in the world. In dealing with cross-border cases abroad, Canadian insolvency representatives will be hard-pressed to persuade foreign countries to adopt the Model Law.

Those who hope that Canada can have the proper bankruptcy legislation it deserves had their hopes dashed on previous occasions and again this time. There is only a slim hope that a Parliamentary Committee review of the shortcomings of the new legislation will produce modest improvements in it. The Lawyers Weekly will keep readers up-to-date on developments.

Bruce Leonard is the chair of the Business Reorganization Group at Cassels Brock & Blackwell LLP in Toronto and the chair of the International Insolvency Institute, a non-profit Canadian association of insolvency professionals. The views expressed above are those of the author alone.

---

BANKRUPTCY AND IN SOLVENCY

THE LAWYERS WEEKLY March 17, 2006

To date, nine countries have adopted the Model Law as a monitor in the company's CCAA proceedings, a practice which, mercifully, was already in decline before the legislation was introduced. Canada's bankruptcy legislation will still lack even an "inappropriateness" requirement that the bankruptcy process will benefit the only relative transparency, Canada has a long way to do, but, evidently, no legislative desire to do so.

Internationally, it is claimed that Canada has adopted the UNCITRAL Model Law on Cross-Border Insolvency, which provides an international set of procedures for recognition of foreign insolvency proceedings and foreign insolvency representatives. To date, nine countries have adopted the Model Law including, most recently, the United States, and the U.K. is poised to do so. The folks in Ottawa, for inexplicable reasons, took it upon themselves to devise their own form of Model Law which doesn't resemble any other adaptation of the Model Law anywhere in the world. In dealing with cross-border cases abroad, Canadian insolvency representatives will be hard-pressed to persuade foreign countries to adopt the Model Law.

Those who hope that Canada can have the proper bankruptcy legislation it deserves had their hopes dashed on previous occasions and again this time. There is only a slim hope that a Parliamentary Committee review of the shortcomings of the new legislation will produce modest improvements in it. The Lawyers Weekly will keep readers up-to-date on developments.

Bruce Leonard is the chair of the Business Reorganization Group at Cassels Brock & Blackwell LLP in Toronto and the chair of the International Insolvency Institute, a non-profit Canadian association of insolvency professionals. The views expressed above are those of the author alone.