

## **A Brief Overview of the Treatment of Employee Claims and Collective Agreements in Canadian Insolvency Law**

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### **Introduction**

Employees are some of the most vulnerable creditors when firms experience financial distress. Unlike sophisticated creditors who can take steps to register security to protect their credit position and have easier access to information to manage their credit exposure, employees often suffer loss of wages and benefits owed in addition to losing their jobs on a firm's insolvency. Canada has provided only very limited protection for employees during insolvency and bankruptcy. This paper is a brief overview of current and proposed protections for employees as economic and social claimants under the *Bankruptcy and Insolvency Act (BIA)* and pursuant to caselaw under the *Companies' Creditors Arrangement Act (CCAA)*.<sup>2</sup>

The limited protections employees currently have during insolvency and bankruptcy will be considerably enhanced if Chapter 47, Statutes of Canada, 2005, is proclaimed in force. Chapter 47, *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*, is the first comprehensive amendment to Canadian insolvency legislation in almost a decade.<sup>3</sup> The public policy goal of the employee protection provisions is to provide a more timely method of payment of wages to employees on insolvency.

Although Chapter 47 was enacted in November 25, 2005, it is not yet proclaimed in force. Since that time, Canada has had a change of government and it is currently unclear as to when or if the current government will proclaim the statute in force. At the time of enactment, there were also concerns expressed by the Canadian Senate about particular aspects of the legislation and Senate Committee hearings are scheduled for 2006, which may result in amendments to the legislation.

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<sup>2</sup> *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (*BIA*); *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*).

<sup>3</sup> *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*, S.C. 2005, Chapter 47, third reading November 25, 2005, not yet proclaimed in force as of May 15, 2006. (Chapter 47).

## Protection of Wages on Insolvency

Currently in Canada, on bankruptcy, employees have a preferred claim, ranking fourth in priority, after secured creditors.<sup>4</sup> Section 136(1)(d) of the *BIA*, subject to the rights of secured creditors, gives employees a preferred claim in a bankruptcy of up to \$2,000 for unpaid wages, salaries and like entitlements earned during the six months immediately preceding the bankruptcy and, in the case of a traveling salesperson, an additional \$1,000 for expenses incurred during the preceding six months. Vacation pay is considered to be wages or a preferred claim to the extent that it accrues during the six months preceding the bankruptcy. Compensation owing that is greater than the statutory preferred claim is an unsecured claim.

The termination of employment by bankruptcy results in a claim by an employee as an unsecured creditor for termination pay (including vacation pay) and severance pay. Severance and termination claims are treated as ordinary unsecured claims.

One study of 94 business bankruptcies in 1991 found that employees overall received an average of 7% of their total unsecured wage claims and only 31% of their fourth ranking preferred wage claims.<sup>5</sup> Hence, employees with unpaid wages have been left with little recovery in many Canadian bankruptcies.

There are carve-outs from the preferred claim status for related persons who were employees. Wage claims of present or former spouses or common law partners are postponed until all claims of other creditors are satisfied.<sup>6</sup> Wage claims of other relatives and officers and directors are unsecured, as opposed to secured claims.<sup>7</sup> There is currently no national wage earner protection fund.

Employees who are owed wages at the time of bankruptcy must pursue collection of those wages on their own; and although provincial employment standards legislation facilitates the collection process, employees must discern their rights and file a complaint with the responsible officials.<sup>8</sup> There is no obligation on the employer or the insolvency officer to advise employees of their rights.

Chapter 47 will create both a national wage earner protection scheme and new priorities for employee claims, and will impose positive obligations to advise workers of their rights. It extends similar treatment to workers in respect of their unpaid wage and pension contribution claims, whether the debtor is under receivership or in bankruptcy proceedings.

## Wage Earner Protection Fund

Chapter 47, if proclaimed, will create for the first time, a program for making payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership. The *Wage Earner Protection Program Act* ("WEPP") provides for payments

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<sup>4</sup> Section 136(1), *BIA*, ranking after reasonable funeral and testamentary expenses, the costs of administration, and the Office of the Superintendent of Bankruptcy levy.

<sup>5</sup> K. Davis and J. Ziegel, "Assessing the Economic Impacts of a New Priority Scheme for Unpaid Wage Earners and Suppliers of Goods and Services" (1998), <http://strategis.ic.gc.ca/SSG/c100150e.html#BIA-consult> at Appendix B, Table 3.

<sup>6</sup> Section 137(2), *BIA*.

<sup>7</sup> Sections 138, 140, *BIA*.

<sup>8</sup> Ronald B. Davis, "After the Fall: Trustees, Receivers and Employees of Insolvent Businesses under Bill C-55", in J. Sarra, ed., *Annual Review of Insolvency Law, 2005* (Toronto: Carswell, 2006) at 258.

to individuals who have been terminated and who have unpaid wages as at the date of bankruptcy or receivership, with certain restrictions on quantum and eligibility. Currently, in many commercial insolvencies where employees are terminated upon bankruptcy or receivership, there are unpaid wages, leaving workers vulnerable in the short term in their ability to meet their living expenses. The WEPP is aimed at relieving some of this hardship.

The features of the proposed WEPP are:

- The maximum amount that may be paid to an eligible individual in respect of a bankruptcy or receivership is the greater of \$3,000 and an amount equal to four times the maximum weekly insurable earnings under the *Employment Insurance Act*, less any deductions applicable under a federal or provincial law.<sup>9</sup>
- Payments will be made out of the federal government Consolidated Revenue Fund.<sup>10</sup>
- Wages expressly include vacation pay and exclude severance or termination pay.<sup>11</sup>
- Wages must be earned during the six months immediately preceding the date of bankruptcy or the first day on which there was a receiver appointed.<sup>12</sup>
- The onus is on individual employees to apply for the wage payments to the Minister.
- Employees that have been employed for three months or less are not eligible.<sup>13</sup>
- Employees who were a director or officer of the employer or who had a controlling interest in the employer's business or who occupied a managerial position are not entitled to receive a WEPP payment.<sup>14</sup>

The Crown is subrogated to any rights of an individual for amounts paid under WEPP against the bankrupt or insolvent employer and the directors.<sup>15</sup> WEPP payments cannot be assigned or pledged as security.<sup>16</sup>

To receive a payment, an individual must apply to the Minister in the form and manner, and within the period, provided for in the regulations.<sup>17</sup> If the Minister determines that the applicant is eligible for a payment, the Minister must approve the making of the payment.<sup>18</sup> An individual can request a review of any determination, and the Minister can review and confirm, vary or rescind the determination.<sup>19</sup> The decision is final except for appeal to an adjudicator only on a question of law or a question of jurisdiction.<sup>20</sup>

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<sup>9</sup> Section 7(2), Chapter 47.

<sup>10</sup> Section 35, Chapter 47.

<sup>11</sup> Section 2(1), Chapter 47. Section 2(1) specifies: 2(1) In this Act, "wages" includes salaries, commissions, compensation for services rendered, vacation pay and any other amounts prescribed by regulation but does not include severance or termination pay.

<sup>12</sup> Section 7(1), Chapter 47.

<sup>13</sup> Section 6(1), Chapter 47.

<sup>14</sup> Section 6(2), Chapter 47.

<sup>15</sup> Section 36, Chapter 47.

<sup>16</sup> Section 37, Chapter 47.

<sup>17</sup> Section 8, Chapter 47.

<sup>18</sup> Section 9, Chapter 47.

<sup>19</sup> Sections 11, 12, Chapter 47.

<sup>20</sup> Sections 13-16, Chapter 47

The duties of the trustees and receivers under the proposed WEPP are much more proactive in respect of employees and are aimed at informing workers of both their right to apply under the WEPP and the amount that is owing to them. Trustees and receivers are to:

- identify each individual who is owed wages by a bankrupt or insolvent employer that were earned during the period of six months immediately before the date of the bankruptcy or the first day on which there was a receiver in relation to the employer;
- determine the amount of wages owing to each individual in respect of that six-month period;
- advise the former employees, who have unpaid wages, of the existence of the WEPP and conditions under which payments may be made;
- provide the Minister and each individual, in accordance with the regulations, with information in relation to the individual and the amount of wages owing to the individual in respect of the six-month period;
- inform the Minister when discharged if a trustee or duties completed if a receiver.<sup>21</sup>

Currently, in a number of operating situations, where funds are available for access by the receiver or trustee, the receiver or trustee pays the current wages in the normal course. However, this tends to occur only in larger companies that hope to continue operating through a restructuring or sale process. WEPP provides for only one process to be followed if there are unpaid wages on the date of bankruptcy or receivership, there is no provision for a second option whereby the receiver or trustee would pay the wages owing at the date of receivership/bankruptcy. WEPP should provide for an option whereby unpaid wages can be paid by a receiver or trustee, in order to expedite money being placed in the hands of employees and to deal with tax forms and employee deduction issues.<sup>22</sup>

There are extensive anti-abuse measures included in WEPP for various offences including sanctions for failure by a trustee and receiver to comply with their statutory responsibilities.

Section 38 of Chapter 47 specifies that every person commits an offence who:

- makes a false or deceptive entry, or omits to enter a material particular, in any record or book of account that contains information that supports an application under the *Act*;
- in relation to an application under this *Act*, makes a representation that the person knows to be false or misleading;
- in relation to an application under this *Act*, makes a declaration that the person knows is false or misleading because of the non-disclosure of facts;
- being required under this *Act* to provide information, provides information or makes a representation that the person knows to be false or misleading;
- obtains a payment under this *Act* by false pretence;

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<sup>21</sup> Sections 21-22, Chapter 47.

<sup>22</sup> This is a recommendation of the Canadian Association of Insolvency and Restructuring Professionals and The Insolvency Institute of Canada in their joint Legislative Review Task Force Report, 2005.

- being the payee of any cheque issued as a payment under this Act, knowingly negotiates or attempts to negotiate it knowing that the person is not entitled to the payment or any part of the payment; or
- participates in, assents to or acquiesces in any of the above acts or omissions.

A prosecution for an offence may be commenced at any time within six years after the time when the subject-matter of the prosecution arose. It is also an offence to delay or obstruct a person in the exercise of his or her powers or the performance of his or her duties under the WEPP.<sup>23</sup> Persons guilty of an offence are liable on summary conviction to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months, or to both.<sup>24</sup>

### **Wage Priorities**

There are a number of proposed new priorities under Chapter 47. The statute will add section 81.3 to the *BIA*, which will give unpaid employees security over all current assets of the bankrupt:

- The *BIA* will provide for a super-priority for wages in a bankruptcy to the extent of \$2,000 and for expenses of a traveling salesperson to the extent of \$1,000.<sup>25</sup>
- The priority is on all current assets of the bankrupt.
- This priority ranks above every other claim, right, charge or security against the debtor's current assets, regardless of when the claim or right arose, except for the priority for the 30 day goods rights of unpaid suppliers; priority rights granted to farmers, fishers and aquaculturists; and source deductions.<sup>26</sup>
- Section 81.4 provides for same wage priority provisions as section 81.3 but in a receivership.
- If a trustee or receiver disposes of current assets covered by the secured claim, the trustee or receiver is liable for the claim to the extent of the amount realized on the disposition and is subrogated in and to all rights of the employee in respect of the amounts paid to that person by the trustee or receiver.<sup>27</sup>
- A court is not to sanction a plan of arrangement under the *CCAA* or a proposal under the *BIA* unless the plan provides for the payment to the employees and former employees of the amount secured under these provisions.
- Section 136(1)(d) gives preferred status to the amount of wages, salaries, commissions, compensation or disbursements referred to in the super-priority provisions that was not paid.

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<sup>23</sup> Section 39, Chapter 47.

<sup>24</sup> Section 40, Chapter 47.

<sup>25</sup> Section 81.3, Chapter 47.

<sup>26</sup> Section 81.1-81.3; 67(3), Chapter 47.

<sup>27</sup> Sections 81.3(5), 81.4(5), Chapter 47.

The effect of the new priority is to give employees, but in reality, the federal government's subrogated claims under the WEPP, a claim that must be satisfied ahead of secured creditors' claims. The wage provisions are also aimed at preventing a moral hazard for insolvent businesses and their secured creditors that would arise if the only legislative change was the introduction of the WEPP.<sup>28</sup> The proposed priority discourages debtor corporations from skipping payments to employees so that increased assets are available for payment of secured creditors' claims.

## Pensions

Currently in Canada, treatment of pension plan contributions depends on the particular circumstances. Contributions will be subject to a trust if they meet the common law tests for trust, and if so, are thereby excluded from assets of bankrupt. Provincial legislation creates a deemed trust; and if funds have been kept separate, can constitute a valid trust in insolvency. However, on bankruptcy, treatment of the claims changes provincial priorities, and a decision of the Ontario Court of Appeal expressed doubt that pension contributions could be included in the fourth ranking preference claim for employee compensation.<sup>29</sup> Claims arising from a pension plan deficit are ordinary unsecured claims. Only one province, Ontario, has a pension guarantee fund.

The lack of protection in respect of pension contributions has been an increasing problem in Canadian insolvency proceedings. While the issue of pension deficits and failure of debtor corporations to remit pension contributions in a timely fashion is an issue that should be addressed (and enforced) much earlier in the firm's financial life cycle, Chapter 47 is aimed at addressing an acute aspect of the failure to remit contributions.

Under Chapter 47, employee contributions that were collected but not remitted to the pension fund; the employer contribution for the normal cost of a pension plan; or the sums due but not paid under a defined contribution plan, will be a secured claim over all the assets of the insolvent debtor or bankrupt.<sup>30</sup> Normal cost liabilities exclude special payment obligations, which are generally required to be made by an employer-sponsor of a defined benefit plan to fund, over a period of time, unfunded plan liabilities or solvency deficiencies.<sup>31</sup> Hence, the super-priority does not extend to any unfunded solvency deficiency in a defined benefit pension plan.

Chapter 47 creates a security interest, ranking above every other claim, right, charge or security, regardless of when that charge arose on all the person's assets in both bankruptcy and receivership situations.<sup>32</sup> This pension contribution security will have a

<sup>28</sup> Davis, *supra*, note 8 at 264.

<sup>29</sup> *Abraham v. Canadian Admiral Corp. (Receiver of)* (1993), 13 O.R. (3d) 649 (Ont. Gen. Div.), reversed (1998), 39 O.R. (3d) 176 (Ont. C.A.), leave to appeal refused (1998), 120 O.A.C. 196 (note) (S.C.C.). For a discussion, see Davis, *supra*, note 8 at 262-4.

<sup>30</sup> Section 81.5, Chapter 47.

<sup>31</sup> The amount of pension plan contributions secured should be an amount equal to the sum of all amounts that were deducted from the employees, plus accrued "normal cost" as defined in subsection 2(1) in the *Pension Benefits Standards Regulations, 1985*.

<sup>32</sup> Sections 81.5(2) and 81.6(2), Chapter 47. Section 81.5 (1) specifies: If the bankruptcy 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 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,

lower priority than the payment of unpaid wage claims, and rank below the deemed trust for employee source deductions; however, the class of assets over which the security is granted is broader than that enjoyed by the wage claims discussed above, and pension contributions will still have to be paid prior to any payment being made to secured creditors.

Some have argued that such statutory super-priorities will have the effect of potentially reducing available credit to companies from operating lenders, particularly for mature debtor companies with significant defined benefit plans, and will add further uncertainty generally for operating and term lenders in valuing their collateral; and have suggested that any super-priority for pension obligations should be against current assets of the business only.<sup>33</sup> However, others have suggested that the priority will create the appropriate incentive effects in terms of ensuring that debtors remit contributions in a timely fashion prior to the insolvency, as their creditors will be seeking such assurances in their continued advancement of credit.

Also under Chapter 47, no proposal under the *BIA* or plan of arrangement and compromise under the *CCAA* is to be approved by the court unless it provides for payment of outstanding pension plan amounts deducted from employees' remuneration.<sup>34</sup> Currently, proposals under the *BIA* must provide for payment of employee preferred claims, but there are no such provisions for pension contributions. The *CCAA* is currently silent on this issue. Chapter 47 will require parties to take into account wage and pension secured claims in devising a proposal under the *BIA* or a plan of arrangement and compromise under the *CCAA*, or they will not receive the sanction of the court for the workout plan.

Under the new legislation, the court may approve a proposal or plan that does not allow for the payment of the amount if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.<sup>35</sup>

### Collective Agreements

The *CCAA* and the *BIA* do not currently contain express statutory language addressing the issue of treatment of collective agreements at the point of insolvency and bankruptcy. This is because labour relations in Canada falls under s. 92(13) as part of civil rights under the

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- (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 funds, 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 Regulations, 1985.

<sup>33</sup> Legislative Review Task Force, *supra*, note 22. Current assets should include those assets ordinarily realizable within one year from the date of the balance sheet or within the normal operating cycle when that is longer than a year. Investments should be classified as current only when capable of reasonably prompt liquidation, CICA Handbook, S 1510.

<sup>34</sup> Sections 6(5) and 60.1.5. Section 60.1.5 specifies: No proposal in respect of an employer who participates in a prescribed pension plan for the benefit of its employees shall be approved by the court unless the proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan: an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund if the prescribed pension plan is regulated by an Act of Parliament, 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 funds, and 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 Regulations, 1985.

<sup>35</sup> Sections 60.1.6, 6(6), Chapter 47.

*Constitution Act, 1867* and hence is the legislative domain of the provincial and territorial governments, as well as the federal government in respect of employees covered under the *Canada Labour Code*.

Recently, however, an issue has arisen as to the most effective means of addressing collective agreements within the context of an insolvency proceeding. While there have been a number of proceedings in which parties to collective agreements have been able to agree upon a restructuring plan and in some instances, amendments to the collective agreement, this situation has rapidly shifted in the past couple of years. The impetus for this change appears in part to have come from U.S. based lenders that seek to exert a greater degree of control over the insolvency proceeding, including placing pressure on debtors to shed terms of collective agreements. The other pressure has been from debtors in an effort to use insolvency as a means of inappropriately bypassing or reducing their obligations under existing labour relations legislation. Equally, however, there are situations in which the collective agreements are a barrier to a successful going forward strategy, and a mechanism is needed to address this situation, aimed at providing a balance in insolvency restructuring, having regard to the constitutional division of powers; the distinction between a temporal stay of rights or claims and a permanent one; and the integrity and efficacy of both the insolvency system and the labour relations system.

While there was historically inconsistency in Canadian judgments regarding the effect of insolvency or bankruptcy on collective agreements, there has recently been some convergence among appellate courts that insolvency and bankruptcy do not terminate collective agreements for all purposes.<sup>36</sup>

The premise of labour relations legislation is that it facilitates labour peace. Collective agreements provide security for employees and certainty for debtor employers in the conduct of their business because they can plan operations around known labour costs and be assured of no strike activity or other economic sanctions during the life of the collective agreement. During this period, dispute over the alleged non-compliance of either party with the terms of their collective agreement are referred to mandatory binding arbitration for final resolution. Equally, however, the system is premised on economic pressure, specifically, the provision of specified periods in which collective agreements are to be re-negotiated and a highly codified scheme for when parties to the collective bargaining relationship can resort to economic sanctions in the form of strike/lock-out or work to rule as part of the bargaining process. However, even during the period of negotiations leading up to the point where the use of economic sanctions is permitted, stability is provided through a statutory “freeze” on working conditions during the negotiations. These dynamics shift during insolvency because of the financial distress of the debtor, the concurrent legislative scheme that facilitates restructuring, and the involvement of multiple interested

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<sup>36</sup> *Royal Crest Lifecare Group Inc., Re* [2003] O.J. No. 756, affirmed [2004] O.J. No. 174 (Ont.C.A.), application for leave to appeal dismissed [2004] S.C.C.A. No. 104 (S.C.C.). The Court held that the collective agreement is not terminated, but placed in “suspended animation”, at para. 30. *Syndicat national de l’amiante d’Asbestos inc. v. Jeffrey Mines Inc.* [2003] Q.J. No. 264 (Que. C.A.), which held that the monitor in a CCAA proceeding does not have the authority to suspend provisions of the collective agreement and that it must bargain with the trade union for changes to the collective agreement; *Saan Stores Limited* (1999) 172 D.L.R. (4<sup>th</sup>) 134 (N.S.C.A.), which held that bankruptcy does not terminate a collective agreement for all purposes; *GMAC Commercial Credit Corp.-Canada v. T.C.T. Logistics Inc.* [2004] O.J. No. 1353 (Ont. C.A.), reversing (2003) 42 C.B.R. (4<sup>th</sup>) 221, leave to appeal granted, [2004] S.C.C.A. No. 267, which held that a collective agreement does not terminate on bankruptcy or interim receivership.

stakeholders that have an interest in the debtor's financial distress and potential restructuring.<sup>37</sup>

With respect to the status of collective agreements on bankruptcy, the Ontario Superior Court in *Royal Crest Lifecare Group Inc.* noted with approval the analysis in *Saan Stores* that a collective agreement is not terminated for all purposes in bankruptcy, and that labour relations legislation must be interpreted liberally to achieve its objectives.<sup>38</sup> The Court held that "the collective agreement is not terminated but rather it is put into suspended animation, to be revived if, as, and when a purchaser with a personal economic interest in the operation of the business acquires the business".<sup>39</sup> The Ontario Court of Appeal in *Royal Crest Lifecare Group Inc.* upheld the lower court judgment that in bankruptcy, collective agreements are not terminated, noting that the bankruptcy judge had expressly recognized the existence and importance of the collective agreements.<sup>40</sup>

Similarly, in *GMAC Commercial Credit Corp. and T.C.T. Logistics*, the Ontario Court of Appeal held that the status of a collective agreement is governed by the *Labour Relations Act* and is only terminated in specific circumstances set out under that *Act*, such as abandonment, fraud or failure to bargain.<sup>41</sup> The Court held that upon the sale of a business by an interim receiver or trustee in bankruptcy, the labour relations board may declare that the purchaser is a successor employer and bound by the collective agreement that was in place between the debtor and the union.<sup>42</sup>

The treatment of collective agreements has become highly contested in the current legislative reform debate. Two factors are driving public policy debates regarding treatment of collective agreements on insolvency. Debtors and senior lenders are concerned that there is no codified process to deal with collective agreements and thus uncertainty in the insolvency proceeding where the trade union and the debtor do not agree on whether changes to the collective agreement are essential to the restructuring. Trade unions are concerned that debtors are seeking insolvency protection in order to shed collective agreements, in an attempt to bypass the existing labour relations system that has been carefully designed to balance the interests of employers and employees.<sup>43</sup>

The provisions of Chapter 47 expressly state that collective agreements continue during insolvency.<sup>44</sup> The law clarifies that the debtor corporation cannot disclaim a collective agreement. However, it does mandate a good faith bargaining process. Chapter 47 specifies that:

- Where a debtor company and the union representing its employees fail to reach a voluntary agreement to revise provisions of the collective agreement, the court has jurisdiction to grant an order authorizing the company to serve a "notice to bargain" on the bargaining agent.

<sup>37</sup> For a full discussion of these issues, as well as the successor employer issues, see Janis Sarra, *Proposed Model of a Federal Insolvency Collective Bargaining Process*, Final Report to Industry Canada, March 5, 2005.

<sup>38</sup> *Royal Crest*, *supra* note 36 at para. 17, 23, citing *Saan Stores Ltd. v. Nova Scotia (Labour Relations Board)* (1999) D.L.R. (4<sup>th</sup>) 134 (N.S.C.A.) at 154.

<sup>39</sup> *Ibid.* at para. 30. The Court dismissed the application as premature.

<sup>40</sup> *Royal Crest Lifecare Group Inc., Re* [2003] O.J. No. 756, affirmed [2004] O.J. No. 174 (Ont. C.A.), application for leave to appeal dismissed [2004] S.C.C.A. No. 104 (S.C.C.), at paras. 34, 35.

<sup>41</sup> *GMAC Commercial Credit Corp., supra*, note 36 at para. 50.

<sup>42</sup> *Ibid.*

<sup>43</sup> See for example, submissions by the Canadian Autoworkers, the United Steelworkers and the Canadian Labour Congress to the Standing Senate Committee on Banking Trade and Commerce consideration of amendments to the *BIA* and *CCAA*, 2002.

<sup>44</sup> Sections 65.12, 33(1), Chapter 47.

- The application to the court must be made on five days notice.
- The court may issue the order only if it is satisfied that:
  - the insolvent person would not be able to make a viable proposal or plan of arrangement and compromise, taking into account the terms of the collective agreement;
  - the insolvent person has made good faith efforts to renegotiate the provisions of the collective agreement;
  - and the failure to issue the order is likely to result in irreparable damage to the insolvent person.<sup>45</sup>
- The vote of the creditors in respect of a proposal under the *BIA* or a plan of arrangement under the *CCAA* may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent has not expired.<sup>46</sup>
- If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under the *BIA* or *CCAA*, the bargaining agent has a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.<sup>47</sup>
- Once the court grants a notice to bargain, it may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent.

The provision clarifying that the collective agreement remains in force absent any agreement to change it, is a provision that will provide initial certainty to all parties to the insolvency proceeding that the *status quo* continues during the stay period. This will prove an important starting point in the workout process and will clarify for parties not familiar with the labour relations system in Canada that there is a continued public policy commitment to this system, as well as that of the insolvency and bankruptcy scheme. It will avoid unnecessary litigation on the status of the collective agreement during insolvency and bankruptcy and will assist parties in deciding their positions on the restructuring process.

For the purpose of this section of Chapter 47, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement, clarifying that there should not be third party interference in the negotiations.

While the “notice to bargain” constitutes a positive first step in encouraging the parties to come to a negotiated compromise regarding provisions of the collective agreement, the provisions may be insufficient in that they fail to provide a timely process to arrive at a final solution to the collective bargaining issues, issues that are often critical to the successful outcome of the restructuring proceeding. There is no mechanism proposed in Chapter 47 or elsewhere that grants the court or an arbitrator the authority to bind the parties where there is no agreement.

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<sup>45</sup> Sections 65.12(2), 33(3), Chapter 47.

<sup>46</sup> Sections 65.12(3), 33(4), Chapter 47.

<sup>47</sup> Sections 65.12(4), 33(5), Chapter 47.

**Concluding Note**

At the time that Chapter 47 received third reading, there was strong support by all federal parties, particularly for the provisions relating to protection of workers. However, subsequent to the election, and pending the Senate Committee hearings, there has been new agitation in respect of some of the proposed protections, most notably the proposed super-priority of pension amounts owed. It remains to be seen whether these proposed protections will survive the rigours of the political process in the period leading up to proclamation of the legislation.