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By email

Standing Committee on Agriculture and Forestry (agfo@sen.parl.gc.ca)
Standing Committee on Banking, Commerce and the Economy (banc@sen.parl.gc.ca)

Senate of Canada
Parliament Hill
Ottawa, Ontario K1A 0A4

Subject: Operational Impact of Bill C-280

Dear Senators:

I am the Superintendent of Bankruptcy and, as a Governor in Council appointee, I lead my office's regulatory, administrative and supervisory duties at arm's length from the Government of Canada. I have general statutory authorities to supervise all estates and matters to which the *Bankruptcy and Insolvency Act* (BIA) applies, as well as certain matters under the *Companies' Creditors Arrangement Act* (CCAA).

My statutory authorities include licensing and regulating the insolvency profession; supervising the administration of estates in bankruptcy, commercial reorganizations, consumer proposals and receiverships; maintaining a public record of BIA and CCAA filings; recording and investigating complaints regarding the insolvency process; and ensuring compliance through the maintenance and enforcement of the regulatory framework.

I am writing to provide a unique operational perspective regarding the potential impact and unintended consequences of Bill C-280, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act (deemed trust – perishable fruits and vegetables)*, currently under consideration by the Senate.

The Canadian insolvency system is an important pillar of a well functioning market economy as it supports business, investor and consumer confidence. In

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order to achieve its goals, an insolvency system must provide as much certainty and predictability as possible while balancing the interests of stakeholders. In particular, the availability and cost of credit can be affected by the addition of priorities – particularly where those priorities are not clearly defined and predictable in terms of time and/or monetary limits. When credit becomes less available and/or more costly, smaller businesses suffer a disproportionate impact with their ability of to remain viable or reorganize and restructure within the context of an insolvency filing being jeopardized to a much greater extent than larger businesses.

In order to ensure the integrity of the Canadian insolvency system and maintain the important elements of efficiency, certainty and predictability, any amendments should be carefully considered within the broader context. Creating piecemeal exceptions to the existing scheme of distribution, such as new priorities, super-priorities or deemed trusts can have ripple effects throughout the insolvency system. It incentivizes other stakeholder groups to request further piecemeal exceptions, each time diminishing the balancing of interests and the returns to all other creditors as well as the possibility of a restructuring.

More specifically, super-priorities and deemed trusts change the rules of creditor distribution, distort credit markets and cause increased losses to all other creditors. Generally, they have been added after careful policy review and reserved for non-commercial actors with compelling public policy interests (such as employer remittances for income tax and Canada Pension Plan) based on evidence of substantial harm for non-payment and the lack of effective market-based alternatives to reduce losses. Commercial actors are generally viewed to be capable of protecting their own interests via the terms and conditions applicable to transactions.

Bill C-280 proposes exceptional treatment for a specific industry group without evidence of exceptional harm from insolvency losses compared to similarly situated creditors. This undermines core insolvency principles, including equitable treatment of similarly situated creditors and the recognition of creditor rights, such as secured loans, in the same priority as they would exist outside of insolvency situations.

Note also that the BIA already provides a limited super-priority for Canadian farmers, fishers and aquaculturalists in bankruptcy. These producers can claim amounts for unpaid products delivered within 15 days of bankruptcy and their claim will be secured by a charge on the purchaser’s inventory. This takes priority over all other creditors except the supplier’s right of repossession.

Bill C-280, while well-intentioned, proposes more expansive protections for perishable fruit and vegetable sellers, with no time or monetary limits, which

would rank ahead of other all other creditors, including farmers (e.g., dairy, egg, meat and grain), fishers and aquaculturists.

The proposed amendments could also have several adverse, unintended consequences. For example, if enacted, the deemed trust will likely cause lenders to increase credit costs, add more restrictive terms and/or reduce amounts available for credit to compensate for higher repayment risks as the collateral available in the event of default will be reduced. While larger businesses may be in a position to arrange their affairs to avoid these consequences, smaller businesses are less likely to be able to do so such that the enactment of Bill C-280 could harm these small businesses when they seek new or refinanced credit.

In CCAA restructurings, the deemed trust could result in the depletion of the purchaser's working capital at a time when it is most needed and it could prevent the purchaser from obtaining interim financing thus endangering the prospects of a successful restructuring that would preserve business value, save jobs and improve creditor recovery.

There is also a risk that the deemed trust created by Bill C-280 would make it more difficult for debtor companies to retain a Licensed Insolvency Trustee (LIT) given the uncertainty that there will be sufficient assets to cover the filing fees and professional costs. This results in a real risk that more businesses, particularly smaller or more significantly indebted businesses, will not be able access the insolvency system because LITs will be unable to take on these files and risk being unpaid. Without a LIT to administer the filing, business owners will have to simply walk away from the business. Abandoned assets are wasted or spoiled and creditor recovery suffers, including the recovery for those very stakeholders Bill C-280 intends to protect.

An additional concern is the absence of an appropriate coming Into force clause in Bill C-280. It is operationally extremely difficult to consider deemed trusts in an insolvency filing in mid-course and also inappropriate in terms of legal certainty where parties entered into business and contractual arrangements based on the realities known at the time. Therefore, I strongly suggest revisions to Bill C-280's coming into force clause to clarify that only filings made after the coming into force are subjected to the law, as per previous insolvency legislation amendments.

To preserve certainty, the delicate balance of interests and to avoid unintended consequences to the Canadian insolvency system and the economy, it is recommended that insolvency legislation only be amended in the context of a

comprehensive and in-depth review and consultation rather than as a response to a specific industry interests.

I thank you for your time and consideration of these important concerns.

Yours sincerely,

Elisabeth Lang
Superintendent of Bankruptcy

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