

UNREVISED / NON-RÉVISÉ**THE STANDING SENATE COMMITTEE ON
BANKING, TRADE AND COMMERCE / COMITÉ PERMANENT DES BANQUES
ET DU COMMERCE****EVIDENCE / TÉMOIGNAGES**

DV May 15, 2003

**THE STANDING SENATE COMMITTEE ON BANKING, TRADE AND COMMERCE
EVIDENCE**

OTTAWA, Thursday, May 15, 2003

The Standing Senate Committee on Banking, Trade and Commerce met this day at 11:00 a.m. to examine on the administration and operation of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act.

Senator E. Leo Kolber (*Chairman*) in the Chair.

The Chairman: Good morning, ladies and gentlemen. We are here to continue our examination on the administration and operation of the Bankruptcy and Insolvency Act, and the Companies' Creditors Arrangement Act, CCAA.

Our first group of witnesses are from the Workers Compensation Boards -- John Solomon, Chair, Saskatchewan Worker's Compensation Board; Mr. Jim Lee, Chair, Prince Edward Island Worker's Compensation Board; Brenda Croucher, Executive Director, Association of Workers' Compensation Boards and Commissions; Douglas Mah, General Counsel, Alberta Workers' Compensation Board; Maurice Cloutier, General Counsel, Quebec Commission of Occupational and Health and Safety; and Jim Houston, Vice-president, Nova Scotia Workers' Compensation Board.

Good morning. I am told that you have some opening statements and that Mr. will speak first. Please proceed with your statement.

Mr. Jim Lee, Chair, P.E.I. Worker's Compensation Board: Thank you very much. I am Jim Lee, Chair of the Worker's Compensation Board of Prince Edward Island. The Association of Workers' Compensation Boards of Canada represents the 12 provincial and territorial Workers' Compensation Boards and Commissions in Canada. We are pleased to be here today to address the importance of designating Workers' Compensation as a secured creditor in the Bankruptcy and Insolvency Act.

Honourable senators, before presenting our position, I wish to note a correction in our brief for the record. On page 2, in the recommendations section of that brief, we stated: "As a result, in a bankruptcy, Workers' Compensation Board claims would be equal to those registered by a bank or other lending institution in all provincial, territorial and federal jurisdictions."

The use of the words "would be equal" is in error. It should read: "x would be superior to those registered by a bank or other lending institution." Accordingly, we would like to correct this mistake, and we apologize for the error.

I would now turn to our presentation. I will begin with a comment on the text for our brief. Amendments to the BIA Act in 1992 and 1997 gave workers' compensation premiums the status of an ordinary creditor whose receiving funds would be determined by a trustee in case of a bankruptcy.

The financial impact of this legislation on workers' compensation has been significant. In 1997, \$175 million in premiums have been lost to our members. Out of that, only \$2.1, a little more than one per cent of the outstanding premiums, have ever been recovered.

We believe that this situation can only be reversed by designating workers' compensation as a secured creditor. The loss revenue inflates costs and results in unfairness to employers through increased assessment premiums and to workers and their dependents when lost revenues jeopardize programs and benefits.

This challenge to our workers' compensation system must be addressed. We feel strongly that workers' compensation must be recognized as a secured creditor in the BIA, because it is a critical program in Canada's social safety net. It currently provides \$6 billion in annual benefits to more than 374,000 injured workers and their families. Accordingly, it needs to be designated a trust.

We propose that workers' compensation have equal footing with Canada and Quebec Pension Plans, Employment Insurance, and income tax, which are secured creditors under the BIA.

Most important, we believe, with respect, that the decision denying workers' compensation secured creditor status should be reversed. We submit that a determination that monies for workers' compensation claims, unlike CPP, EI or income tax are not deducted from employees' salaries, but are paid for out of employer revenue and cannot be a determining factor in defining creditor status.

The basis of funding is not a relevant distinction because the purpose of workers' compensation, like EI and CPP, is wage replacement. From a social policy perspective, it should not matter whether the employee or employer contributes. Furthermore, workers have, in fact, contributed, in the sense that they gave up valuable tort rights as part of the workers' compensation equation. Workers have contributed and continue to contribute. The premiums that employers pay represent, at least in part, a foregone tort right.

We also know that since the amendments in 1997, a clear change in the attitude of the federal government itself regarding wage protection has occurred. In announcing BIA reform, Industry Canada released a number of discussion papers in 2001. One paper, statutory priorities in business insolvencies, which was released in May 2001, raised the need for wage protection as a central issue in the reform of commercial bankruptcies. Raising this issue recognizes the inability of the average employee to control risks and the adverse effect of commercial bankruptcies on working Canadians and their families.

We believe wage protection and protecting workers' compensation go hand in hand. If there is protection for workers who are employed, why should there not be protection for workers who, for reasons of work-related injuries or illnesses, are not working? Both require wages.

It is not acceptable that the financial stability of workers' compensation, a public institution, be put at risk and the capacity of Workers' Compensation Boards and commissions to meet the commitments be weakened through the loss of premium revenues.

Workers' compensation is one of the three underpinnings of Canada's social safety net for workers. It serves the wage and income security needs of injured workers and their families, Canada Pension and Quebec Pension support retired workers and Employment Insurance assist workers in time of unemployment.

Like EI and CPP, workers' compensation is a mandatory program. All three were established to improve conditions for workers and their families. The BIA should be amended to re-establish workers' compensation as a secured creditor, like CPP and EI. Our presentation will show that the current legislative regime is not in the public interest. It compromises the integrity and purpose of workers' compensation as a valued public service and critical program within Canada's social safety net.

My colleague, John Solomon, chair of the Worker's Compensation Board of Saskatchewan will present the balance of this presentation.

Mr. John Solomon, Chair, Saskatchewan Worker's Compensation Board: Thank you, honourable senators. It would be helpful to know something about the origins of workers' compensation in Canada, in order to understand our position on the Bankruptcy and Insolvency Act.

We are the oldest social economic safety net in the world. The Germans invented workers' compensation in the 1800s. It came to Canada in 1915, into Ontario as a result of a Royal Commission chaired by Justice William Meredith. It is Canada's oldest social economic safety net, preceding the establishment of CPP and EI.

Prior to Workers' Compensation, Canadian workers had no protection against workplace injury or illness, except to sue their employers or fellow workers. One in ten lawsuits was successful, and almost all lawsuits ended up in financial misery, not only for the injured worker but also for the employer, who would often end up bankrupt.

In Canada, workers' compensation is often referred to as an historic compromise between workers and employers. Workers gave up the right to sue for workplace injuries in exchange for a no fault insurance system and employers funded the system in exchange for protection from lawsuits. Through the compromise, workers received secure wage loss protection and employers were shielded from the potential of lawsuits.

Today, we request that the BIA be amended to restore WCB premiums to the secured creditor status afforded to CPP, QPP and EI. This amendment would protect the WCB as an essential and critical part of Canada's social safety net. It would result in three benefits to the system, if amended.

First, WCBs remain able to deliver the benefits and services that have been promised through legislation to Canada's workers, their families and employers.

Second, other employers do not subsidize the premiums of bankrupt employers. That is, the cost of providing work-related disability insurance is apportioned, as it should be.

Third, and perhaps most important, the losses of the credit industry are no longer subsidized by Workers' Compensation Boards.

To illustrate the value of Workers' Compensation in Canada, let me outline a few basic principles. It is a no fault disability insurance system funded by employers' premiums. It is

mandated through provincial legislation that contributes to positive industrial relations in Canada's workplaces by providing wage security to injured workers, their spouses and children.

Workers' Compensation Boards also pay for the costs of occupational health and safety services. Nearly \$6 billion in benefits is spent annually to cover the cost of benefits to injured workers, their families and to employers.

The determination in 1997 that creditor status for WCBs was not warranted because premiums are not deducted from employees' salaries, ignores the historic agreement and founding principles of workers' compensation. This determination does not have regard to the fact that workers' compensation is, like EI and CPP and QPP, a mandatory program. Like EI and CPP, Workers' Compensation benefits provide income security when a worker is faced with income loss because of work injury. Our experience has shown that the loss of creditor status that had a negative impact on revenues, which were intended to provide wage protection and benefits, and on employers who are left to bear the revenue loss through higher premiums.

The amendment would end the current scheme that favours the credit industry over the wage security of injured workers. The amendment would mean that Workers' Compensation Boards are no longer bearing the cost of poor credit decisions made by the credit industry.

With the amendment, worker benefits, whether wage replacement, vocational rehabilitation, or medical attention and treatment, are protected even on those occasions of bankruptcy. Equally important, the amendment preserves fairness by placing the financial security provided by Workers' Compensation benefits on the same footing as EI and CPP.

There are five primary advantages to amending the act to protect workers' compensation premiums and the BIA.

The first is to assure the primacy and sustainability of the social safety net. Like CPP and EI, WCB benefits provide wage security for injured workers, as well as income benefits to surviving spouses and children. Therefore, through its legislation, the federal government must afford workers' compensation premiums the same protection and status that it provides to EI and CPP premiums. We believe as well that the federal government must also act to remedy the harm it caused WCBs in 1997 and protect boards from unfair revenue loss as a result of employer bankruptcy.

The second reason, paramountcy and consistency also present compelling reasons for amending the act. Provincial legislation assures that Workers' Compensation premiums have a priority status in the event of bankruptcy. On principle, federal governments aim to accommodate provincial legislation. Indeed the courts recognize the importance of accommodation and respect for the law of a provincial legislature. Changing the BIA supports that consistency.

Currently the BIA displaces the provincial legislation and creates two different systems for distributing a debtor's assets. Consistency among federal, provincial and territorial jurisdictions supports certainty in commercial relations, which is an important objective for the BIA and one that the AWCBC supports. The AWCBC believes that another clear advantage that would result from an amendment to the act is a fairer distribution of the debtor's assets and a distribution more in keeping with the intents of provincial legislators.

Currently, lending institutions can invoke the act and ignore provincial priority regimes at will. Indeed, the liquidation of assets before bankruptcy is often achieved by lending

institutions. The AWCBC believes that this interpretation and use of the act rewards the unscrupulous. Making CPP, EI and WCB premiums equal to a secured creditor supports a fairer and, we believe, appropriate distribution of debtor assets.

A fourth advantage to amending the act is the continuing economic sustainability of Workers' Compensation services and programs. In the year 2000, employer premiums totalled over \$6 billion in Canada. WCB premiums are a cost of doing business in our country. Affordable, competitive premiums are important to business and industry and to the AWCBC, and this should be important to the Canadian government. As the act is currently written and applied, employers who faithfully pay their premiums are paying for bankruptcies because WCBs cannot recover premiums from insolvent companies. By honouring their obligations to the workers compensation system, these employers are directly subsidizing poor credit decisions made by the lending industry.

Lastly, but perhaps most importantly, our request for amendment has the advantage of placing responsibility for bad credit decisions where it rightly belongs -- with the banks and the lending institutions. In every Canadian province and territory workers compensation is a legislated and mandatory program without choice of customer or ability to limit risk. This contrasts sharply with lending institutions that can manage their risks by choosing their clients and customers. Put another way, workers' compensation is social legislation and non-profit, lending institutions are profit-driven. They can cultivate their customers and they can choose their level of risk.

WCBs are non-profit, have no choice of customer and fulfil the claims of workers regardless of premium status of the employers. As the act is currently written and applied, the burden of failed business loans is borne by workers' compensation and not by lenders. Further, injured workers do not enjoy the wage protection that is provided to benefits under EI and CPP. Without amendment to the act, the cost of failed business loans to Canada's compensation systems will only grow.

It is important to consider who should, and is able to, bear the burden of failed business loans. Under the current act, lending institutions have successfully shifted the burden of bad credit decisions from themselves on to the WCBs. If it is not acceptable for CPP or EI programs to underwrite the banking industry, it is equally unacceptable for workers' compensation boards to do so. We submit that this would be unacceptable.

Who should and is best able to bear the burden of failed business loans? We believe that it is the lending institutions that selects the business as a client and chooses to extend that credit. Comparative figures bear this out. Since 1997, Canadian employers have absorbed \$175 million in bad debt losses through their WCB premiums. In contrast, the total amount of outstanding credit in Canada in 2001 was better than \$ 1,402 trillion. Clearly, allowing WCBs to recuperate their claims in bankruptcy would have a negligible effect on the costs or availability of credit but it would end the unfair practice of asking employers to subsidize the cost of bankruptcies for lending institutions through their premiums.

In summary, Mr. Chairman, amending the BIA to restore the protected credit status for WCB premiums would do four things: Re-establish workers' compensation as a trust similar to EI and CCP and QPP; support Canada's competitiveness and productivity by ending bad credit subsidies through WCB employer premiums; acknowledge workers' compensation as an essential part of

Canada's social safety net; and assist the WCBs with their mandate to provide services and benefits that support injured workers, their families and employers.

Mr. Lee: There are other people who would like to have been here with us this morning as part of the delegation from other regions of the country. We do have a letter from Mr. Douglas Ens, Chair of the Board of Directors of the Workers' Compensation Board of British Columbia. I would ask Mr. Douglas Mah to outline Mr. Ens' comments, from a British Columbia perspective.

Mr. Mah: I would like to introduce this letter from the Workers' Compensation Board of British Columbia. It adverts to a serious but not uncommon scenario in virtually every province and territory in Canada. It talks about a company that used the Bankruptcy and Insolvency Act to avoid payment of some one-quarter of a million dollars in WCB debt, which occurred in 1996. About two months later, the company was reincarnated and immediately defaulted under its new WCB registration. As you were previously advised, the WCBs have no choice as to whom to extend services so even a bad client, or customer as it were, must be registered when it recommences business.

This company is currently indebted to Workers' Compensation Board of British Columbia for a sum of \$1 million. Meanwhile, the WCB has paid out \$2.5 million in claims, benefits and services and anticipates paying out a further \$1.5 million in claims. The WCB feels that it is somewhat powerless to collect the premiums from this employer because the company may simply invoke the Bankruptcy and Insolvency Act again and invert the priorities.

This example illustrates a situation that occurs in most of the provinces and territories and shows that some employers are able to use the Bankruptcy and Insolvency Act to, in effect, get free workplace insurance. The result is that some \$4 million in benefits have been paid out without any premium being collected and that, in our submission, is significant. Thank you.

Mr. Lee: Coming from Prince Edward Island, I would like for a moment, honourable senators, to give you an Atlantic point of view on this. In Atlantic Canada, as in the rest of Canada, there are compelling reasons that support the proposal to amend the Bankruptcy and Insolvency Act so that workers' compensation is re-established as a trust with priority creditor status. The social insurance provided through workers' compensation is essential to Atlantic Canadians. Over 90 per cent of the Atlantic Canadian workforce depends on workers' compensation coverage in the event of a work-related injury or illness.

For example, in 2002 on Prince Edward Island, 3,000 workers relied on the workers' compensation system for wage replacement and for medical aid benefits and services. At the same time, in order to pay these services, workers' compensation insurance remained the major cost of doing business for Atlantic Canadian employers.

For example, employers in three of the four Atlantic provinces -- Newfoundland and Labrador, Nova Scotia and Prince Edward Island -- paid the highest assessment rates in Canada. A contributor to these high assessment rates is the write-offs of workers' compensation caused by unpaid assessments. These write-offs represent a direct cost to the employers. For example, over the past five years in Atlantic Canada, \$4.8 million was written off and reported in the annual reports of the Workers' Compensation Boards of Atlantic Canada. Less than 5 per cent of that total amount was ever recovered. In Prince Edward Island, a write-off amount of \$500,000 means an additional 5-cents for every \$100 that the employer pays on his payroll expenses.

If we consider the negative effects caused by the current Bankruptcy and Insolvency Act provisions, it makes sense that we consider re-establishing workers' compensation as a trust with priority creditor status. The current provisions of the act are serving to inflate workers' compensation costs. The consequences of this are significant and far-reaching. Solvent employers, who faithfully pay their premiums, are now having to absorb the cost of bankruptcy, and injured workers and their families continue to be affected through the availability of essential benefits and services.

By amending the Bankruptcy and Insolvency Act, we could increase competitiveness and productivity and help to insure the continuation of essential benefits and service for both workers and employers. Thank you.

The Chairman: You suggest that workers compensation board premiums be given the treatment of deemed trusts. We understand that the entire trust of the amending process in 1992 and 1997 with respect to deemed trust was to eliminate them.

If workers compensation premiums were to be given a deemed trust status, would you not be concerned that the relevant departments of all levels of government would seek deemed trust treatment for all amounts due to them?

Mr. Mah: Certainly there is a floodgate type argument that can be made. We believe that workers compensation forms one of the three components of the program of support within Canada along with EI and CPP. Therefore, so we are seeking the same status with regard to the deemed trust portion as CPP and EI.

The Chairman: You indicate in your brief that in 2001 some 374,000 workers and their families received benefits from the workers compensation system in Canada. You estimated the total annual value of those benefits to be \$6 billion.

You have also estimated that the losses resulting from bankruptcies since 1996 are in the neighbourhood of \$175 million. Notwithstanding these losses, is it correct to say no workers compensation board across Canada has a significant deficit?

Mr. Solomon: Mr. Chairman, of the 12 jurisdictions in Canada, the two territories and 10 provinces, there are now only three boards that are fully funded. You will see in this year's announcements of the 2002 results that many boards have very large deficits on an annual basis.

By fully funded, I mean that we set aside money for injuries that incur during a particular calendar year projected for the next 50 years to pay out those benefits. Injuries incurred in the year are paid for in the future by employers' premiums. To be fully funded means that we have to have money for those injuries of the next 50 years.

In Saskatchewan's example, we suffered a loss in 2002 of \$93 million for an annual budget of about \$250 million. That is due to the set aside of money for future benefits injury rates increases and so on. Other jurisdictions are having substantial losses as well. As I said, only nine of the 12 jurisdictions have an unfunded position -- that is, 100 per cent funded or better to meet future obligations.

The Chairman: You indicate on page 3 of your brief that the workers compensation boards losses since 1996, a period of seven years as your brief is dated April 2003, amount to approximately \$175 million. You indicate on page 8 that if 1 per cent of revenue based on 2001 data were lost to bad debts the national total would about be \$65.5 million. It would seem,

however, that the \$65.5 million bad debt experience would come to \$175 million in a bit over two and one half years.

You indicate on page 8 that the association does not keep an aggregated statistics on bad debt write-offs. Looking only at those figures would it not be fair to say that the aggregate bad debts are less than one-half per cent without the protection of the deemed trust?

Mr. Solomon: The reason we have not kept all the details on this particular matter is that since the act was amended, some jurisdictions decided it was an exercise they did not want to continue. We have checked the records. The numbers that we provided are estimates. I would say that they are plus or minus 10 per cent.

Mr. Lee has given the example of P.E.I. Five cents on every \$100 on payroll in Prince Edward Island is as a result of these shortfalls due to the BIA and not recouping outstanding premiums from companies that are in bankruptcy and insolvency. In PEI's situation, it is very important.

For every other jurisdiction it may not be five cents on the payroll premium, but it certainly would be quite significant. In Saskatchewan's, it is about one cent.

Our average is \$1.91 per \$100 payroll across the board. We would be about \$1.90.

Employers who continue in business are subsidizing those employers quitting business and subsidizing the banks and lending institutions. We do not believe that that is fair.

The Chairman: I do not know if that answers my question. Would it not be fair to say the aggregate bad debts are less than one half a per cent without the protection of a deemed trust?

Mr. Solomon: I suppose that it could be in that ballpark, senator.

The Chairman: I want clarification, Mr. Mah. I refer to the letter that you read out from the board of directors of the Workers Compensation Board of British Columbia. You talked about a \$1 million claim from the bankrupt company. Is that correct?

Mr. Mah: That is right.

The Chairman: How many months of non-payment would that be? Surely it would be a number of months?

Mr. Mah: Yes.

The Chairman: Why would not the workers compensation board in British Columbia sue after the first month of non-payment?

Mr. Mah: The Workers' Compensation Board of British Columbia would have a provincial statutory priority. In the normal course, it would attempt to enforce that priority by either judicial or extra-judicial means. As soon that occurs, as is indicated in the letter, the company could then assign itself into bankruptcy and get rid of the debt.

The Chairman: As soon as there seems to be default, why is not more action taken?

Mr. Solomon: I am not familiar with the B.C. example. However, in many jurisdictions if there is a problem, some boards initiate action. They either put a lien on the property or make some legal move to try to secure it.

If the company in question invokes the BIA, that becomes a problem. That money is lost if there is not sufficient funds to cover all the creditors.

The Chairman: I am trying find out why they do not take quicker action.

Mr. Solomon: You would have to ask British Columbia. I do not know the answer to that.

Mr. Mah: We can find that out for you.

The Chairman: Will you drop a note to the clerk of the committee?

Mr. Solomon: Part of the reason is that employers pay only once or twice a year. They do not pay monthly. Each jurisdiction has its own process, but some will pay once a year. If they miss a year, by the time you get around to them it is into the second year because they have already been covered for a year. This company could have been a company in that circumstance.

The Chairman: Why do they only pay once a year? Could not you change that? I thought that it was every month.

Mr. Solomon: Some jurisdictions have monthly check-offs, some are quarterly and Saskatchewan is twice a year, April and October.

The Chairman: That seems to be not a good way to run business. I do not know as I have never run it.

Mr. Solomon: All our boards are representative of employers and workers. Employers advise the boards as to what kind of policies they would like to see. Larger companies with larger premiums tend to pay on a quarterly basis because they do not want that big hit.

Each jurisdiction takes that decision on the advice of stakeholders, which are employers. They then have processes.

The Chairman: You have no way of knowing if a company is gradually getting into big trouble and you will get paid?

Mr. Solomon: That is correct.

The Chairman: Should not that be corrected somehow?

Mr. Solomon: In Saskatchewan, we cover 32,000 employers. If we were to monitor all of those corporations and employers, it would add a significant amount to the premiums.

The Chairman: I am not suggesting that you monitor them, but if they paid monthly, you would find out very quickly if there were a pending problem.

Mr. Solomon: It is a good suggestion, and many boards are pursuing that.

Senator Kelleher: Industry Canada had a consultation process prior to these particular hearings. Did you meet with them and express your concerns?

Mr. Mah: Yes.

Senator Kelleher: Are they the same concerns that you are expressing today?

Mr. Mah: They would be the same concerns, yes.

Senator Kelleher: It sounds like they did not listen to you. Is that a correct assumption? If so, why? Tell me about those consultations.

Mr. Mah: We were privileged at the AWCBC to be invited to a forum on Crown priorities held in Toronto last year. Myself and Ms. Croucher were in attendance, along with a number of individuals representing federal and provincial governments and trustees in bankruptcy across Canada, as well as the office of the Superintendent of Bankruptcy. There was a full, frank and thorough discussion of not just WCB's position in the scheme of distribution but rather statutory priorities in general, and a lot of good discussion. There was, of course, no conclusion at the end of those discussions. We were encouraged by the fact that we were invited to the table and, indeed, individuals from Industry Canada urged us to make this presentation today.

Senator Kelleher: Did you ever get snookered. You went and explained to them all your concerns, and your concerns do not appear to have been answered in any of their recommendations. Why would they encourage you, then, to come and see us, when they have turned you down? Something is not right here.

Mr. Solomon: Part of it was timing. From my conversation with the officials, senator, they were already in the position of having a paper focusing on wage security and other priorities, because they looked at the BIA as it applies to Workers Compensation premiums in the previous review. They felt that the government and the Senate would want to have another perspective to see what other priorities there would be. By the time we got in the loop, much of the work had been done. The priorities conference and forum that Mr. Mah refers to was the end of the process, and by then they had their priorities set. I cannot answer for the Department of Industry on why they did not take our suggestions.

Senator Kelleher: You would not be the first, and you will not be the last, if that is any consolation.

I find it a little difficult to understand that they could not have addressed some of your concerns rather than tell you to come and see us. It almost sounds to me like they were shirking their obligation of full consultation. Is that fair to say?

Mr. Solomon: I do not want to comment on their decision process, but we feel that attending your committee is a very important part of the process. If our arguments and position are reasonable and embracing to you, then we are hoping that will have an influence on what the final report from your committee will be. I do not think we want to get into the debate of giving opinions that are not based on fact and inside information that they would have.

Senator Kelleher: It seems to me you are being a little nice to Industry Canada. I would not be so kind. We will leave that topic.

You mention that Workers Compensation is an employer-funded benefit, but do not employees pay into this fund as well?

Mr. Solomon: Again, if you refer to our comments, Workers Compensation is a result of a historic compromise. It was the first social safety net program introduced in this country, so it preceded CPP and EI. At that time, the governments of the day decided that employers would be paying the benefit for workers. As CPP came into force, the new formula was 50-50. Then EI came into force, and it was, I think, 40-60. We see government changing their formulas all the time through the course of history. For example, with agriculture, the government federally funds 40 per cent and provinces have to carry 60 per cent. As time goes on, different governments have different views on the formulas. However, certainly Workers Compensation premiums, as a result of this historic compromise, coming out of a royal commission, had

established the first program, and it would be paid entirely by employers' premiums, but in effect that was part of the employees' salaries as well, just not defined as such.

Senator Kelleher: I have one final question. What are your obligations to an employee who is on Workers Compensation when his employer goes bankrupt?

Mr. Solomon: We cover the worker if injured at work regardless of the status of the employer. Certain groups are exempt from coverage of the Workers Compensation, such as professional sports athletes, and, in Saskatchewan, farmers, although they can opt to come in, and other kinds of jurisdictions.

Senator Kroft: It is a pleasure to have you here. I have been listening carefully to the questioning going on and trying to put this all in perspective. Insofar as the previous review in the Department of Industry is concerned, it is my understanding, although I was not on this committee at the time of the last review, that there was a general thrust to minimize or reduce or even eliminate the number of trust conditions that appeared in the system. I put that up as fact one.

I have reference to the chairman's line of questioning, which was trying to put the loss ratios in some degree of context. It seems to work out, on the best numbers that our research can indicate as perhaps across the board, and there may be discrepancies from plan to plan, at somewhere in the area of one half of 1 per cent.

As far as the Department of Industry is concerned, I take some difference with my colleague Senator Kelleher in that the Department of Industry did not make, in fact, any recommendations. They gave us a very thorough list of issues. If you followed their testimony, you will have seen, as part of their presentation, a list of 35 or 40 issues they felt had emerged through the consultation process. This does not appear on the list as one of the issues. Forget whether they are pro or con, it is just not identified as an issue. Those are background facts.

What strikes me when I look at the facts of the previous conclusions about whether or not this is a major issue, what the loss ratios are, and then asking if the burden is shifted from one place, is that there is not an infinite pool out there. There is a finite pool of resource, and what is taken from one place has to be balanced. If it does not come from you, it comes from somewhere else. That is in the nature of this pool.

From a public policy view, it strikes me that the existence of bankruptcy insolvency legislation is an important component of public policy in which society, over many years, has decided that we want to provide relief in these situations, for compassionate reasons and for very practical reasons. If there was no such relief and no such plan, there would be a great reduction in risk-taking, and that would not have a positive economic and social effect.

As I look at it, the essence of the public policy question here is to have a fair sharing of the burden. We recognize that we want to be able to compensate people and help people who are in positions of distress. We want to help fairly share the burden of the write-offs or costs that are involved in doing that. However, what continues to defeat me in looking at this is the substance of your case to argue that not only are you carrying too much of the burden, but that you really should not carry any of the burden at all. If you put this in a fully secured or trust position, the implications would be that you would be out of the problem. Where would it shift? It would shift, as you say somewhere here, or at least the implication is, to banks or other creditors who can better afford it.

That is a pretty arbitrary judgment. Frankly, looking at the numbers and at the policy here, I am not convinced that the present system does not do a pretty good job of fairly sharing the burden. To simply say all the banks or all the department stores and credit card companies can afford it is an easy statement to make. However, the very people who you are trying to help through the workers compensation plans will end up bearing the cost of that through a higher cost for those services, a more restrictive credit practice or whatever.

I am trying to stand back and look at this and say: In terms of broad social policy, is there a fair sharing of the burden to carry a policy of relieving conditions of bankruptcy and insolvency? Frankly, on the numbers that are here and on the principles that are here, I have to say that I am not persuaded that your particular situation represents the carrying of an unfair burden. Perhaps that is an aggressive question. I invite your comment.

Mr. Solomon: Senator, thank you for your question. It is a fair question. To extend your logic, then I suppose CPP and EI should be in the same position of WCB premiums, if you want to spread the risk. However, there are some interesting points I would like to make.

First, lending institutions have tax write-offs against their losses. We see banks and other institutions writing off hundreds of millions of dollars to invest it in other countries against income tax payable in Canada. Is that fair? If you ask Canadians, they would say they do not like that. I guess it is in the eye of the beholder.

With respect to workers compensation, we are one of the three cornerstones or underpinnings of a system which protects workers. Our system protects workers when they are injured. The CPP protects them when they retire or have some major disability. EI protects workers when they lose their jobs. We look at it from the perspective that these are the three social safety nets that workers have negotiated over the last 90-some years with governments, and they have achieved that. What we are seeing is a threat to our system because this is a subsidy we are providing to the lending institutions and the banks. In our view, we do not believe that to be very fair.

Senator Kroft: I guess it is in the eye of the beholder. I am rejecting the line of argument that says because these two other safety net agencies, or entities, have the protection, therefore you should. Perhaps that is the wrong way around. It might be incumbent upon us to ask why they do. I would prefer to take it that way. I really do look for a level playing field.

I also think there is substance to the argument that the banks and the other private sector organizations that provide benefits in the way of services and credits to the same people you do are also contributing to the system.

An old mentor of mine years ago said that Marks & Spencer did more for the common man than Marx and Engels. We have to look fairly at the position of everyone in the system. I am more inclined to look at those protected by trusts rather than going the other way, frankly. That would be my view.

Senator Moore: On page 3 of your remarks, Mr. Lee, you say that, at present, the claim of a WCB under the BIA is unsecured in a bankruptcy, unless it has registered its interest in a provincial personal property registry. This gets back to the chairman's question about the timeliness of all that. Even then, its interest is subordinate to previously registered security interests. Of course, it is; it was registered afterward. Are you advocating that WCB claims be given a super priority over all other secured claims?

Mr. Solomon: No. We are requesting that we have the same status as CPP and EI. We want equal footing. We are not asking for super priority status above those.

Senator Moore: Do you mean equal footing with those on the basis of your argument that it is a trust?

The Chairman: We have a statutory protection, I think, and they do not.

Senator Moore: They do not, right.

Mr. Solomon: That is right.

Senator Moore: This is because of your argument that you view it as a trust along the lines that you think they are trusts and therefore you should have it?

Mr. Solomon: Both EI and CPP take in premiums to pay for future costs. They pool those results so that workers are protected in retirement or in job loss situations. We take in premiums to pay for future benefit liabilities, which include pension, wage replacement and medical costs. Workers compensation boards are the only organizations in Canada exempt from the Canada Health Act, which means that to deliver efficient health care services to our injured workers, we can establish our own system if we like. Each jurisdiction is different. Some have their own facilities. Most rely upon the public facilities.

The Chairman: I have been informed that in Quebec large companies pay their premiums monthly, while the corner grocer pays it yearly. It may be that in some small provinces you do not have large companies -- I hope you do. I guess every province is a little different. It seems to me for those who pay monthly that is an automatic tracking system. If they miss a month, you know there is a problem.

Mr. Solomon: That is correct. Every system has their own processes in place. Larger companies will pay on a more regular basis. If smaller companies are paying a \$100 or \$200 premium a year based on payroll, to get that monthly is too costly for them. For the larger ones, yes, that is the case.

The Chairman: I am simply saying that the big ones do pay. I assume that is with whom you run into big trouble.

Mr. Solomon: In Saskatchewan we have a lot of small companies that go bankrupt. The cumulative effect has been a little over \$1 million in that four-year period.

Senator Biron: You said that you had a loss of \$175 million. If you were a privileged creditor, how much of that \$175 million do you think you could recuperate?

Mr. Solomon: Almost all of it.

Senator Biron: You said that this is part of their salary. Would there come a point where the administrator would be also responsible for what is due to...

(French follows -- Senator Biron--... Au Québec, les administrateurs sont responsables des salaires...)

GS/15-05-03 (après anglais)(Sén. Biron)

Au Québec, les administrateurs sont responsables des salaires non payés. Vous dites que les cotisations versées aux commissions des accidents de travail c'est comme une partie de leur salaire. Éventuellement, demanderez-vous que les administrateurs soient aussi responsables du paiement des primes?

(M. Mah: 12h00 : You are talking about directors' liability. ...) (anglais suit).

MJ May 15, 2003 (1200 -- Following French)

Mr. Mah: You are talking about directors' liability. As far as I am aware, in most jurisdictions across Canada there is no directors' liability for workers' compensation.

Senator Biron: Would you eventually ask for it?

Mr. Mah: If the problem of under funding and non-sustainability of the system becomes serious, then provincial legislators may well have to consider it. That, of course, is not in our control.

The Chairman: In your answer to Senator Biron, you said that if the workers' compensation boards were to receive what you are asking for, then the \$175 million would be totally recovered.

Mr. Solomon: -- almost all of it.

The Chairman: That is open to some doubt. You are suggesting that most bankruptcies pay on the basis of 100-cents on the dollar to secured creditors. I do not think that is the case, although I do not know because I do not have the statistics. However, it seems dubious.

Mr. Solomon: That is the best information we have available. I suppose we could obtain the exact answer by way of information from CPP and EI administrators to see how they fare.

The Chairman: I would strongly suggest that you attempt to secure that information and drop us a letter. It simply does not ring right. I am not in a position to argue with you but my instinct tells me that it is not quite accurate.

Mr. Solomon: We will obtain that information for you.

The Chairman: Gentlemen, thank you for your time, your patience and your excellent presentation.

Mr. Lee: Thank you, honourable senators; we appreciate the opportunity to appear before you here this morning.

The Chairman: We will hear from our next panel of witnesses from the Writers Union of Canada: Ms. Marian Dingman Hebb and Ms. Deborah Windsor. Welcome. Ms. Windsor, please proceed.

(French follows: Ms. Windsor up in full: Merci de nous donner l'occasion...)

Gs/15-05-03 (après anglais)

Mme Deborah Windsor, directrice générale, Union des écrivains du Canada: Je tiens à vous remercier de nous donner l'occasion de vous présenter nos opinions.

(Mme Windsor: We will paint a picture that will give you some...)

(anglais suit)

(Following French -- Ms. Windsor continuing)

We will paint a picture that will give you some context for our proposal. This canvass clearly identifies turbulence. In the past year, we have seen a dramatic disruption in the book industry, notably, last year's collapse of the publishing empire of General Publishing. The insolvency and eventual bankruptcy at General Distribution Service had a devastating fallout effect on the publishers distributed by it; on the authors published by it; and on the General-owned Stoddard Publishing, which did not survive but never declared bankruptcy.

We have been involved in advising on the distribution of the government emergency fund to assist authors, many of whom have lost all of the fruits of their labours for a period of time, and for a few others who were very lucky to receive a portion back. In recent years, there have fewer notice changes caused by insolvency of publishers, including Somerville House, Press Gang and Ragweed, with most royalties lost and many delayed royalties for the lucky few.

Most recently, in January 2003, Stewart House Publishing filed for bankruptcy. The demise of General, because it had such far-reaching effects on so many other publishers and authors, sparked some extraordinary government assistance. However, this assistance comes nowhere near the amount necessary to compensate authors for their actual losses. The help that was provided to publishers was merely an advance on their grants -- a borrowing from the future.

There has been no governmental help to cushion the demise of other publishers that we have mentioned. This crisis has an even darker side that is not often seen. The average net professional income of Canadian book and freelance writers in 1998 was approximately \$11,480. They are hard hit when their publishers, often their sole or main source of income, become insolvent or bankrupt. It has been said that writing in this country should be viewed as an avocation and not as a vocation. Writers need other sources of income in order to write.

When a publisher becomes insolvent and ceases to function effectively, passes into receivership or obtains court protection from its creditors, apart from losing out financially writers may also see their works passed into limbo for a period of time and eventually, often without their consent, passed into the hands of a publisher not chosen by them. The writer usually receives no royalties and sees his or her books on remainder tables, where they are sold at bargain-basement prices. Those sales benefit only the secured creditor, liquidators and booksellers and often kill the market for a new edition if the author is lucky enough to have his or her rights back and be able to find a publisher.

Ms. Marian Dingman Hebb, Counsel, Writers Union of Canada: Without authors' creations there would be no publishing industry. Why does this happen? The existing law, legislation and case, is confused and confusing and does little to protect writers. Writers are not preferred creditors, they have no security and they can seldom afford to litigate against a trustee or receiver who disputes the rights they do have. The Companies' Creditors Arrangement Act, CCAA, makes no mention of copyright or books and the Bankruptcy and Insolvency Act, BIA, less frequently applies or does not apply initially. When the BIA does apply, it provides writers very limited protection and often too late. A receiver or a trustee in bankruptcy may already have assigned his or her rights or have sold the inventory, thereby short-circuiting a possible statutory reversion of rights, depriving the author of possible revenues from sales by the trustee and interfering with the author's future opportunities for re-publication. We intend our

recommendations for the protection of authors to apply to both of these acts, if they remain separate.

We submit that authors should be treated as preferred creditors and should be entitled to receive their royalties on an equal footing with the unpaid wages of the employees. A provision to this effect should be backed up by the provision of the Canadian Business Corporations Act, CBCA, and its provincial counterparts to make the directors of corporations jointly and severally liable for the royalties of authors. This would make publishers more cautious about using royalties owed to authors for new projects when their future revenues are in doubt.

We also submit that although they do not own the physical copies of their works, authors should be treated in a manner akin to the treatment of unpaid suppliers to repossess their goods proportional to unpaid amounts. The claim of an unpaid supplier to repossess goods ranks above most other claims. A publisher's goods are partially intellectual property.

If that intellectual property has not been fully paid for, the author should have a lien on the physical books to the extent of the accrued royalties or other shortfall in payment. We want something comparable to the special right of farmers and fishermen in section 81.1 of the Bankruptcy and Insolvency Act to a charge against the bankrupt's inventory, securing unpaid amounts for their products.

We also submit that rights granted to a publisher in respect of both unpublished manuscripts and published books should revert to the author immediately upon bankruptcy, without delay or payment. The trustee in bankruptcy should not be permitted to carry out the contract without the author's consent because publishing is a creative business and there is often a significant personal relationship between the author and the publisher or editor. A publishing business cannot be administered by economists and accountants without risk to the artistic and literary integrity of the books produced and marketed.

Section 83 of the Bankruptcy and Insolvency Act provides for reversion of rights in unpublished work without financial cost to the author if the work is unpublished and if no expense has been incurred by the publisher. If expense has been incurred, however, the author is only entitled to a reversion if he or she pays the trustee an amount to cover those expenses.

If the author declines to pay, the rights will revert six months after the date of the bankruptcy if the trustee decides not to carry out the contract. By this time, a book could well be out of date, and the author will likely have suffered loss or delay of royalties.

In the case of a published book, the author apparently has no entitlement to a reversion of rights whatsoever in any circumstances under the Bankruptcy and Insolvency Act. However, the trustee is not permitted to assign the contract, assign the copyright or licence the work, except on terms that will guarantee the author royalties.

Even if the author buys all the copies, or even if the trustee sells all copies to booksellers or jobbers, the act does not specifically require the trustee to reassign the copyright to the author. The author is in limbo.

We submit that the trustee should not be permitted to transfer or assign the copyright or any interest in it. The relationship between the writer and the publisher is a personal one, and the writer should be free to make his or her own alternative arrangements for publication -- in effect, to have the right not to be published by a trustee or receiver, and not to have a publisher chosen for him or her by a receiver or trustee.

We further submit that writers should be secured creditors with respect to their unpaid accrued royalties in a receivership or bankruptcy. Their security should be the copies of their own books. With respect to this inventory, they should have priority over all other preferred and secured creditors, including employees and financial institutions. Obviously, some our proposals are alternates, or they can work together.

Where the author chooses to acquire some or all of the copies, the author should be liable only for the purchase price in excess of the unpaid royalties owed to the author. If the book costs less than the royalties owing, the royalties owing to the author would be reduced by the amount attributed to the author's purchase of them.

An author who chooses not to acquire inventory of his or her book, or insufficient inventory to wipe out the royalties owing to the author, should be entitled to receive revenues from books sold by the trustee or receiver to the extent of his or her unpaid royalties. This would amount to an author's lien on bound copies and printed sheets of his or her own work.

In practice, this amounts to giving the author the option of taking books in lieu of royalties. It does not put bread on the table or pay the rent, but it is better than nothing, which is the author's usual fate in a receivership or bankruptcy.

It is very important for a writer to be able to control or acquire the inventory of his or her book, as it may be impossible to find a new publisher if the new publisher is going to face competition from books sold by receiver or trustee, sometimes through regular retail outlets and sometimes ending up on a remainder table or in some wholesale outlet.

We submit that writers should have the statutory right to purchase their books immediately at the audited depreciated inventory cost. Subsequent to this first opportunity, they should later be entitled to purchase copies at the same price that the receiver or trustee is willing to accept from any other person, including a liquidator.

We often have situations where the trustee offers an author the opportunity to purchase his or her book at the manufactured cost of the book. On the face of it, that may seem fair enough; but then the author cannot afford to do it and they sell it a few weeks later to a liquidator for 25 cents a copy. This is unfair.

Section 83(3) of the Bankruptcy and Insolvency Act requires a trustee to offer the author the right to purchase the manufactured or marketable copies of the book on terms and conditions the trustee considers fair and proper, before offering to anyone else. This has been interpreted by trustees as requiring the author to purchase all of the books. If there is a huge inventory of several thousands books, the author is given the choice of taking all 3,000 of the books, but cannot get 250.

We submit that the author should be able to purchase some of the inventory. The price at this point should be specified to be no more than the price that the trustee is willing to accept from any other purchaser, including liquidators.

The purchase price of books sold to the author should be reduced by the amount of the unpaid royalties; and the author should have the first right to purchase his or her books at a reasonable price -- no more than what they would be offered for sale to anyone else.

If the author does not acquire all the copies of his or her book, there should be a legal obligation on the purchaser of the book to pay a royalty on sales that is no less than the royalty stipulated in the agreement with the bankrupt or insolvent publisher.

We further submit that a trustee in bankruptcy or receiver who decides to carry on selling an author's book should be required to pay that author royalties on previously sold books for which the trustee collects payment, as well as on the royalties on copies actually sold by the trustee or receiver. You have the situation where, if the trustee ships out the books, then the author will get royalties on them; but if, in fact, the trustee is just gathering money in from bookstores and so on, the author gets no part of that.

There is considerable uncertainty regarding the applicability of the Bankruptcy and Insolvency Act to publishing contracts, though the law is stated quite simply. When copyright is retained by the author, the agreement is automatically terminated by the bankruptcy of the publisher. The trustee cannot continue to deal with the author's rights, although the trustee can deal with the inventory of the books.

Where there is a copyright assignment to the publisher, section 83 deals with the author's reversionary rights, and the trustee's rights to carry out or assign the contract. However, many -- if not most -- trade book contracts are licences for publication rather than copyright assignments. It is sometimes unclear in law whether a publishing agreement is a partial assignment of copyright or whether it is a licensing agreement under which the author retains his copyright.

In the practical world, trustees dispute whether an exclusive licence conveys an interest in the copyright. Although it is not an assignment of copyright as far as the Copyright Act regime is concerned, perhaps it is under the Bankruptcy and Insolvency Act; no one really knows. In my experience, trustees are always reluctant to acknowledge that an author's rights have reverted.

Section 83(2) of the Bankruptcy and Insolvency Act is, to say the least, extremely confusing. It entitles the trustee to sell, to authorize the sale or reproduction of any copies of the published work subject to payment of royalties to the author.

This is an important clause because it does guarantee the author royalties from sales under the auspices of the trustee. However, does it apply where the rights have reverted to the author because the agreement is a licence?

Inapplicability of the Bankruptcy and Insolvency Act may be to an author's advantage or disadvantage, depending on the circumstances. Is the book published? What happens to the inventory? If it is applicable, it may prompt a quick release of author's rights or it may put them into limbo for all time, or for a period of time.

In addition to the confusion with respect to the application of section 83, section 65.1 of the Bankruptcy and Insolvency Act also provides that, where a notice of intention to file a proposal or proposal has been filed, no one can terminate or amend an agreement with an insolvent person for this reason -- or because the person is insolvent. Court orders, as well, under both acts, may contain prohibitions intended to prevent persons, including authors, from exercising their rights as a result of any default by the debtor. Therefore, any contractual protections the author may have built into his or her contract are right out the window.

Whether or not either act is applicable, most authors will lose royalties. All will be caught up in their publisher's insolvency if there is any remaining inventory. Most important of all to authors, there will often be a continuing cloud over their rights.

Ms. Windsor: The insolvency picture we see is pathetic and it is unfair. Authors provide the foundation for the whole publishing business. Without them, this industry would not exist.

In conclusion, we ask that you give serious consideration to our proposals. That would go some distance to rectify this situation.

Senator Kelleher: I want to go back to some paragraphs in your brief and throw some questions back at you people. You suggest that the author should be permitted to purchase only some of the books authored by him or her, and not necessarily all of them, at a price equal to that which is obtainable by the trustee elsewhere. Would a partial purchase of the inventory by the author and purchase of the balance by another publisher not diminish the price that the other publisher would be willing to pay?

Ms. Dingman Hebb: Do you mean because the other publisher does not get all the books? If the authors were only purchasing some of the books, it is probably because they sell books at readings, and they are not likely to take that many books. My experience has been if the author will take enough to be competitive with the other publisher, the author probably will take all of those books because no publisher wants to have books from competing sources. When you sell something in the book industry, unlike most other industries, it is not a real sale and there can be returns. Out in the market, no one would know to whom to return those books because they are all identified by ISBNs. They go back to the original publisher; they go back to the trustee. I do not think that that would be a problem.

Senator Kelleher: I leave that for you to consider.

In your brief, you suggest that writers should be considered secured creditors with respect to their unpaid royalties, and the security should be the inventory of their own book's ranking prior to all other securities. If you were to adopt this, would it not make the financing of publishers by conventional means virtually impossible?

Ms. Dingman Hebb: I have thought a lot about that question. I have not got a perfect answer for it. You are right. The inventory of the publisher is mainly a building, maybe, that they own, and that will be, perhaps, the biggest asset. Next are the inventory and the contract rights as well. However, the inventory is a big part of it. The financing of publishers comes from their own assets, their potential sales and the banks. They are, in a sense, borrowing the royalties they owe to the author. They used to pay royalties only once a year. Partly as a result of pressure from the Writers Union, it is fairly standard to pay royalties once a year, so the publisher's cash flow is the authors' royalties.

The Chairman: You said once a year in both cases. What did you mean?

Ms. Dingman Hebb: Once a year they would --

The Chairman: Then you said under pressure from the union.

Ms. Dingman Hebb: Under pressure from the union, it is now fairly standard for publishers to pay royalties twice a year. It should be more often. It should be quarterly. In fact, that does not happen. That is a very important source of financing to the publisher.

When banks lend money to publishers, they should scrutinize it pretty carefully to see whether the publisher will be able to -- and I am all in favour of banks lending money to publishers. One does not want to discourage that because it is necessary cash flow, but some publishers do get themselves over extended, and they seem to forget that money that is owed will

become due to authors two times during the year. Will they have enough money in their bank account to pay the authors? Publishers should operate in a way that means that that money will be available to meet their obligations to the author regularly.

Senator Kelleher: You are right to have thought about it.

Ms. Dingman Hebb: That means you did not like my answer.

Senator Kelleher: No, I did not say that. I am trying to be very nice. It is not like me, but I am trying very hard.

The brief suggests that there be a preferred treatment, or a secure treatment, for all unpaid royalties and suggests by analogy a treatment similar to that of unpaid wages or unpaid suppliers. Unpaid wages have a limitation of \$2,000, and unpaid suppliers have a limitation to those goods that were delivered within the previous 30 days. Are you suggesting that there be similar types of limitations on authors' royalties and, if so, in what form?

Ms. Dingman Hebb: I was not suggesting there should be, but that could be looked at. If there were a book like *Harry Potter*...

Senator Kelleher: That is cheating. Anyone can sell *Harry Potter*.

Ms. Dingman Hebb: You can see that the accrued royalties could be a very big hit, but that is an unusual situation. I did not really address myself to whether there should be a limit to that, but I think it would be a reasonable suggestion at some time.

Senator Kelleher: If you have any thoughts in that area and you could let us know, that would be helpful.

Ms. Dingman Hebb: On the other point, I do not think that intellectual property is in the same category as the delivery of other goods. I do not think there is any sense. You make your delivery when you sign your contract, and that is probably two years before a book comes out. Therefore, on that one, there should not be a limitation, or the scheme would not work.

Senator Moore: Thank you, witnesses, for being here.

On page 3, with respect to the reversion of rights, you are saying that the trustee in bankruptcy should not be permitted to carry out the contract without the author's consent. The rights granted to a publisher with respect to both unpublished and published should revert to the author immediately upon bankruptcy.

Is it usual for a writer to assign his or her copyright in this precious asset to a publisher?

Ms. Dingman Hebb: No, it is not the usual practice in trade book publishing. It is the usual practice in educational publishing, which is a big part of the market as well. In educational publishing as in trade publishing, no, that is more general.

Senator Moore: What would the division be on educational versus trade publishing businesses? What is the split? Is it 50-50? Do you know?

Ms. Dingman Hebb: I would think the educational sector is larger because you are dealing with some of the multinational companies and publishing big textbooks. One of the problems with this is the issue of whether or not there has been an assignment of copyright because there is language in the bankruptcy act that refers to the copyright or an interest. The textbook writers

say, of course, you do not have a problem if you have not signed your copyright. That does not seem to be how the trustees read it.

Senator Moore: I do not understand that. I agree with your position on this. Would an author not write into the agreement with the publisher that he or she retains absolutely all copyright in their work?

Ms. Dingman Hebb: Yes, indeed.

Senator Moore: How can trustees even think that they have acquired that asset? That does not make sense to me.

Ms. Dingman Hebb: Trustees do think they have acquired it, and they seem not to pay a lot of attention to the clauses in the contract. They seem to take the view that the Bankruptcy Act in some way is an overlay over the whole thing, and you can forget looking at your contracts.

Many of my legal colleagues also have debates about what sort of bankruptcy clauses you can write into contracts that will actually work. The one the Writers Union recommends in any bankruptcy or receivership is that the rights will revert automatically to the author. Many of my colleagues are of the view that that clause will be completely ignored by trustees, and I can testify that that is the case. Even in the case of sophisticated wording, such as the reversion will happen one minute before the trustee comes into place, or you can buy it back for a dollar, the trustees seem to just ignore that.

Senator Moore: I do not see how they can. If you have a written agreement, you have a contract. We do have laws in this country. I do not see how they could take over a writer's asset and transfer, or otherwise assign it. They could not do that.

Ms. Dingman Hebb: They ignore the assignment clause as well. I saw, in the recommendations of the insolvency institute, or in something I was just reading, that one of the recommendations made to you by some group is that, in fact, clauses that prohibit assignability of a contract should be ignored and it should be made clear that, in fact, those clauses are overridden by the insolvency legislation.

Senator Moore: That is preposterous. I cannot understand that.

You talk about the writer being able to buy back books and you talk about the purchase price. Are you talking about the purchase price being the industry norm of the suggested retail, less 40 and then less any royalties owing? What are you starting out with as the basic price; the less 40?

Ms. Dingman Hebb: It would have to be a wholesale price. I think it should be the manufacturer's price. The price that I would think was fair and sometimes happens, but not in other situations, where the author wants to buy and the publisher is getting into difficulty, the fair price may be the manufactured price of the book.

Senator Moore: What it cost the publisher to have it printed and bound?

Ms. Dingman Hebb: I am suggesting it should be the audited, depreciated cost in a situation of financial distress.

Senator Moore: Okay.

The Chairman: Could we get some perspective in order to have a better understanding of what you are saying? The Writers Union that you represent, would most of your writers be, I am not sure what other words to use, small writers?

Senator Moore: Struggling?

Ms. Windsor: No. The Writers Union represents professional trade book writers. A professional writer is designated as someone who has written and had a book published by a reputable publisher, not through a vanity press. We have members who are first book out, we have many members who are Geller award winners, GG award winners, the big name writers, as well as many who are professors and write on the side and others who are literally the starving artist and struggling.

The Chairman: When you look at the book publishing business in Canada, I think it would be fair to say it is a very precarious business?

Ms. Windsor: Very fair to say.

The Chairman: Many of the best have gone bankrupt. In my career, the company I ran, maybe 25 years ago, with the aid of the Ontario government, gave help to McLellan and Stewart, to keep them going. We did it pro bono; it was not a business investment. Is it not also a fact that they term a bestseller in Canada 5,000 books?

Ms. Dingman Hebb: That is correct, but many books sell many more than that.

The Chairman: I am not suggesting they do not, but also, the big textbook publishers and trade journals are allowed to sell publishing, are they not?

People who enter into the big business of textbook publishing and a lot of the trade journals, et cetera, many of those would be self-published would they not?

Ms. Dingman Hebb: What do you mean by self-published?

The Chairman: They own their own publishing companies.

Ms. Dingman Hebb: I do not think so. I mean Loony Spoons or the fellow that did the Lemonade book?

The Chairman: McGraw Hill, for example.

Ms. Dingman Hebb: How do you mean they are self-published?

The Chairman: McGraw Hill publishes their own books.

Ms. Dingman Hebb: Right.

The Chairman: You do not have anything to do with those kinds of publishers?

Ms. Dingman Hebb: We have authors who deal with them.

The Chairman: I understand, but they are not amongst the precarious ones. I am not criticizing you; I am trying to get a perspective here. All I am saying is that many of your members have to deal with publishing houses whose existence is precarious?

Ms. Dingman Hebb: That is true, but we did not think General Publishing's existence was precarious.

The Chairman: No, that I understand, but in general publishing, we do not see that many bankruptcies there.

Ms. Dingman Hebb: The publishing house called General Publishing went bankrupt.

The Chairman: You mean the name General Publishing, I misunderstood. You say here that it would not be a publishing business if there were not authors, which is a truism. I assume the corollary is there would not be authors if you did not have publishing houses?

Ms. Dingman Hebb: I do not think that is true. If you go back 20 years in this country, there were many little publishers that started that were run by authors. There still are some, and some of them grow. One of the very important ones was Anancy, which as it became more successful; General Publishing bought it. New West is a co-op of authors, so if big publishers collapse, there will always be publishers. However, it would be more and more difficult for an author to make a living because a small publisher, or a publishing co-op run by authors, not going to be able to pay the advance that the author needs in order to spend two years or three years writing the book.

The Chairman: That is the point I am trying make, but you made it for me.

If you could take an estimate, out of curiosity, how many people in Canada earn a good living, on a constant yearly basis, by writing? I do not mean textbooks or newspapers, I mean authors. Do you have any idea?

Ms. Dingman Hebb: What do you mean by a good living?

The Chairman: Let us say at least \$25,000 a year, which is not a great living, but it is something.

Ms. Dingman Hebb: A number would.

The Chairman: How big would that number be?

Ms. Dingman Hebb: I do not know how big that number would be, but there would not be that many book writers, from their book writing. For writers who do periodical writing, the level is a bit higher because magazines and so on pay more.

The Chairman: I remember spending an evening about 30 years ago with Michener, who is obviously a very successful writer. He was making the point that there probably were not 120 people a year who wrote fiction on a profitable basis each year. I have no idea.

Ms. Dingman Hebb: We would have more than 20 people in the Writers Union who make a fairly good income from their writing.

The Chairman: From fiction?

Ms. Dingman Hebb: Not necessarily from fiction, from fiction and non-fiction. From fiction only?

Ms. Windsor: If you extrapolate that 20 in relation to the number of professional writers at that time, take that same percentage and apply it to the number of professional writers there are today, I believe the number of writers is much larger, but the ratio of that "successful" group would be about the same.

Ms. Dingman Hebb: There were 350 members of the writers union about 20 years ago, today there are 1,400. At the beginning, most of the authors were fiction writers and there would have been a handful of them that would have earned a living.

The Chairman: I have a conflict of interest because I am writing a book and it will come out in October and I am not a member of your union.

Ms. Windsor: Until you are published you are not entitled, but once published, we would love to talk to you.

The Chairman: I am being published by McGill Queen's.

Senator Kroft: I would like to hear a little more in the same area in order to have more of a sense of policy. Public policy often has to intervene in order to make sure that what one might call the power relationships in society are fairly balanced.

I must say I consider myself a serious reader and I am delighted by the fact that although, for decades now, there has been talk about the end of reading because of television, but everything we hear seems to be to the contrary; even bookstores are bigger now.

We are dealing with more writers and more books, which comprise, in totality, a viable component of our economy. Yet, there seems to be a whole set of crises levels in these power relationships. There is the concern of writers to earn an acceptable living. There are the publishers who seem to possess a fragile element, other those publishing giants of scientific journals and textbooks. There are the retailers, about whom the jury is still out. There has been enormous consolidation but whether the mergers in this country will be successful, because of their war with the Internet, remains to be seen. Is there any safe area in the whole industry?

Ms. Hebb: Perhaps there is not.

Senator Kroft: Everyone seems to recognize, in spite of the fact there are more books and more people buying and reading more books, a fragility of the entire structure. There is no clear, dominant figure -- no clear victim and no clear victor. Am I missing something?

Ms. Windsor: I do not think you are missing anything. I see the industry as being like an ecological system. We like to have big and little writers so that we always have a new group of writers coming into the system. We also need little publishers because writers usually get their first chance with the little publishing houses, unless they have a name from another position in their life. We need the big publishers so that the recognized writers can receive the international recognition that Canadian writers should receive. We also need to have big and little booksellers so that we can have the niche bookstore. It is an ecology that needs a complete balance.

The union clearly understands this and we have established an initiative to work on strengthening the industry in its entirety. However, we are firm in our belief that it is the story -- the foundation; without it you cannot make a book and without it you cannot have a movie. The story is very much the foundation of Canadian culture and therefore, it is the pivotal tool without which the entire ecological system would fall apart.

Senator Kroft: Darwin's observations have not been suspended in that ecology?

Ms. Windsor: Not in mine.

Senator Kroft: Is there a group of creative people, other than writers, who are in a similar situation? Do you have common with another group so that we do not draw the circle too tightly? Where do you see authors vis-à-vis other creative people? Are we correct to focus specifically on authors and manuscripts? Are there other cohorts?

Ms. Hebb: Recently, there was an interesting court case. Although the particular section in the BIA was intended to assist book writers, a court interpreted it to apply to a musical work.

Senator Kroft: Would it apply to the creative world of software writers of computer software?

Ms. Hebb: It is fairly arbitrary that Canada and other countries have treated software as a literary work for the purpose of copyright legislation. There was much debate about that. I think software is unique in that it is not truly a literary work because it does not tell a story. I saw a bit of the discussion about software in the government's working document of its report to the committee. In it, software was referred to as a tool being used in other businesses -- programs utilized to assist other businesses. That is unique. If you address that problem, you have to look at software as a separate issue.

The Chairman: Thank you, Ms. Hebb and Ms. Windsor.

Ms. Windsor: Thank you, senators.

The committee adjourned.