

15 July, 2014

Paul Halucha  
Director-General  
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Industry Canada  
235 Queen Street, 10th Floor, East Tower  
Ottawa, Ontario K1A 0H5

**Re: Industry Canada's Statutory Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act***

Credit Union Central of Canada (Canadian Central) welcomes the opportunity to participate in Industry Canada's statutory review of the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement Act* (CCAA).

Credit Union Central of Canada is the national trade association for the 320 Canadian credit unions operating outside of Quebec. Canadian Central's shareholders include five provincial/regional credit union Centrals and one Federation. Credit unions are financial co-operatives owned by their members and operate in a manner that puts member service ahead of profit. The credit union system outside of Quebec holds more than \$162 billion in assets and serves 5.3 million members. Credit unions also employ more than 27,000 people across Canada and are the only bricks-and-mortar financial institution in more than 360 communities.

Credit unions are significant retail lenders to individual Canadians and commercial and agricultural enterprises across the country and thus have an interest in the evolution of Canada's *Bankruptcy and Insolvency Act* and the *Companies' Credit Arrangement Act*. Canadian Central has consulted with its national committees in relation to the 2014 Industry Canada consultation document on these respective statutes and our main comments associated with legislative reform are set out below.

**1. Consumer Deposits**

The 2014 Industry Canada consultation document raises the possibility of legislative reform to address situations in which purchasers of prepaid goods or services do not receive their purchases (or a refund) when a good/service provider declares bankruptcy. In such events a consumer may unwittingly become an unsecured creditor in a retailer's bankruptcy.

The paper asks stakeholders to comment on how the government may enhance protection for consumer deposits in such situations and suggests the possibility of creating a consumer lien that would rank ahead of unsecured creditor claims but behind the claims of secured creditors.

The paper also considers the possibility of an even stronger consumer lien that would grant consumers priority ahead of secured creditors also.

Credit Union Central of Canada is of the view that a consumer lien ranking behind secured creditors would have little practical impact in many insolvencies since secured creditors would be the beneficiaries with first access to the bankrupt's remaining assets. The alternative of placing consumer claims ahead of secured creditors would be equally problematic since it would undermine the efforts of creditors to secure their loans against assets that can be realized in a bankruptcy scenario. This, in turn, will result in either (i) an increase in the cost of credit charged to the borrowing business in order to hedge further against bankruptcy risk or (ii) a reduction in credit availability to businesses that may face significant consumer claims in the event of a bankruptcy. Furthermore, it is not realistic to assume that secured creditors can continually (and without cost) monitor and respond to the changing potential consumer claims that may be faced by a growing business. This is especially true for smaller financial institutions such as credit unions.

Canadian Central recommends the Government of Canada consider other possible options to address these situations (e.g. a commercial business funded insurance scheme) rather than the imposition of a consumer lien that will penalize prudent secured lenders.

## **2. Responsible Lending**

The Industry Canada consultation paper invites stakeholders to consider how the BIA could take into account creditor behaviour that may have contributed to the financial difficulties or insolvency of a debtor. The paper notes that under BIA proceedings the debtor's conduct is subject to close scrutiny but not that of the creditor. It goes on to suggest that Canadians may benefit from the establishment of a "responsible lending" regime that would impose duties on creditors before extending credit and restrict the availability of insolvency remedies to creditors that have failed in those duties.

In response to these proposals Canadian Central holds that major Canadian banks and credit unions are already held to very strict standards of lending behaviour. Credit unions and banks are already required to provide detailed cost of borrowing disclosures to consumers and to advise consumer on the possible perils of excessive borrowing. In addition, financial consumer legislation at both the federal and provincial level, has been enhanced to ensure consumers are adequately informed and protected from dubious lending practices.

Both federal and provincial financial services legislation create a heavy regulatory burden on the lender that deals with retail consumers. Thus it would be costly and inappropriate to further saddle heavily regulated credit unions and banks with an additional burden and the risk of having their claims disallowed under the BIA.

Of course, there may be some merit in considering the application of such proposals where credit has been extended improvidently or on unconscionable terms by unregulated lenders that are not subject to extensive market conduct and consumer protection regimes. If that is the intent of these proposals it should be made clear that they will not apply to regulated institutions already compliant with extensive consumer protection requirements.

### **3. Professional Fees in CCAA Proceedings**

The Industry Canada consultation document invites stakeholders to comment on the impact of professional fees on insolvency proceedings. This is a welcome invitation since the last few major CCAA restructurings have seen a significant rise in professional fees. In fact, in some recent restructurings, professional fees have reached the point where the proceeding itself is at risk due to the high cost of the fees eating away at the principle amount. The Nortel CCAA proceeding is probably the highest profile example of this, but others such as Indalex (another major recent CCAA proceeding) also provides an example of high fees where the amounts range into millions of dollars. In our view, these costs are becoming a major deterrent to using the CCAA and may be undermining the utility of the CCAA statute. From a creditor's perspective, expected professional costs are often a major factor in avoiding the CCAA regime and the same concerns may also affect the debtor.

While courts are responsible for reviewing professional fees, it is very difficult to reject counsel and other professional fees once they have already been incurred. To deal with these situations it is recommended that the government consider adopting guidelines that would assist the judiciary in determining reasonable professional fees under the circumstances before approving the fees. Furthermore, a more rigorous disclosure and break-down of fees should be put in place to ensure transparency.

### **4. Employee Claims**

The Industry Canada consultation paper suggests the possibility of further increasing the claims available to employees in bankruptcy (e.g. raising or eliminating the current \$2000 cap on unpaid wages) and other measures to enhance protections to pension plan deficits and benefit plans. These would add considerably to the protections brought in during the 2008 bankruptcy and insolvency reform process that saw the establishment of the Wage Earner Protection Plan (WEPP).

Canadian Central recommends the federal government proceed with caution when considering further enhancements to the protections established in 2008. A further reduction in the

priorities available to secured creditors as a result of these enhancements would likely result in the reduction of credit availability and may increase incentives for lenders to reduce credit to companies facing financial difficulties. As an alternative Canadian Central recommends the

government review the impact of the 2008 employee protections on credit availability and creditor behaviour and make policy decisions regarding further enhancements based on the results of that evidence. Currently, too little is known about the impact of the WEPP and enhanced employee priorities to determine with confidence the impact of any future enhancements.

Canadian Central is grateful for the opportunity to provide comments on this important consultation and looks forward to working cooperatively with Industry Canada as it endeavours to strengthen the BIA and CCAA. If you have any questions of comments please contact Rob Martin at Canadian Central ([martin@cucentral.com](mailto:martin@cucentral.com)).

Regards

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Credit Union Central of Canada