Unilateral Disclaimer of Collective Agreements: Exploring the Constitutional Implications

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1. INTRODUCTION

The objective of a commercial restructuring under either the *Bankruptcy and Insolvency Act* (BIA) or the *Companies' Creditors Arrangement Act* (CCAA) is to prevent a company from going into bankruptcy by making it economically viable.[1] To do so, it is generally permissible for a debtor company to reduce operational costs through the unilateral disclaimer of partly performed contracts.[2] Currently, this ability does not encompass collective agreements.[3] The issue of whether disclaimer should be statutorily extended to allow for the termination of collective agreements was the subject of considerable debate during the most recent round of amendments to the *BIA* and the *CCAA*. In a 2003 Parliamentary Review of Canadian insolvency law, the Standing Senate Committee on Banking, Trade and Commerce recommended that courts supervising commercial restructurings be given the ability to authorize the disclaimer of collective agreements.[4] Such an approach would have moved Canadian law closer to the American position found in U.S. *Code* §1113.[5] Ultimately, however, the government in Statute c. 47 took the opposite approach and the continuation of a collective agreement during a restructuring

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1 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*]; *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*].

2 For a discussion on the treatment of the disclaiming of partly performed contracts under the *BIA* and the *CCAA* see Anthony Duggan, "Partly Performed Contracts" in Stephanie Ben-Ishai & Anthony Duggan, ed., *Canadian Bankruptcy and Insolvency Law* (Canada: Lexis Nexis Canada, 2007) 15.

3 *Mine Jeffrey inc., Re*, 2003 CarswellQue 90, [2003] Q.J. No. 264, REJB 2003-37078, 35 C.C.P.B. 71, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (Que. C.A.) at para. 80 [*Jeffrey Mines*].

4 Standing Senate Committee on Banking, Trade, and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: 2003), online <http://www.parl.gc.ca/37/2/palbus/commbus/senate/com-e/bank-e/rep-e/bankruptcy-.pdf> at xxi ["2003 Senate Report"].

5 29 U.S.C. §1113 (1984) [U.S. *Code* §1133].

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was statutorily entrenched.[6] Yet, the debate remains unresolved and, as the Canadian government explores legislative changes to address current economic troubles, it is possible that future amendments may include the ability of a restructuring debtor to unilaterally modify or terminate collective agreements.

Two recent Supreme Court of Canada (SCC) decisions, however, raise questions about the constitutionality of unilateral disclaimer of collective agreements. This paper will analyze the constitutional issues that arise in the relationship between ensuring a successful restructuring and guaranteeing the rights of workers. Specifically, this paper will examine the issue of whether legislation based on U.S. *Code* §1113 would be constitutional in Canada.

In the first section, I will review the current judicial interpretation of the *BIA* and the *CCAA* regarding this issue, the American position in U.S. *Code* §1113, the suggestions contained in the 2003 Senate Report, and the Statute c. 47 provisions. The second section of this paper will explore the federalism and *Charter* issues pertinent to the debate that arises as a result of the two recent SCC decisions.[7] The holding in *GMAC Commercial Credit Corporation — Canada v. T.C.T. Logistics*, that a determination of successor liability is *ultra vires* bankruptcy courts, will be used to examine whether the ability of such courts to alter or disclaim collective agreements is also beyond their jurisdiction.[8] As well, I will analyze the potential implications of the section 2(d) *Charter* right to collective bargaining, recognized in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*.[9]

Ultimately, I will argue that although there may be constitutional hurdles to a proposal allowing for the statutory ability to disclaim collective agreements, these are not so insurmountable as to prevent Parliament from introducing such legislation if it elects to do so.[10] Regarding the federalism issue, I will show that, although there may be operational inconsistencies between the proposed insolvency legisla-

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6 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, (assented to on 25 November 2005), c. 47 [Statute c. 47].

7 *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

8 *GMAC Commercial Credit Corp. — Canada v. TCT Logistics Inc.*, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, [2006] S.C.J. No. 36, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 SCC 35, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 271 D.L.R. (4th) 193 (S.C.C.) [*T.C.T. Logistics*].

9 *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290, 2007 C.L.L.C. 220-035, 363 N.R. 226, 400 W.A.C. 1, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 65 B.C.L.R. (4th) 201, 283 D.L.R. (4th) 40, 137 C.L.R.B.R. (2d) 166, 242 B.C.A.C. 1, 164 L.A.C. (4th) 1, 157 C.R.R. 21, 2007 SCC 27, [2007] 2 S.C.R. 391 (S.C.C.) [*Health Services*].

10 It should be noted that the focus of this paper will be limited to the constitutional aspects of unilateral disclaimer during a commercial restructuring. It will not evaluate the

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tion and current provincial labour laws, the paramountcy doctrine will ensure the former trumps the latter. Regarding the *Charter* issue, I will apply the characteristics of section 2(d) of the *Charter* to collective bargaining to both the 2003 Senate Recommendations and the Statute c. 47 provisions in order to demonstrate that neither substantially interferes with this new constitutional right.

2. THE CURRENT STATUS OF THE LEGAL RELATIONSHIP BETWEEN COLLECTIVE AGREEMENTS AND COMMERCIAL RESTRUCTURINGS

(a) The Law Prior to Statute c. 47

The *BIA* and the *CCAA* are the two main bankruptcy and insolvency statutes in Canada.[11] As currently drafted, neither statute expressly provides for the disclaimer of contracts.[12] Accordingly, it has fallen on the courts to determine whether disclaimer is implicitly permitted. In *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting*, the British Columbia Court of Appeal held that the common law right disclaimer that exists outside of insolvency also exists during bankruptcy proceedings under the *BIA*.[13] As well, in the Ontario case *Re: Dylex Ltd.*, Justice Farley found that section 11 of the *CCAA*, which outlines the powers of a court during a restructuring, provides insolvency courts with the inherent jurisdiction to author-

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arguments in favour and against unilateral disclaimer of collective agreements, nor present a conclusion on whether it should be legislated.

11 Canada has a bifurcated reorganization system. Industry Canada has explained the distinction between the two statutes in these terms: "The Canadian regime derives efficiency gains from having a dual structure capable of addressing the different needs of small and large business. The two schemes making up the regime are complementary. Part III of the *BIA* provides a somewhat rigid and perhaps less facilitative, but low-cost, approach tailored to small business reorganizations. The *CCAA* provides an administratively more costly, but also more flexible scheme for larger corporate restructurings." Canada, *Efficiency and Fairness in Business Insolvencies* (Ottawa: Industry Canada, Corporate Law Policy Development, 2001), at 51; Section 3(1) of the *CCAA* specifies that the *Act* only applies in respect of a debtor company or affiliated debtor companies where the total of claims against the debtor company or affiliated debtor companies exceeds five million dollars. *CCAA*, *supra*, n. 1, s. 3(1).

12 A notable exception to this was the treatment of commercial tenancy agreements under the *BIA*. A debtor tenant could disclaim a lease by giving the landlord 30 days notice. If the landlord objected, the court had to disallow the objection if it was satisfied that the debtor could not make a viable proposal without the disclaimer. *BIA*, *supra*, n. 1, s. 65.2.

13 *New Skeena Forest Products Inc., Re*, 2005 CarswellBC 578, 2005 BCCA 154, *(*sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, *(*sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185, *(*sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327 (B.C. C.A.) at para. 23.

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ize disclaimer of contracts.[14] Until recently, however, it remained unclear whether the ability to disclaim general contracts under either statute extended to the disclaimer of collective agreements.

A collective agreement is a written agreement between an employer and a bargaining agent (typically a union) that represents the employees. It contains provisions respecting the terms and conditions of employment. In Ontario, the *Ontario Labour Relations Act* (*OLRA*) comprehensively governs the creation, function, and termination of collective agreements.[15] Pursuant to section 58(3) of the *Act*, prior to the expiry of its term, a collective agreement can only be terminated by an order of the applicable labour relations board after a *joint* application by the employer and the employee.[16] Even then, section 73 provides that a union's certification remains in force and that an employer can only implement new terms and conditions with the agreement of the union.[17] As is evident, these unique statutory-mandated characteristics of collective agreements differentiate them from other partly-performed contracts.

In 2003, the Quebec Court of Appeal in *Syndicat national de L'amiante D'asbestos v. Jeffrey Mines Inc.* held that these unique statutory provisions preclude courts from authorizing disclaimer of collective agreements.[18] The Court noted that:

> I find it difficult to apply the monitor's power to disclaim a contract, with or without the authorization of the court, to a collective agreement because of the attendant legislative framework . . . which makes such an agreement a truly original instrument rather than a mere bilateral contract. Besides, why cancel collective agreements if the certifications remain in effect and, as a result, the employer is obliged to negotiate with the appropriate union the conditions applicable to a new delivery of services by employees contemplated by the said certifications?[19]

The decision reiterated the legal principle that statutes generally override the common law when the two conflict. Importantly, nothing in *Jeffrey Mines* indicated that Parliament could not statutorily permit the unilateral disclaimer of collective

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14 *Dylex Ltd., Re* (1995), 1995 CarswellOnt 54, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]) at para. 8 [*Re Dylex*].

15 *Ontario Labour Relations Act*, 1995, S.O. 1995, c. 1, Schedule A [*OLRA*]. For the statutes governing labour relations in the other provinces see: *Labour Relations Code*, R.S.A. 2000, c. L-1 (Alberta); *Labour Relations Code*, [RSBC 1996] Chapter 244 (British Columbia); *Labour Relations Act*, C.C.S.M. c. L10 (Manitoba); *Trade Union Act*, R.S.S. 1978, c. T-17 (Saskatchewan); *Labour Code*, R.S.Q. c. C-27 (Quebec); *Industrial Relations Act*, R.S.N.B. 1973, c. I-4 (New Brunswick); *Trade Union Act*, R.S.N.S. 1989, c. 475 (Nova Scotia); *Labour Relations Act*, R.S.N.L. 1990, c. L-1 (Newfoundland); *Labour Act*, R.S.P.E.I. 1988, c. L-1 (P.E.I.).

16 *OLRA*, *ibid.*, s. 58(3).

17 *Ibid.*, s. 73.

18 *Jeffrey Mines*, *supra*, n. 3. *Mine Jeffrey inc., Re*, 2003 CarswellQue 90, [2003] Q.J. No. 264, REJB 2003-37078, 35 C.C.P.B. 71, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, *(*sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (Que. C.A.).

19 *Ibid.*, at para. 80.

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agreements. The issue thus arose in the 2003 parliamentary review of Canadian insolvency legislation. During submissions regarding the status of collective agreements in commercial restructurings, the American approach was often the standard that potential Canadian legislation was compared to, and it is thus worth reviewing.

(b) The American Approach to Treatment of Collective Agreements during a Reorganization

U.S. *Code* §1113, found in Chapter 11 of the U.S. *Code*, deals with the "rejection" of collective agreements during restructuring.[20] The section is a congressional response to the United States Supreme Court decision in *N.L.R.B. v. Bildisco & Bildisco*.[21] There, the Court held that collective agreements were to be treated like other executory contracts and, pursuant to U.S. *Code* §365, a debtor or trustee could reject them if they were shown to be burdensome and the equities favored rejection.[22] The Supreme Court stated the appropriate test was whether "reasonable efforts to negotiate a voluntary modification [were] made and that they [were] not likely to produce a prompt and satisfactory solution."[23] The Court also held that between the time a petition was filed and the time a court permitted the debtor to reject the collective agreement, the debtor did not to comply with the agreement and could unilaterally alter its terms.[24]

Through U.S. *Code* §1113, Congress imposed stricter standards on a reorganizing debtor seeking to reject collective agreements.[25] The purpose of the section is to encourage the debtor and the union to reach a mutually acceptable agreement before a disclaimer will occur. In contrast to the *Bildisco* ruling, during negotiations, the provisions of an existing collective agreement remain in effect until the bankruptcy court authorizes unilateral rejection or modification. The 1984 decision

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20 U.S. *Code* §1113 uses the term "rejection" instead of "disclaimer." For the purpose of the discussion of the American approach, the terms will be used interchangeably. In using the term "rejection", the United States Congress intended to allow courts to tailor remedies unique to this concept, unencumbered by prior jurisprudence. However, American courts have analogized rejection to many other legal concepts. The courts have appeared to use the words release, repeal, voiding, cancellation, reconsideration, discharge, revocation, repudiation, alternation or avoidance interchangeably. The implication is that in practice the term "rejection" is treated similarly to that of "disclaimer" in Canada. Keith Yamauchi, "Collective Agreements in the Context of Corporate Reorganization: The Canadian and American Models" (2004) 11 C.L.E.L.J. 1 at 216 [Yamauchi].

21 *N.L.R.B. v. Bildisco & Bildisco* (1984), 104 S.Ct. 1188, 465 U.S. 513, 79 L.Ed.2d 482, 115 L.R.R.M. 2805, 100 Lab. Cas. P. 10,771, 11 Bankr. Ct. Dec. 564, Bankr. L. Rep. 69,580, 5 Employee Benefits Cas. 1015 (U.S.S.C.) at 104 [U.S.] [*Bidilsco*].

22 *Ibid.*, at 523; U.S. *Code* §365.

23 *Bidilsco*, *supra*, n. 21 at 526.

24 *Ibid.*, at 532.

25 Because U.S. *Code* §1113 is found in Chapter 11 of the U.S. *Code*, it only applies during reorganizations under that section. As a result, U.S. *Code* §365 and *Bildisco* are still used for liquidation cases under U.S. *Code* Chapter 7 and for the adjustments of debts of a municipality pursuant to U.S. *Code* Chapter 9. *Supra*, n. 20 at 220.

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Re American Provision Co. provides a practical summary of the procedural requirements a debtor must now meet before a court will approve rejection of a collective agreement.[26] These are:

> (1) The debtor must make a proposal to the union to modify the collective agreement.[27]
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> (2) The proposal must be based on complete and reliable information available at the time.[28]
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> (3) The modifications must be necessary to permit the reorganization of the debtor.[29]
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> (4) The proposed modifications must assure that all creditors, the debtor, and the employees are treated equitably.[30]
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> (5) The debtor must provide to the union all such relevant information as is necessary to evaluate the proposal.[31]
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> (6) Between the time of the making of the proposal and the time of the hearing on approval of the rejection, the debtor must meet at reasonable times with the union.[32]
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> (7) At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.[33]
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> (8) The union must have refused to accept the proposal without good cause.[34]
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> (9) The balance of equities must clearly favour rejection of the collective agreement.[35]

American courts have adopted different approaches for interpreting the nine requirements. For example, the word "necessary" in the requirement that the proposed modifications be "necessary" has been held by the Third Circuit Court of Appeals to be synonymous with "essential," while the Second Circuit Court of Appeals has declared that it is to be interpreted as being what is needed for the long-term (as opposed to interim) survival of the debtor company.[36] Further inconsisten-

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26 *Re American Provision Co.*, 44 B.R. 907 , 909 (Bk.D.Minn, 1984) [*Re American Provision Co.*].

27 U.S.C. §1113(b)(1)(A).

28 *Ibid.*

29 *Ibid.*

30 *Ibid.*

31 U.S.C. §1113(b)(1)(B).

32 U.S.C. §1113(b)(2).

33 *Ibid.*

34 U.S.C. §1113(c)(2).

35 U.S.C. §1113(c)(3).

36 See *Wheeling-Pittsburgh Steel Corp. v. U.S.W.A.*, 791 F.2d 1074 at 1088-1089 (3d Cir. Pa., 1986); *Teamsters, Local 807 v. Carey Transportation, Inc.*, 816 F.2d 82 at 89 (2d Cir. 1987).

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cies have arisen over the interpretation of what constitutes "good cause" for a union's refusal to accept a proposal, as well as the balance of equities requirement.[37] Although the interpretations may vary, what is important for the present discussion is to note that, unlike in the current Canadian approach, American law permits the unilateral disclaimer of collective agreements.

The recent Chapter 11 filing by Northwest Airlines provides an illustration of the practical effect of unilateral rejection. In 2005, Northwest sought relief under U.S.C. §1113, seeking rejection of its collective agreements with six labour unions. In March, 2006, the airline reached an agreement with the Professional Flight Attendants Association. Eighty percent of the flight attendants, however, voted down the agreement. As a result, the bankruptcy court, pursuant to its authority under §1113, authorized the airline to impose terms consistent with the March agreement.[38] The employees' subsequent efforts to strike were quashed by an injunction that the Second Circuit Court of Appeals upheld.[39]

(c) The 2003 Senate Recommendations

As evident, U.S. *Code* §1113 is substantively different from the current Canadian regime, which unilaterally authorizes termination or modification of collective agreements. During the 2003 parliamentary review, both the Canadian Association of Insolvency and Restructuring Practitioners (CAIRP) and the Insolvency Institute of Canada (IIP) made submissions recommending that Canada adopt a similar approach.[40] The Canadian Labour Congress (CLC), meanwhile, argued against adopting the approach.[41] These organizations' reasoning provides insight into the theoretical arguments for and against the disclaimer of collective agreements.

CAIRP and the IIC presented several arguments regarding why Canadian insolvency law should move towards the American approach. These included the need to facilitate downsizing during a restructuring, that labour laws and the provincial boards that enforce them are not flexible enough to respond on a timely basis to the real-time needs of a commercial restructuring, and that permitting disclaimer would be in accordance with the general notion of favoring reorganizations over liquidations. The case of *Canada 3000*, an airline that went into liquidation because it could not renegotiate collective agreements during its reorganization, was the main example cited in support of these arguments. The assumption underlying the submissions was that insolvency law, and the need to prevent liquidations, should take precedence over labour law.

The CLC, meanwhile, put forward three arguments opposing the disclaimer of collective agreements during a restructuring. The first was that insolvency courts have little collective bargaining or labour relations expertise and lack the compe-

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37 For a discussion of the different interpretations of these terms adopted by various U.S. courts, see Yamauchi, *supra*, n. 20 at 224–226.

38 *Re Northwest Airlines Corp.*, 346 B.R. 333 at 336-37 (Bankr. S.D.N.Y., 2006).

39 *Re Northwest Airlines Corp.*, 2007 WL 926488 at 12 (2d Cir. Mar. 29, 2007).

40 *Proceedings of the Standing Senate Committee on Banking, Trade, and Commerce*, 37th Parl. 2nd Sess., Iss. 19-Evidence (8 May 2003).

41 *Proceedings of the Standing Senate Committee on Banking, Trade, and Commerce*, 37th Parl. 2nd Sess., Iss. 19-Evidence (13 September, 2003).

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tency to begin meddling in a 50 to 75 article (or more) collective agreement. The second was that judges are in a poor position to determine fault or the necessity of a disclaiming contract because, unlike the employer and employee, they do not have as great an interest in protecting what they have fought for over a long period of time to achieve in the agreement. Finally, the CLC argued that unilateral disclaimer would result in increased uncertainty because of different approaches judges may take. Evidently, the CLC approached the issue from the opposite perspective of CAIRP and the IIC, stressing the primacy of collective agreements and employee rights.

Ultimately, the 2003 Senate Report reflected the position submitted of CAIRP and the IIC. In doing so, it implicitly recommended that Canadian labour legislation move closer towards the U.S. approach in U.S. *Code* §1113. Specifically, Senate Committee Recommendation 30 recommended that insolvency courts be given the jurisdiction to permit the disclaimer of collective agreements if the debtor established that (1) it would suffer serious hardship in restructuring without the disclaimer; (2) post-filing negotiations had been carried out in good faith for relief of too onerous aspects of the collective agreement; and (3) the court was satisfied that the disclaimer was necessary.[42]

Clearly, there are numerous similarities between this report and the American model. Both authorize insolvency courts to disclaim or modify collective agreements. As well, both require the employer at a minimum attempt to engage the employees' bargaining agent in good-faith negotiations prior to such authorization. Finally, both require the court to be satisfied that the debtor would likely be unable to restructure if the onerous aspects of the collective agreement were not removed.

(d) The Statute c. 47 Provisions

Ultimately, Bill C-55, which became Statute c. 47 when it received Royal Assent in 2005, does not reflect the Senate recommendations.[43] Pursuant to the amendments, the status of collective agreements during a commercial restructuring will receive identical treatment under the *BIA* and the *CCAA*. Statute c. 47 expressly affirms that courts overseeing a restructuring may not authorize the debtor to unilaterally disclaim collective agreements.[44] Instead, a collective agreement will remain in full force and effect unless both the debtor company and the representative union agree to change it.[45]

A court will be authorized, however, to serve a "notice to bargain" on the employees' bargaining agent pursuant to applicable collective bargaining legislation if the debtor so requested.[46] In doing so, the court will have to be satisfied that

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42 *Charter*, *supra*, n. 7 at xxi.

43 Statute c. 47, *supra*, n. 6 at Pss. 44 and 131; see also, amended *BIA*, *supra*, n. 1, s. 65.12(1), and amended *CCAA*, *supra*, n. 1, s. 33(2).

44 Statute c. 47, *ibid.*; see also, amended *BIA*, *ibid*,. 65.11(2)(c), and amended *CCAA*, *ibid.*, s. 32(2)(c).

45 Statute c. 47, *ibid.*; see also, amended *BIA*, *ibid.*, s. 5.12(6), and amended *CCAA*, *ibid.*, s. 33(8).

46 Statute c. 47, *ibid.*; see also, amended *BIA*, *ibid.*, s. 65.12(1), and amended *CCAA*, *ibid.*, s. 33(2).

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(1) a viable compromise or arrangement could not be made under the current collective agreement's terms and conditions; (2) that the debtor has made good faith efforts to renegotiate the collective agreement provisions; and (3) that the failure to issue the order would result in irreparable harm to the employer's prospects of restructuring.[47] If a notice to bargain is given, the union may obtain an order from the court requiring the disclosure of information relating to the employer's business or financial affairs that is relevant to the collective bargaining between the company and the union.[48] Finally, any agreement to revise the collective agreement will give the union an unsecured creditor's claim equal to the value of any concessions granted by the union over the remaining term of the agreement.[49]

(e) Criticisms of Statute c. 47

Although the ability to serve a notice to bargain on the employees' bargaining agent may *prima facie* appear to be a significant departure from Canadian jurisprudence, a review of provincial labour legislation reveals that its effects will likely be limited. Pursuant to the *Ontario Labour Relations Act* (*OLRA*), a "notice to bargain" may be issued either when there is no collective agreement in place or within 90 days of the expiry of an existing one.[50] The issuance of a notice to bargain triggers a complicated series of events. Within 15 days of the notice being given, the employer and employees' representative must meet and bargain in good faith to make reasonable efforts at negotiating a collective agreement.[51] At the request of either party, the Minister must appoint a conciliation officer whose purpose is to endeavor to help the parties reach a compromise.[52] Within 14 days of his/her appointment, the conciliation officer issues a report to the Minister regarding the progress that has been made.[53] If the Minister determines that a settlement is unlikely to be reached, then a notice is sent that a conciliation board will not be appointed.[54] The parties are then permitted pursuant to *OLRA* section 79(2) to resort to a strike or lockout after a specified period of time has passed following the issue of the minister's notice.[55]

It is important to note, however, that the ability of employers to lock-out employees after the completion of this process is unlikely to apply to insolvency-court issued notices to bargain. This is because *OLRA* section 79(2) only applies if there is no collective agreement in place.[56] Section 79(1), meanwhile, explicitly states that where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an

47 Amended *BIA*, *ibid.*, s. 65.12(3), and amended *CCAA*, *ibid.*, s. 33(3).
48 Amended *BIA*, *ibid.*, s. 65.12(5), and amended *CCAA*, *ibid.*, s. 33(6).
49 Amended *BIA*, *ibid.*, s. 65.12(4), and amended *CCAA*, *ibid.*, s. 33(5).
50 *ORLA*, *supra*, n. 15, ss. 16 and 59(1).
51 *Ibid.*, s. 17.
52 *Ibid.*, s. 18(1).
53 *Ibid.*, s. 20(1).
54 *Ibid.*, s. 21(b).
55 *Ibid.*, s. 79(2).
56 *Ibid.*

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employee.[57] Section 58(3) also provides that the parties shall not terminate a collective agreement before it ceases to operate in accordance with its provisions without consent of the Board on the joint application of the parties.[58] Because of these provisions in the OLRA, the usefulness of the insolvency court's power to issue a notice to bargain pursuant to Statute c. 47 appears negligible. Although the issuance may force a recalcitrant union to the negotiating table, it does not provide incentives, either in the form of "carrot" or "stick," to reach an agreement. The effect of this is that the insolvency court's notice to bargain becomes what one commentator has described as a "toothless tiger."[59]

Several commentators have thus criticized the legislation. In a submission to the House of Commons Standing Committee on Industry, Science, and Technology, CAIRP noted that the amendments "fail to provide a timely process to arrive at a final solution to the collective bargaining issues, issues that are often critical to the successful outcome of the *CCAA* proceeding."[60] Arguing that finality was needed in the event of a bargaining impasse, CAIRP recommended that insolvency courts be given the authority to implement binding solutions ranging from mandatory arbitration to court supervised modification.[61]

Statute c. 47 has yet to come into force. The original statute contained several technical deficiencies, and amendments were required. In December, 2007, Bill C-12, which substantially modified Statute c. 47 (though not on the issue of collective agreements during a restructuring), received Royal Assent.[62] It too, however, has yet to fully come into force.[63] The Senate wants additional time to hear from stakeholders who expressed concerns about several of the provisions in Bill C-12, in-

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57 *Ibid.*, s. 79(1).

58 *Ibid.*, s. 58(3).

59 Baird, David, "Bill C-55: The Changing Face of Insolvency Legislation" (November 2005), online: Fasken Martineau Dumolin Insolvency and Restructuring Bulletin <http://www.fasken.com/files/Publication/d6d4736b-afff-480c-bc7e-95e803512144/Presentation/PublicationAttachment/cc43b87e-8ab3-4eb2-a9b1d7ee1308f4c1/INSOLVENCYRESTRUCTURINGBULLETIN_NOV05.PDF>.

60 Canadian Association of Restructuring and Insolvency Practitioners, "Submission on Proposed Commercial Insolvency Amendments under Bill C-55 to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology [INDU]" (9 November 9 2005), online: <http://www.cairp.ca/pdf/CAIRP%20Commercial%20Submission.pdf> at 56.

61 *Ibid.*, at 57-58.

62 Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Program Protection Act and Chapter 47 of the Statutes of Canada*, 2005, 39th Parl., 2nd Sess., received Royal Assent on December 14, 2007.

63 In July, 2008, the Minister of Labour signed an Order in Council to implement several of the amendments. These include reducing the time a student has to have been out of school from ten years to seven in order for his/her loans to be dischargeable in a bankruptcy, generally exempting RRSPs from seizure and that income tax refunds form part of the bankrupt's estate. As of writing, these are the only two features of the amendments to be in effect. As well, the *Wage Earner Protection Program* came into effect on January 26, 2009. This program provides for payment of outstanding wages up to

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cluding the section pertaining to the disclaimer of collective agreements.[64] It is thus still possible that the 2003 Senate Report recommendations will be implemented.

As noted, Senate Committee Recommendation 30 essentially recommends that Canadian legislation move towards the American approach in U.S. *Code* §1113. The proposal, however, rests on the assumption that such legislation would be constitutionally permissible. Since Statute c. 47 received Royal Assent, however, the Supreme Court has handed down two decisions that raise constitutional issues both relevant to the Senate Committee Recommendation 30 and the Statute c. 47 provisions. In the following two sections, the implication of the decisions in *T.C.T. Logistics* and *Health Services* on issues pertaining to federalism and the *Charter*, respectively, will be explored to determine whether the approach in U.S. *Code* §1113 would be permissible in Canada's constitutional setting.

3. THE FEDERALISM IMPLICATIONS

(a) Introduction

U.S. *Code* §1113 operates in a constitutional setting where the federal government has jurisdiction over both bankruptcy law and labour law. Article 1, Section 8 of the U.S. Constitution enumerates the powers of Congress. Clause 4 provides that the federal body has the authority to "establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."[65] Clause 3, also known as the Commerce Clause, provides that Congress has the jurisdiction "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[66] In 1937, the U.S. Supreme Court held that this clause enables Congress to regulate actions that indirectly influence interstate commerce, even if the action can also be characterized as being intra-state, specifically the regulation of trade unions.[67] As Congress has jurisdiction over both bankruptcy and labour law, U.S. *Code* §1113 does not give rise to any federalism issues.[68]

In Canada, however, the federal government does not have jurisdiction over both the regulation of insolvency and labour relations. Section 91(21) of the *Constitution Act, 1867* grants to the federal Parliament the power to enact laws in relation to "bankruptcy and insolvency."[69] Section 92(15), however, specifies that the prov-

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$3,000 (or four times the maximum weekly insurable earnings) of which $2,000 has a superpriority over secured creditors.

64 As of writing, the Senate Standing Committee on Banking, Trade, and Commerce has just concluded hearing oral submissions regarding Bill C-12.

65 U.S. Const. Art. I, § 8, cl. 4.

66 U.S. Const. Art. I § 8, cl. 3.

67 *National Labor Relations Board v. Jones & Laughlin Steel Corp.* (1937), 301 U.S. 1, 57 S.Ct. 615, 108 A.L.R. 1352, 81 L.Ed. 893, 1 L.R.R.M. (BNA) 703, 1 Empl. Prac. Dec. P 9601, 1 Lab. Cas. P. 17,017 (U.S. Sup. Ct.).

68 A notable exception is the regulation of individual public sectors within a state, which is the jurisdiction of individual state legislatures.

69 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, ss. 91(21) and s. 92(15).

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inces have jurisdiction over "property and civil rights." In the leading case *Toronto Electric Commissioners v. Snider*, this power was found to encompass labour relations over most of the economy.[70] Because of this, it should not necessarily be assumed that the holding in *Jeffrey Mines* — specifically, that insolvency courts do not have the jurisdiction to disclaim collective agreements — can be statutorily overturned.[71] As the Supreme Court decision in *T.C.T. Logistics* illustrates, such legislation would only be legitimate if it accords with Canadian federalism principles.

(b) A Review of *T.C.T. Logistics v. GMAC Commercial Corporation*

In *T.C.T. Logistics*, T.C.T. Logistics ("TCT") became insolvent while a collective agreement with forty-two employees represented by the Industrial Wood & Allied Workers of Canada, Local 700 (the "Union") was still in force. TCT's largest secured creditor, GMAC Commercial Credit Corporation ("GMAC"), applied for an order from a bankruptcy court appointing KPMG as interim receiver pursuant to section 47 of the *BIA*.[72] Paragraph 15 of the order provided for the termination of all employees if need be, but also gave KPMG the authority to hire or fire any of TCT's employees.[73] Paragraph 14 and 15 of the order also provided that KPMG's actions as an interim receiver were not to be considered those of a "successor employer."[74] The Union challenged this part of the order on the basis it contradicted provincial legislation, as, pursuant to *OLRA* sections 69(2) and 114(1), only the Ontario Labour Relations Board has jurisdiction to determine whether someone is a successor employer.[75]

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70 *Toronto Electric Commissioners v. Snider*, 1925 CarswellOnt 80, [1925] A.C. 396, [1925] 2 D.L.R. 5, [1925] 1 W.W.R. 785 (Ontario P.C.). Subsequent cases have held that this exclusive ability to legislate on labour relations extends to labour standards legislation. See *Canada (Attorney General) v. Ontario (Attorney General)*, 1937 CarswellNat 2, [1937] 1 W.W.R. 299, [1937] A.C. 326, [1937] 1 D.L.R. 673, [1937] W.N. 53 (Canada P.C.). There are, however, exceptions to this general rule. The federal Parliament has jurisdiction to regulate labour relations in the federal public sector, as well as in industries that fall under exclusive federal jurisdiction. See *Reference re Validity of Industrial Relations & Disputes Investigation Act (Canada)*, 1955 CarswellNat 275, [1955] 3 D.L.R. 721, 55 C.L.L.C. 15,223, [1955] S.C.R. 529 (S.C.C.).

71 *Supra*, n. 3.

72 Section 47 of the *BIA* provides that a court may appoint an interim receiver to administer a Secured Creditor's claim when it is satisfied that proper notice of an intention to enforce a claim has been given. *BIA*, *supra*, n. 1, s. 47.

73 *T.C.T. Logistics*, *supra*, n. 8 at para. 8.

74 *Ibid.*, at para. 8-9.

75 Section 114(1) states that "[t]he Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling." *OLRA*, *supra*, n. 15, s. 114(1); A successor employer is one who becomes the owner of a business through sale or transfer. *OLRA*, *supra*, n. 15, s. 69.

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In a majority decision written by Justice Abella, the Supreme Court ruled that bankruptcy courts lack the jurisdiction to determine whether an interim receiver is a successor employer and that issues of successorship are the exclusive domain of the OLRB.[76] Importantly, the decision was not based on a finding that the federal *BIA* and provincial *OLRA* were inconsistent. Rather, the Court narrowly interpreted section 47(2) of the *BIA* (which grants the court the right to direct the interim receiver's conduct), as neither explicitly nor implicitly confer authority on bankruptcy courts the power to make unilateral declarations about the rights of third parties affected by other statutory schemes.[77] Abella J. noted that in order to preserve provincial civil rights, explicit (statutory) language would be required before such a sweeping power could be attached to section 47.[78] She also quoted the Supreme Court decision in *Crystalline Investments Ltd. v. Domgroup Ltd*, where Major J. noted that:

> Explicit statutory language is required to divest persons of rights they otherwise enjoy at law ... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights.[79]

The majority in *T.C.T. Logistics* did not directly address the issue of whether a hypothetical *BIA* provision authorizing insolvency courts to make determinations on successorship would be valid. The minority decision, written by Deschamps J., however, set forth a comprehensive framework that will form the basis of the following analysis on the federalism issues of Senate Committee Recommendations 30 and Statute c. 47.[80]

(c) The Effect of Canadian Federalism Principles on the 2003 Senate Report and the Statute c. 47 Provisions

Canadian constitutional law does not allow for conflicts of legislative powers. It is possible, however, that legislation enacted under a federal enumerated power may intrude on a provincial one, and vice versa. A number of judicial doctrines have been developed to resolve this conflict and ensure that federal and provincial powers are respected without operational inconsistency between federal and provincial statutes. The three most important of these are the "double-aspect-doctrine," "paramountcy" and "inter-jurisdictional immunity." In order for either Senate Committee Recommendation 30 or Statute c. 47 to be constitutionally valid, one of these doctrines will have to apply. As well, it must be found that the pith and substance of the proposed legislation is something upon which the federal government can legitimately legislate.

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76 *T.C.T. Logistics*, *supra*, n. 8 at para. 78.

77 *Ibid.*, at para. 45.

78 *Ibid.*, at para. 51.

79 *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 CarswellOnt 219, 2004 CarswellOnt 220, [2004] S.C.J. No. 3, REJB 2004-53098, 2004 SCC 3, 184 O.A.C. 33, 16 R.P.R. (4th) 1, 43 B.L.R. (3d) 1, [2004] 1 S.C.R. 60, 70 O.R. (3d) 254 (note), 46 C.B.R. (4th) 35, 234 D.L.R. (4th) 513, 316 N.R. 1 (S.C.C.) at para. 43.

80 *T.C.T. Logistics*, *supra*, n. 8 at paras. 113–133.

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(i) The Pith and Substance of the Proposed Amendments

If the pith and substance (the dominant "matter") of legislation is in relation to matters falling within the field of a specific legislative competence pursuant to the *Constitution Act, 1867*, the legislation is *prima facie* valid.[81] Incidental or ancillary extra-provincial aspects of such legislation are irrelevant to this determination. As Professor Hogg notes:

> It is important to recognize that this "pith and substance" doctrine enables one level of government to enact laws with substantial impact on matters outside its jurisdiction. ... There are many examples of laws which have been upheld despite their "incidental" impact on matters outside the enacting body's jurisdiction. A provincial law in relation to insurance (provincial matter) may validly restrict or even stop the activities of federally-incorporated companies (federal matter) ... a federal law in relation to the national capital region (federal matter) may validly regulate land use in Ontario and Quebec (provincial matter).[82]

The validity of legislation authorizing the disclaimer of collective agreements would thus depend on whether commercial reorganizations are in pith and substance "bankruptcy and insolvency," pursuant to section 91(21) of the *Constitution Act, 1867*.

This issue was addressed in *Reference re: Companies' Creditors Arrangement Act*.[83] There, Duff C.J.C., writing for the majority, held that a federal scheme whose objective is to reorganize a company through arrangements that might not be valid prior to a formal bankruptcy, does not radically depart from the normal character of bankruptcy legislation and is thus within the authority of the federal government.[84] Regarding the argument that such legislation unduly infringes on con-

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81 *British Columbia v. Imperial Tobacco Canada Ltd.*, EYB 2005-95296, 2005 CarswellBC 2207, 2005 CarswellBC 2208, [2005] S.C.J. No. 50, [2004] S.C.C.A. No. 302, 45 B.C.L.R. (4th) 1, [2005] 2 S.C.R. 473, 134 C.R.R. (2d) 46, 2005 SCC 49, 257 D.L.R. (4th) 193, [2006] 1 W.W.R. 201, 218 B.C.A.C. 1, 359 W.A.C. 1, 339 N.R. 129, 27 C.P.C. (6th) 13 (S.C.C.) at para. 78.

82 Peter Hogg, *Constitutional Law of Canada* 5th ed., Vol. 1 (Carswell, 2007) at 15.

83 *Reference re Companies' Creditors Arrangement Act (Canada)*, 1934 CarswellNat 1, [1934] 4 D.L.R. 75, 16 C.B.R. 1, [1934] S.C.R. 659 (S.C.C.) at 664 [S.C.R.].

84 *Ibid.*, at para. 4. It is worth noting that there is conflicting case law regarding the solvency requirements that a company must meet before it can apply for relief under the *CCAA*. In *Semi-Tech Corp. v. Enterprise Capital Management Inc.*, Justice Farley noted that a debtor company must actually be insolvent. See *Semi-Tech Corp. v. Enterprise Capital Management Inc.*, [1999] O.J. No. 5685. In *Re: Stelco Inc.*, however, Justice Farley reversed his position and held that a company needs to only be approaching insolvency. See *Stelco Inc., Re* (2004), [2004] O.J. No. 1257, 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]); leave to appeal refused (2004), [2004] O.J. No. 1903, 2004 CarswellOnt 2936 (Ont. C.A.); leave to appeal refused (2004), [2004] S.C.C.A. No. 336, 2004 CarswellOnt 5200, 2004 CarswellOnt 5201, 338 N.R. 196 (note) (S.C.C.). It thus appears that where the petitioner is the creditor, the Courts will adopt the stricter test in *Semi-Tech Corp*. Where the petitioner is the debtor, however, the courts will adopt the more lenient *Stelco* test.

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tracts (because of the ability to disclaim them), a provincial power pursuant to section 92(13) of the *Constitution Act, 1867*, the Court noted that:

> An adequate answer to this objection is [that a]part altogether from the judicial control over the proceedings, there is the circumstance that the legislation applies to insolvent companies only; and, consequently, that it is within the power of any creditor to apply for a winding-up order or a receiving order. It seems difficult, therefore, to suppose that the purpose of the legislation is to give a sanction to arrangements in the exclusive interests of a single creditor or of a single class of creditors and having no relation to the benefit of the creditors as a whole. The ultimate purpose would appear to be to enable the Court to sanction a compromise which, although binding upon a class of creditors only, would be beneficial to the general body of creditors as well, it may be, as to the shareholders.[85]

The result of this decision would appear to be that Parliament not only has the jurisdiction to legislate on commercial reorganizations, but that they may justifiably infringe on provincial jurisdiction while doing so. The disclaimer of a collective agreement, an intrusion into provincial legislative authority, would be necessarily incidental to this ability. Because of this, both the relevant provisions of Senate Committee Recommendation 30, as well as those in Statute c. 47, would be in accordance with Canadian federalism principles. It is worth briefly asking, however, whether and to what extent the "double-aspect-doctrine," "paramountcy" or "interjurisdictional immunity" would apply in the case of the relationship between section 58(3) of the *OLRA* and the recommended insolvency provisions.[86]

(ii) The Application of the Interjurisdictional Immunity Doctrine

The interjurisdictional immunity doctrine provides that classes of subjects in sections 91 and 92 of the *Constitution Act, 1867* must be assured a "basic, minimum, and unassailable content," immune from the application of legislation enacted by the other level of government, no matter how incidental the intrusion may be.[87] The recent Supreme Court decision in *Canadian Western Bank v. Alberta* held that the doctrine is to be used rarely and essentially limits its application to areas of law on which there is already precedent regarding its use.[88] Because insol-

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85 *Ibid.*, at para. 7.

86 As previously noted, s. 58(3) of the *OLRA* maintains that a collective agreement is valid until its expiry with the single exception of a joint application by the employer and the union. *ORLA*, *supra*, n. 15.

87 *Canadian Western Bank v. Alberta*, 2007 CarswellAlta 702, 2007 CarswellAlta 703, [2007] S.C.J. No. 22, [2007] I.L.R. I-4622, 281 D.L.R. (4th) 125, [2007] 2 S.C.R. 3, 409 A.R. 207, 402 W.A.C. 207, 49 C.C.L.I. (4th) 1, 2007 SCC 22, 362 N.R. 111, 75 Alta. L.R. (4th) 1, [2007] 8 W.W.R. 1 (S.C.C.) at para. 33 [*Canadian Western Bank*]. Examples of areas of law where provincial laws have been held to be inoperative include those that impair the status or powers of federally incorporated companies, those that have the effect of "sterilizing" federal regulations in interprovincial or international transportation and communication, and laws affecting the basic operation of the military, Royal Canadian Mounted Police, and postal workers. Hogg, *supra*, n. 82 at 15.8(c).

88 *Canadian Western Bank*, *ibid.*, at paras. 34–47.

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vency is not one of these areas, the decision would appear to nullify any potential argument that the interjurisdictional immunity doctrine prevents the operation of provincial laws from affecting bankruptcy. It is equally unlikely that the doctrine would be applied to prevent *any* provincial legislation from impacting commercial restructurings.

(iii) The Application of the Double Aspect Doctrine

The "double aspect doctrine" provides that subject matter that falls within both federal and provincial jurisdiction can be legislated by both levels of government if the statutes can operationally coexist. When effect is given to federal and provincial statutes, they can often thus be applied concurrently. As the Supreme Court noted in *Reference re: Employment Insurance Act*, when a court is hearing a dispute relating to the concurrent operation of federal and provincial statutes, it must attempt to reconcile their application in a manner consistent with the respective jurisdiction of the two levels of government.[89] In *T.C.T. Logistics*, the Court interpreted *BIA* section 47(2) narrowly so as to avoid any inconsistency with the *OLRA*. This was possible because of the wording of section 47(2), which reads:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.[90]

As is evident, there is nothing in section 47(2) that refers to the determination of successor employment pursuant to the *OLRA*, and the court could thus interpret the *Act* so that it was in accordance with the provincial statute.

It is unlikely, however, that either Senate Committee Recommendation 30, or to a lesser extent the current provisions of Statute c. 47, could co-exist with the *OLRA*. As previously noted, the proposed *BIA* section 65.12 and *CCAA* section 33 would allow insolvency courts to issue a notice to bargain, a concept that is a creation of labour relations statutes. This contradicts section 114(1) of the *OLRA*, which states that the OLRB has exclusive jurisdiction to exercise the powers conferred upon it under the *OLRA*.[91] The majority decision in *T.C.T. Logistics*, which interpreted section 114(1) of the *Act* broadly so as to prevent any bankruptcy court from dealing with issues of successorship, reinforced this.

As well, not only does the Senate Committee Recommendation 30 conflict with *OLRA* section 114(1), it also directly conflicts with section 58(3), which (as

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89 *Québec (Procureur général) c. Canada (Procureur général)*, 2005 CarswellQue 9127, 2005 CarswellQue 9128, 2005 C.L.L.C. 240-015, *(*sub nom. *Reference re: Employment Insurance Act (Can.), ss. 22, 23)* 258 D.L.R. (4th) 243, 45 C.C.E.L. (3d) 159, [2005] 2 S.C.R. 669, 2005 SCC 56, *(*sub nom. *Reference re: Employment Insurance Act)* 339 N.R. 279 (S.C.C.), ss. 22, 23.

90 *BIA*, *supra*, n. 1, s. 47(2).

91 *ORLA*, *supra*, n. 15, s. 114(1).

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previously noted) declares that prior to the expiry of its term, a collective agreement can only be terminated by an order of the applicable labour relations board after a *joint* application by the employer and the employee.[92] Because of these operational inconsistencies, the double aspect-doctrine would not apply. It is thus necessary to turn to the paramountcy doctrine.

(iv) The Application of the Paramountcy Doctrine

The doctrine of paramountcy provides that where there is a conflict between federal and provincial legislation, the federal one will prevail. Conflicts that will trigger recourse to the doctrine may occur where it is impossible to apply a federal statute and a provincial statute simultaneously.[93] It may also occur where the application of a provincial statute frustrates the legislative purpose of a federal one.[94] In *T.C.T. Logistics*, Deschamps J. noted that the Supreme Court has applied the doctrine numerous times when the *BIA* has conflicted with provincial legislation.[95]

In *Husky Oil Operations Ltd. v. Minister of National Revenue*, Gonthier J., writing for the majority, dealt with the relationship between priorities under the *BIA* and provincial property arrangements.[96] He noted that not only can provinces not directly affect the priority scheme of the *BIA*, but that the paramountcy principle would also apply where provincial legislation indirectly conflicted with it.[97] As well, Gonthier J. noted that while provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred, section 136(1) of the *BIA* exclusively determines the status and priority of any creditor claims.[98]

In *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, Wilson J., writing for the majority, held that the definition of terms such as "secured creditor" must be interpreted in bankruptcy cases as presented by the federal Parliament in the *BIA*, and not according to definitions in provincial legislation.[99] *British Columbia v. Henrey Samson Belair Ltd.* reinforced the principle of federal

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92 *Ibid.*, s. 58(3).

93 *Multiple Access Ltd. v. McCutcheon*, 1982 CarswellOnt 128, 1982 CarswellOnt 738, [1982] S.C.J. No. 66, [1982] A.C.S. No. 66, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138 (S.C.C.) at 191.

94 *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 CarswellSask 162, 2005 CarswellSask 163, EYB 2005-86468, [2005] S.C.J. No. 1, [2005] 1 S.C.R. 188, 2005 SCC 13, 250 D.L.R. (4th) 411, [2005] 9 W.W.R. 403 (S.C.C.) at para. 12.

95 *T.C.T. Logistics*, *supra*, n. 8 at para. 120.

96 *Husky Oil Operations Ltd. v. Minister of National Revenue*, 1995 CarswellSask 739, 1995 CarswellSask 740, EYB 1995-67967, [1995] S.C.J. No. 77, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.).

97 *Ibid.*, at para. 32.

98 *Ibid.*, at para. 33. Gonthier J. drew this principle from Andrew J. Roman & M. Jasmine Sweatman, "The Conflict Between Canadian Provincial Personal Property Security Acts and the *Federal Bankruptcy Act*: The War is Over" (1992) 71 Can. Bar Rev. 77 at 78-79.

99 *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)*, 1985 CarswellAlta 319, 1985 CarswellAlta 613, [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577,

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paramountcy.[100] There, McLachlin J., as she then was, writing for the majority, held that a "deemed" statutory trust created by the British Columbian legislature was not a trust within the meaning of what is now section 67 of the *BIA* (which exempts certain property from being distributed to creditors in a bankruptcy), because it was inconsistent with the definition of "trust" as defined in section 1 of the *BIA*. This was so even though the province intended the deemed trust to apply in bankruptcy.

As previously noted, the *OLRA* is inconsistent with both Statute c. 47 as well as Senate Committee Recommendation 30. The doctrine of paramountcy and the jurisprudence regarding the application of the *BIA* suggests that the *BIA* and the *CCAA* would override the *OLRA* to the extent of the inconsistency.

(d) Conclusion on Federalism Issue

Given that Parliament has the power to legislate on matters pertaining to commercial reorganizations, it is likely that the relevant provisions in Statute c. 47 and Senate Committee Recommendation 30 will be constitutionally valid as far as the federalism issue is concerned. The intrusion of either into the provincial domain of private employment relationships has two implications. The first is that the double aspect doctrine cannot apply because the federal insolvency legislation directly contradicts the provincial labour legislation. The second is that the doctrine of paramountcy provides that to the existent of the inconsistency, the provincial legislation cedes to the federal one. As far as the federalism issue is concerned, the proposed amendments and the Senate recommendations will thus be valid, and section 58(3) and section 114 of the *OLRA* will be of no effect to the extent of the inconsistency. The federalism issue, however, is only half of the constitutional analysis. In the following section, the prospect of a potential *Charter* issue will be examined.

4. THE *CHARTER* SECTION 2(d) IMPLICATIONS

(a) Introduction

The United States and Canada have adopted different approaches to the constitutional treatment of collective bargaining as a protected right. In America, as previously noted, the federal government has jurisdiction over labour relations in the private sector as well as the federal public service. Section 7 of the *National Labor Relations Act* ("*NRLA*") provides that "employees shall have the right to self-organization, to form, join, or assist labour organizations, [and] to bargain collectively through representatives of their own choosing. ..."[101] Consequently, there has been no real issue regarding whether there is a constitutional right to collective bargain-

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[1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241 (S.C.C.).

100 *British Columbia v. Henfrey Samson Belair Ltd.*, 1989 CarswellBC 711, EYB 1989-66987, 1989 CarswellBC 351, [1989] S.C.J. No. 78, [1989] 1 T.S.T. 2164, 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263 (S.C.C.).

101 *National Labor Relations Act*, 29 U.S.C. §§ 151–169 at § 157.

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ing at the federal level.[102] However, the issue has been discussed at the state level. In various cases, the U.S. Supreme Court has reiterated that, although the United States constitution does support a right to join a union, it does not provide for a right to collective bargaining.[103] For example, in *Babbit v. UFW*, the Court specifically stated that "the Constitution does not afford ... employees the right to compel employers to engage in a dialogue or even to listen."[104] Because of this, there would be no "constitutional rights" basis for challenging U.S. *Code* §1113.

Until recently, the same could have been said about Canadian constitutional law with respect to "rights." Section 2(d) of the *Charter* provides that everyone has the right to freedom of association.[105] In 1984, the Supreme Court held that although this clause guarantees the freedom of workers to join a union and pursue the collective interests of its membership, it does not guarantee the objects and purposes of the union or the means by which they may be achieved.[106] The Court upheld this decision numerous times until it abruptly reversed itself in *Health Services*.[107] Because of the potentially tremendous impact this case may have on labour law, as well as its potential impact on the relationship between collective agreements and commercial restructuring, it is worth reviewing in detail.

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102 State governments have jurisdiction over the labour relations of their public services.

103 For U.S. Supreme Court cases confirming that the right of association in the First Amendment includes the right to form and join a labour union, see *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1979); *AFSCME v. Woodward*, 406 F.2d 137 at 139 (8th Cir. 1969); *Atkins v. City of Charlotte*, 296 F.Supp. 1068 at 1077 (W.D.N.C. 1969). For cases reiterating that the U.S. Constitution does not protect the right to collective bargaining, see *United Federation of Postal Clerks v. Blount*, 825 F.Supp. 879 (D.D.C. 1971); *Smith v. Arkansas State Highway Employees*, 41 U.S. 68 (1979); *Hanover Township Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972).

104 *Babbit v. UFW*, 442 U.S. 289 at 313 (1979).

105 *Charter*, *supra*, n. 7, s. 2(d).

106 *Dolphin Delivery Ltd. v. Retail, Wholesale Department Store Union, Local 580* (1986), 1986 CarswellBC 411, 1986 CarswellBC 764, [1986] S.C.J. No. 75, [1987] D.L.Q. 69 (note), 38 C.C.L.T. 184, 71 N.R. 83, [1986] 2 S.C.R. 573, 9 B.C.L.R. (2d) 273, 87 C.L.L.C. 14,002, 33 D.L.R. (4th) 174, 25 C.R.R. 321, [1987] 1 W.W.R. 577 (S.C.C.).

107 See *P.S.A.C. v. Canada*, EYB 1987-67278, 1987 CarswellNat 904, 1987 CarswellNat 1103, 87 C.L.L.C. 14,022, [1987] 1 S.C.R. 424, 75 N.R. 161, 38 D.L.R. (4th) 249, 32 C.R.R. 114, *(*sub nom. *A.F.P.C. c. Canada)* [1987] D.L.Q. 230 (note) (S.C.C.); *Arlington Crane Service Ltd. v. Ontario (Minister of Labour)* (1988), 1988 CarswellOnt 876, [1988] O.J. No. 2060, 89 C.L.L.C. 14,019, 56 D.L.R. (4th) 209, 67 O.R. (2d) 225 (Ont. H.C.); *P.I.P.S. v. Northwest Territories (Commissioner)*, 1990 CarswellNWT 50, EYB 1990-67417, 1990 CarswellNWT 48, [1990] 5 W.W.R. 385, 72 D.L.R. (4th) 1, *(*sub nom. *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner))* [1990] 2 S.C.R. 367, 90 C.L.L.C. 14,031, [1990] N.W.T.R. 289, 49 C.R.R. 193, 112 N.R. 269 (S.C.C.); *N.S.T.U. v. Nova Scotia (Attorney General)* (1993), 1993 CarswellNS 275, 102 D.L.R. (4th) 267, 122 N.S.R. (2d) 40, 338 A.P.R. 40, 15 C.R.R. (2d) 29 (N.S. S.C. [In Chambers]).

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(b) A Review of the Holding in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*

In *Health Services*, the Supreme Court found that the section 2(d) *Charter* guarantee of freedom of association protects the right of labour unions to engage in collective bargaining on workplace issues.[108] A substantial portion of the judgment was dedicated to explaining the scope of this newly recognized right, and understanding its limitations is necessary to understand its implications.

The protection does not cover all aspects of "collective bargaining" as the term is understood in the labour relations regimes.[109] Indeed, the section 2(d) right does not even guarantee access to any particular statutory regime.[110] Nor does it ensure a particular outcome in a labour dispute.[111] Rather, it protects the right of employees to associate in a process of collective action to achieve workplace goals.[112] If the government substantially interferes with this, then it will violate section 2(d) of the *Charter*.[113] Paragraph 109 of the judgment summarizes the test for whether there has been "substantial interference." It explains that:

> Substantial interference must be determined contextually, on the facts of the case, having regard to the importance of the matter affected to the collective activity, and to the manner in which the government measure is accomplished. Important changes effected through a process of good faith negotiation may not violate s. 2(d). Conversely, less central matters may be changed more summarily, without violating s. 2(d). Only where the matter is both important to the process of collective bargaining, and has been imposed in violation of the duty of good faith negotiation, will s. 2(d) be breached.[114]

This paragraph, combined with examples and additional points from the rest of the judgment, reveal numerous characteristics regarding the section 2(d) right to collective bargaining.

First, to constitute "substantial interference," the intent or effect of the questionable action must be to seriously undercut or undermine the activity of workers joining together to pursue the common goals of negotiating workplace conditions.[115] The Court gave examples of actions that would breach the right, which include laws that could be characterized as "union breaking," as well as less dramatic actions including "acts of bad faith, or unilateral nullification of negotiated terms, without any process of meaningful discussion and consultation."[116]

Second, government actions done in bad faith will only breach section 2(d) of the *Charter* if the breach pertains to a matter important to the collective bargaining

108 *Health Services*, *supra*, n. 9 at para. 2.
109 *Ibid.*, at para 19.
110 *Ibid.*
111 *Ibid.*
112 *Ibid.*
113 *Ibid.*, at para. 90.
114 *Ibid.*, at para. 109.
115 *Ibid.*, at para. 92.
116 *Ibid.*

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process. The Court noted several examples of what this encompasses; it includes laws or state actions that prevent or deny meaningful discussions or consultations about working conditions between employees and their employer as well as laws that unilaterally nullify significant negotiated terms in existing collective agreements.[117] Conversely, measures affecting matters such as the design of uniform, the Court identified the lay out and organization of cafeterias, or the location or availability of parking lots, as being "less important."[118] The interference with collective bargaining over these matters will not violate section 2(d) because, according to the Court, interference with such matters does not undermine the capacity of union members to pursue shared goals in concert.[119]

Third, the Court stated that although the parties to a labour dispute have to meet and commit time to the process of negotiating in good faith during a labour dispute, there may be a point where it is necessary to break them off.[120] This holding is important, and seems to answer unresolved questions in previous judicial decisions regarding the lack of a final resolution if negotiations are unsuccessful. In *Jeffrey Mines*, for example, Dalphond J. noted that the bankruptcy court judge should have "declared that the monitor was required to negotiate with the unions any amendment considered necessary. I invite the parties to enter into urgent negotiations, in good faith, in order to agree on the amendments."[121] In *T.C.T. Logistics*, Abella J. noted in a postscript the value of engaging unions in good-faith negotiations.[122] These judgments had been criticized for failing to specify what would happen if the negotiations were not successful. *Health Services* resolved the issue by noting that, in certain circumstances, it would be constitutionally permissible to break off negotiations. Read in conjunction with the rest of the decision, it also appears that legislatures may permit employers to unilaterally nullify or alter collective agreements if needed.

Finally, the Court noted that the circumstances involving the adoption of particular legislative provisions are important in determining whether the interference with collective bargaining is substantial. Specifically, situations of exigency and urgency affect the content and the modalities of the duty to bargain in good faith, and different situations may demand different processes and timelines.[123]

As is evident, the section 2(d) right to collective bargaining is not very extensive. The problem appears to be limited to situations in which there is a substantial interference with the collective bargaining process. This requires a significant departure from the norms of good faith, as well as the involvement of matter that is of fundamental importance to the collective bargaining process.

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117 *Ibid.*, at para. 96.

118 *Ibid.*

119 *Ibid.*

120 *Ibid.*, at para. 102.

121 *Jeffrey Mines*, *supra*, n. 18 at para. 68.

122 *T.C.T. Logistics*, *supra*, n. 8 at para. 82.

123 *Ibid.*, at para. 107.

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(c) A Review of the Application of the Section 2(d) right in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*

In *Health Services*, the Supreme Court applied the section 2(d) *Charter* right to collective bargaining to the British Columbia *Health and Social Services Delivery Improvement Act*.[124] Enacted to permit health care employers to reorganize the administration of the public labour force and make operational changes to enhance management's ability to restructure service delivery, the controversial legislation unilaterally nullified collective agreements. It was enacted without any consultation with public sector unions. Because of the need to analyze the subject matter to determine whether a section 2(d) right to collective bargaining was breached, the Court reviewed the *Act* section by section.

Sections 6(2), 6(4), and 9 of the *Act*, read in conjunction with section 10, were found to breach section 2(d) of the *Charter*. The combined effect of sections 6(2), 6(4) and 10 was to preclude collective agreements from containing provisions that prohibited the ability of employers to contract out, as well as to prohibit provisions requiring the employer to consult with the union prior to contracting out.[125] Section 9 made collective bargaining over specified aspects of layoffs and bumping meaningless, and also invalidated parts of collective agreements dealing with those issues.[126] These provisions were found to substantially interfere with collective bargaining because they rendered negotiations on matters of fundamental importance to employees meaningless, and were enacted without consultation. Regarding whether the infringement was justified pursuant to section 1 of the *Charter*, the Court found that although the sections contained a pressing and substantial objective and were rationally connected to that objective, they were not minimally impairing, as the Court found that there was no real need to completely negate collective bargaining over these issues for the indefinite future.[127]

The Court also found that sections 4 and 6 of the *Act* interfered with collective bargaining, but not substantially.[128] These clauses altered the provisions for transfer and reassignment in existing collective agreements. Specific rights lost included a requirement that the employer consider enumerated criteria in making hiring decisions, a guarantee that temporary assignments would not exceed four months, some

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124 *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2.

125 *Ibid.*, ss. 6(2), 6(4), 10. Section 10 reads: "(1) A collective agreement that conflicts or is inconsistent with this Part is void to the extent of the conflict or inconsistency. (2) A provision of a collective agreement that (a) requires a health sector employer to negotiate with a trade union to replace provisions of the agreement that are void as a result of subsection (1), or (b) authorizes or requires the labour relations board, an arbitrator or any person to replace, amend or modify provisions of the agreement that are void as a result of subsection (1), is void to the extent that the provision relates to a matter prohibited under this Part."

126 *Ibid.*, at s. 9. "Bumping" is when a redundant employee is offered another person's job — usually someone who has been there a shorter time, or is in a more junior position — and that person is then made redundant.

127 *Health Services*, *supra*, n. 9 at para. 147–161.

128 *Ibid.*, at para. 131.

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protections for seniority and the right to refuse a transfer if the employee has other employment options with the original employer. As well, the *Act* specified that these areas could not be bargained for in future collective agreements.

Although the *Act* clearly rendered future collective bargaining over transfers and reassignments largely meaningless, significant protections remained. As well, the Court deemed the subject matter to be not as central as the matter in sections 6(2), 6(4) and 9. Thus, even though the legislation interfered with the right to collective bargaining, it did not infringe section 2(d) of the *Charter* because the breach was thus not substantial.

Many provisions of the *Act* that unilaterally nullified or modified workplace relations were found not to interfere with collective bargaining at all, let alone substantially. Sections 6(3), 6(5), and 6(6) limited the degree to which collective agreements bind successor employees as well as subcontractors. These provisions were found to *not* interfere with the protection over collective bargaining offered by section 2(d) because the provisions merely modified protections available under the British Columbia *Labour Relations Code* and did not deal with entitlements of employees based on collective bargaining.[129] Sections 7 and 8 had the effect of abolishing a program that gave employees of the health sector one year of training, assistance, and financial support.[130] Because this program did not arise out of collective bargaining, but was rather the result of recommendations of an inquiry committee, the sections did not have the effect of interfering with collective bargaining in purpose or effect.

The case reveals numerous aspects of the *Charter* right to collective bargaining. First, it is extremely fact specific. Second, actions or legislation that potentially infringe upon collective bargaining are to be interpreted not as a whole, but rather by individual section. Third, the determination of what constitutes an important matter to employees is extremely subjective. In *Health Services*, the Court seemed to arbitrarily determine that matters pertaining to contracting out were extremely important, while matters pertaining to transfer were not. Finally, the Court's criticism of the *Act* focused not on the fact that changes were made to collective agreements, but rather that these were done unilaterally and without consultation with the union.

(d) The Implication of a Constitutional Right to Collective Bargaining on the 2003 Senate Recommendations

Although one would *prima facie* assume that a statutory scheme allowing debtor companies to unilaterally disclaim collective agreements would infringe a *Charter* right to collective bargaining, the requirements for a breach pursuant to *Health Services* indicate that this is not necessarily the case. To recap, the Senate Committee Recommendation 30 indirectly recommended that Canada move towards the American position in U.S. *Code* §1113 with respect to the treatment of collective agreements during a commercial restructuring. Under the proposal, a

129 *Ibid.*, at para. 124.

130 The abolished program was the *Employment Security and Labour Force Adjustment Agreement*. It was administered by the Healthcare Labour Adjustment Agency, which was also abolished.

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debtor would be able to unilaterally disclaim a collective agreement if it could show that (1) it would be unable to or would suffer serious hardship in restructuring without disclaimer; (2) that post-filing negotiations had been carried out in good faith for relief of too onerous aspects of the collective agreement; and (3) the court was satisfied that the disclaimer was necessary.[131]

The second requirement of good-faith negotiations prior to disclaimer would likely result in legislation based on the Senate Committee Recommendation 30 being constitutional. As noted in *Health Services*, "important changes effected through a process of good faith negotiation may not violate s. 2(d) ... [it is] only where [the action] has been imposed in violation of the duty of good faith negotiation [where] s. 2(d) [will] be breached." In *Health Services*, the Supreme Court applied this principle to find that the complete absence of consultation was important in determining that there was a substantial breach.

Under the 2003 Senate Recommendations, however, debtor companies will have to carry out good faith negotiations before a court can authorize disclaimer. Assuming that the requirement of negotiating in "good faith" is similar to the concept as it already exists in Canadian labour law, it would impose a heavy burden on the debtor company. First, the employer would have to provide the union with financial information regarding the status of the debtor company.[132] Second, the debtor company could not hold back issues it wanted to discuss, only to later introduce them.[133] Third, surface bargaining, or "going through the motions," would be unacceptable. Finally, the debtor company would likely not be able to use the threat of unilateral disclaimer to influence the proceedings.[134] Given that walking away from negotiations is permissible in certain circumstances pursuant to *Health Service*, it is thus likely that Senate Committee Recommendation 30, with its requirement of good faith negotiations prior to unilateral disclaimer, would not infringe section 2(d) of the *Charter*. The Court's ruling that certain scenarios, which presumably would include the threat of insolvency, would justify different treatment than normal breaches, further supports this conclusion.

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131 *Charter*, *supra*, n. 7.

132 In *DeVilbiss (Canada) Ltd. v. U.E.*, the Ontario Labour Relations Board noted that "it is patently silly to have a trade union in the dark with respect to the fairness of an employer's offer because it has insufficient information." *DeVilbiss (Canada) Ltd. v. U.E.*, [1976] O.L.R.B. Rep. 49, [1976] 2 Canadian L.R.B.R. 101 (Ont. L.R.B.). For other cases on the requirement of employers to provide financial data pursuant to a duty to bargain in good faith, see *Graphic Arts International Union Local 12-L v. Graphics Centre Ontario and Canadian Association of Industrial, Mechanical, and Allied Workers v. Noranda Metal Industries Ltd*, *infra*, n. 133.

133 See *G.A.U., Local 12-L v. Graphic Centre (Ontario) Inc.*, 1976 CarswellOnt 630, [1976] O.L.R.B. Rep. 221, [1976] 2 Canadian L.R.B.R. 118, 76 C.L.L.C. 16,041 (Ont. L.R.B.); *C.A.I.M.A.W. v. Noranda Metal Industries Ltd.* (1974), [1975] 1 Canadian L.R.B.R. 145 (B.C. L.R.B.) at 12.

134 *In National Automobile, Aerospace, Transportation and General Workers Union of Canada v. Buhler*, the OLRB found that the using of a threat of shutdown violated the duty to bargain in good faith. Presumably, this principle would extend to threatening to use unilateral disclaimer.

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(e) The Implication of a Constitutional Right to Collective Bargaining on Statute c. 47

Given that Senate Committee Recommendation 30 likely does not infringe the section 2(d) right to collective bargaining, it is unlikely that Statute c. 47 does either. First, although it interferes with collective agreements by prematurely reopening them to negotiation, it does not permit the unilateral altering of any provisions. Indeed, rather than impeding collective bargaining, Statute c. 47 encourages more of it. As well, it is unlikely that the courts will find that forcing a resumption of negotiations is an important enough matter to breach section 2(d). As such, it is unlikely that it would be found to infringe the *Charter*.

5. CONCLUSION

The treatment of collective agreements during a commercial restructuring is of great importance both because of the capacity for collective agreements to impede successful restructuring and also because of their importance in ensuring the equitable treatment of workers. It will be up to Parliament to determine how best to balance the relationship between the two objectives, and whether to persevere the current approach that prevents collective agreements from being unilaterally disclaimed, or to introduce legislation based on the U.S. approach. It has been argued in this paper that there are no constitutional impediments to either approach.

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