House of Commons
CANADA

Standing Committee on Finance

FINA • NUMBER 148 • 1st SESSION • 38th PARLIAMENT

EVIDENCE

Tuesday, November 15, 2005

Chair

Mr. Massimo Pacetti

Standing Committee on Finance

Tuesday, November 15, 2005

● (1535)

[*English*]

The Chair (Mr. Massimo Pacetti (Saint-Léonard—Saint-Michel, Lib.)): If we can, let's get started. We have votes at 5:30, so I'd like to be out of here by 5:15 or 5:20 at the latest.

We're here pursuant to the order of reference of Thursday, October 6, 2005, on Bill C-57.

[*Translation*]

We are discussing An Act to amend certain Acts in relation to financial institutions.

I would like to thank the witnesses for taking the time to appear before the committee.

[*English*]

I understand some of the witnesses have five minutes and some ten. If we could keep it to that timeframe, I would appreciate it.

From the Office of the Privacy Commissioner of Canada we have Ms. Black. You're first up, please.

Thank you.

[*Translation*]

Ms. Heather H. Black (Assistant Privacy Commissioner, Office of the Privacy Commissioner of Canada): Mr. Chairman, thank you for the opportunity to appear today to comment on Bill C-57.

I should preface my remarks by noting that we are not experts on corporate governance nor are we experts on the Bank Act, the Insurance Companies Act or the other acts that Bill C-57 will amend.

[*English*]

The bill contains several references to the Personal Information Protection and Electronic Documents Act, one of the two federal acts that protect personal information. However, these references do not relate to part 1 of PIPEDA, the part dealing with the protection of personal information, and we only have oversight with respect to part 1.

There are only a few provisions in the bill that relate to the collection, use, or disclosure of personal information. There is a series of provisions requiring the directors or officers of banks and other financial institutions to report any interest they may have in a material contract or material transaction with the bank or other financial institutions, and there are parallel provisions allowing shareholders to review these disclosures. There are also provisions that allow shareholders to obtain personal information about other shareholders, provided the information is only used for the purposes specified. These provisions are intended to promote greater transparency and accountability.

We are living in an era in which public trust and confidence in the political process, large corporations, and other institutions are eroding. The Enron and WorldCom scandals and to a lesser extent the Nortel experience in Canada have created a renewed emphasis on corporate governance. This renewed emphasis on corporate governance has taken several forms, including new requirements to report the salaries and other compensation of senior executives and more openness about potential conflicts of interest.

These demands for greater transparency and openness often require disclosures of personal information. The challenge is to figure out how to achieve greater transparency without unduly intruding on the privacy rights of senior executives and others. I suspect this is an issue to which many of you can relate, since members of Parliament and senators are required to provide significant amounts of personal information to the Ethics Commissioner, including information about spouses and children.

Viewed in this context, the provisions in Bill C-57 that require or allow the disclosure of personal information do not appear disproportionate. In addition, our understanding is that the provision requiring disclosure of potential conflicts of interest and many of the other provisions in Bill C-57 reflect requirements that already apply to many other corporations as a result of the 2001 amendments to the Canada Business Corporations Act.

[*Translation*]

So to be clear, we do not have any significant concerns about Bill C-57 from a privacy perspective. We have not been able to find anything in the bill that directly affects customer information. In fact, it is possible that the greater emphasis on corporate governance is in fact beneficial from a privacy perspective because it will force corporations to be more aware of the risks of poor management practices and will result in corporations giving more emphasis to security considerations.

Since we do not have much to say about Bill C-57, I would like to make a few general comments about our experience with financial institutions.

In our most recent annual report on PIPEDA for the calendar year 2004, we reported that we received more complaints about financial institutions than about any other industry. This has been the case every year since 2001, the first year PIPEDA came into force.

However, this does not necessarily mean that financial institutions are not complying with the act. Rather, we suspect that it is a reflection of the amount and the sensitivity of the personal information banks and other financial institutions are required to collect, the central role that they play in our day-to-day lives and perhaps the complexity of our relationships with financial institutions.

● (1540)

[*English*]

Many of the complaints we have received are the result of the actions of particular employees who failed to follow company policies and procedures, as opposed to systemic problems. In the case of the well-founded complaints, financial institutions are typically prepared to adopt our corrective recommendations. On the whole, we have a very positive relationship with financial institutions.

Thank you, Mr. Chairman.

The Chair: Thank you, Ms. Black.

From the Canadian Life and Health Insurance Association, we have Mr. Traversy. Will you do the presentation?

[*Translation*]

Mr. Gregory Traversy (President, Canadian Life and Health Insurance Association Inc.): Mr. Chairman, honourable members, I would like to thank the committee very much for giving us an opportunity to contribute to your study of Bill C-57. My name is Gregory Traversy, and I am the president of the Canadian Life and Health Insurance Association Inc., the CLHIA. With me today are Simon Curtis, the executive vice-president and chief actuary of Manulife Financial and Frank Zinatelli, the vice-president and assistant legal director of CLHIA.

[*English*]

The Canadian Life and Health Insurance Association represents companies that together account for 99% of Canada's life and health insurance business. The industry protects 23 million Canadians, with products such as life insurance, retirement savings products, disability insurance, and supplementary health insurance. It also administers two-thirds of Canada's pension plans and protects over 20 million policyholders in more than 20 other countries around the world.

Chairman, the committee has before it copies of CLHIA's written input on the bill, but recognizing the time constraints facing your committee, our remarks today are entirely focused on one very important improvement to the bill that would provide greater certainty and greater protection for those millions of life and health insurance policyholders here in Canada and elsewhere.

In particular, the industry has identified an important omission in Bill C-57 relating to how the bill's increased requirements on appointed actuaries to provide fairness opinions would be applied in practice.

Bill C-57 puts in place new requirements for appointed actuaries, such as Simon, to provide fairness opinions on a number of issues that are critically important to our policyholders, but the bill leaves those requirements hanging in a vacuum. The industry urges the committee to add one brief clause to the bill to replace that vacuum with a solid framework of authoritative, professional, and regulatory guidance as to how those fairness opinions must be prepared.

Under the current Insurance Companies Act, every life and health insurance company must designate an appointed actuary who has statutory responsibilities for preparing and presenting to the board of directors professional opinions on a number of critically important issues each year.

For example, the appointed actuary reports every year on whether or not the committee has set aside enough money to pay for all its future obligations to all its policyholders under a wide range of future scenarios. These reports are shared with our regulator, OSFI. The act provides that those currently required reports must be prepared in accordance with the standards of practice of the Canadian Institute of Actuaries.

Regrettably, Bill C-57 has no such requirement for the new reports that it will introduce. Simon and the industry's other appointed actuaries play a fundamentally important role in safeguarding the interests of our millions of policyholders. Simon, his colleagues, and the rest of the industry are deeply concerned at this omission in Bill C-57.

He'll now explain that important omission in a little more detail and suggest how it could be fixed.

I should note that Simon is a member of the Canadian Institute of Actuaries' committee on the role of the appointed actuary, he currently chairs the institute's committee on risk management and capital, and he is a past member of its board of governors and has previously chaired a number of its most important committees.

Simon.

● (1545)

Mr. Simon Curtis (Executive Vice-President and Chief Actuary, Manulife Financial, Canadian Life and Health Insurance Association Inc.): Thank you, Greg, Mr. Chairman.

As Greg mentioned, I'd like to focus my remarks on a recommendation that we believe would increase the certainty to policyholders, companies, regulators, and all the other stakeholders by placing the Bill C-57 requirements for appointed actuaries to provide fairness opinions on a range of important issues with respect to policyholder governance within a framework of authoritative professional and regulatory guidance.

The matter arises from a concern relating to how the bill's general requirements on the appointed actuary of the company to provide fairness opinions would actually get implemented in practice. The provisions of Bill C-57 would increase the specific duties of the board of governors of life and health insurance companies by requiring that the directors establish certain new policies and criteria relating to policyholder governance in addition to those that are already required. Bill C-57 then goes on to give the appointed actuary of the company the specific duty to provide the directors of the company with fairness reports regarding these policies and the criteria.

The result is that the fairness reports would have to be provided, with copies sent to OSFI, on the fairness to participating policyholders of the policy for determining policyholder dividends and bonuses to participating policyholders, and at least annually, on the continuing fairness of those policies; on the fairness to participating policyholders of the policy respecting the management of the participating account, and at least annually, on the continuing fairness of those policies; on the fairness to adjustable policyholders of criteria for making changes to adjustable policies, and at least annually, on the continuing fairness of those policies; on the fairness to participating policyholders of any proposed dividend to participating policyholders; and finally, that any changes made by the company with respect to adjustable policies during the year were made in accordance with the applicable policy and that such changes were fair to adjustable policyholders.

As one of the appointed actuaries who will be responsible for providing these opinions, I can assure you that while understanding the objectives for the opinions, I and my colleagues who serve as appointed actuaries at other financial institutions have some concerns with the current wording of the bill.

The concern is that Bill C-57 does not provide a framework or context for assessing fairness. The current text of the bill leaves this requirement essentially in a vacuum with no guidance in the bill and no specific guidance either from the Office of the Superintendent of Financial Institutions, OSFI, or the relevant professional body, the Canadian Institute of Actuaries.

The broad reliance on the appointed actuary to provide fairness opinions outside the context of a framework of authoritative professional and/or regulatory guidance to support the opinions creates an extensive and unnecessary uncertainty, with all the attendant risks that flow from that. A fairness opinion does need context. The requirement could be particularly challenging in certain areas, such as non-participating adjustable policies, which would be new ground entirely.

In order to remove these uncertainties, the CLHIA would like to recommend the addition of a specific clause to the bill—which is set out in our written comments that Greg has commented on—to the effect that such fairness opinions would be prepared in accordance with generally accepted actuarial practice with such changes as may be determined by the superintendent. This clause would mirror the current requirements in section 365 regarding another actuarial fairness opinion on the valuation report for the valuation of policy liabilities of a life insurer.

This amendment would place a provision by the appointed actuary of fairness opinions within the context of a framework of professional and regulatory guidance. It would also provide a clear direction for the approach to be taken for the development of any analytical and professional tools that would be needed to provide for such opinions. This addition to the bill would ensure that a similar approach will be taken by all appointed actuaries in providing fairness opinions, which creates greater certainty for policyholders, companies, regulators, and other stakeholders, and also greater consistency.

In conclusion, Mr. Chairman, I reiterate that Canada's life and health insurers believe this is an important piece of legislation and we're very appreciative of this opportunity to provide comments.

Mr. Chairman, this concludes our opening remarks.

The Chair: Thank you, Mr. Curtis.

From the Canadian Bankers Association, Mr. Law.

● (1550)

Mr. Warren Law (Senior Vice-President, Corporate Operations and General Counsel, Canadian Bankers Association): Thank you.

Good afternoon, Mr. Chairman and members of the committee.

The Canadian Bankers Association also appreciates the opportunity to present the banking industry's views on Bill C-57. I am Warren Law, the senior vice-president of corporate operations, and also the general counsel of the Canadian Bankers Association.

I'd like to begin by saying that we commend the effort that has been taken in the bill to bring corporate governance standards for federally regulated financial institutions into line with the 2001 changes that were made to the Canada Business Corporations Act, the CBCA. As a general rule, it's sensible that the corporate governance regime that applies to banks and other federally regulated financial institutions should be consistent with the requirements applying to other businesses under the CBCA. Therefore, generally speaking, we support the proposals in Bill C-57.

However, there is one section—section 41 of the bill—which adopts the provision of the 2001 CBCA changes, that causes our member banks some concern. If enacted, it would become subsection 204(2) of the amended Bank Act. This subsection would give bank shareholders access to portions of any minutes of meetings, whether they be board minutes or committee minutes or any other document that contains a disclosure of a conflict of interest, with a view to verifying if the directors or officers of a bank have properly disclosed any conflicts of interest in a material contract or material transaction with the bank.

I want to assure members that the banking industry agrees with the need for transparency in corporate dealings. This is a basic element of good corporate governance. But this amendment, in our view, could give rise to conflicts with other legal obligations owed by banks. Moreover, we believe that existing disclosure requirements for banks effectively address the issues of the independence of directors and the disclosure of conflicts of interest, which are the intended objectives of the proposed amendment. As a result, we recommend that subsection 204(2) of the Bank Act, as proposed in section 41 of the bill, be deleted.

I'd like to take a few minutes, if I can, to explain two conflicts the banks would face under the proposed regime. The first relates to the banks' confidentiality obligations. Banks are in a unique position in that they have legal obligations that other corporations do not have. They owe a duty of confidentiality to their customers. Long before there was privacy legislation in Canada, and quite independent of Canada's privacy legislation, the courts required banks to keep confidential the business affairs of customers. This has remained a fundamental tenet of the business of banking. Moreover, banks are primarily in the business of lending money and arranging debt transactions. While banks are no different from other corporations when complying with the corporate governance rules regarding conflicts of interest, insider trading, and board and committee members' independence, the impact on banks of this provision would be much different.

Consider the following example. When the business affairs of a customer are discussed at a meeting of a bank board or committee to decide if a significant loan should be granted to the customer, the bank's confidentiality obligations could be breached if a shareholder were to exercise his or her right under this access provision to have access to the same documents giving details about the customer. By providing excerpts of the meeting's records to a shareholder, the customer's private details of the transaction could be divulged.

The second area of potential conflict pertains to securities laws. Banks are prohibited from informing or tipping someone about a material fact or material change concerning the bank before the material fact or change has been generally disclosed. An example of the tipping prohibition is found in subsection 76(2) of the Ontario Securities Act. These prohibitions extend to all public companies—banks and non-banks alike—but it is the particular nature of a bank's business that makes the proposed subsection 204(2) particularly problematic. This is because material information about the bank or its customers might be in the minutes of a board or committee meeting or in another document that could be accessed by shareholders under the proposed subsection before the information is generally made available. This would be contrary to the tipping prohibition. Obtaining material information in this way, in our view, could contravene securities laws, since not all participants in the capital markets would have access to the same information at the same time.

● (1555)

As I indicated earlier, we believe there is currently in place an effective array of requirements and regulatory oversight that ensures that directors and officers properly disclose a conflict of interest and act properly. The Bank Act contains extensive conflict of interest provisions, which are being amended under Bill C-57 to encompass not only material contracts but also material transactions.

Banks are also required by the Canadian Securities Administrators' national instruments to disclose whether a bank's director is independent of the bank and whether a bank's director is presently a director of any other public company, and to disclose the five-year employment history for each director.

In conclusion, Bill C-57 is a major step forward in achieving uniformity in the corporate governance standards applicable to business corporations governed by the CBCA and to federally regulated financial institutions. However, given the unique nature of the banking business and the resulting confidentiality obligations of banks, we submit that adding another layer of regulatory oversight could raise serious conflicts with the banks' other legal obligations.

Accordingly, the CBA recommends that subsection 204(2) of the Bank Act, as proposed in clause 41 of Bill C-57, be deleted.

Thank you for your time, and at the appropriate time I would be open to questions.

The Chair: Thank you, Mr. Law.

From the Canadian Institute of Chartered Accountants, we have Mr. Allinson or Mr. Dancey.

Mr. Dancey, please.

Mr. Kevin Dancey (Representative, Liability Reform Task Force, Canadian Institute of Chartered Accountants): Mr. Chair and members of the committee, on behalf of Canada's 70,000 chartered accountants, thank you for the opportunity to speak to you today on Bill C-57.

I have been asked by David Smith, president and CEO of the CICA, who could not be here today, to appear on the organization's behalf.

I am a former senior partner and CEO of PwC LLP, and before that I was an ADM in the Department of Finance. I enjoyed my time at Finance, and I look forward to a good discussion of the issues here today.

Our concern with Bill C-57 is very simple. It retains joint and several liability for auditors and for other advisers such as management directors and lawyers, rather than providing for a modified proportionate liability regime. Modified proportionate liability has been included under the Canada Business Corporations Act, CBCA, and the Canada Cooperatives Act since 2001, and it has been twice recommended by the Senate banking committee for inclusion in federal financial institution legislation.

Allow me to draw a simple distinction up front between the two regimes. Under joint and several liability you can be held financially responsible for an entire loss, even if others have contributed to that loss. Under a proportionate system you are held responsible only for your own actions, and hence only for your share of the total loss.

There are a number of good policy reasons for limiting liability in this way. Let me begin first with fairness. Canada's chartered accountants are quite prepared to take responsibility and accept their share of losses where they are to blame, but joint and several liability is inherently unfair. The burden of satisfying judgments falls entirely on those who can pay, regardless of their degree of fault, which means that an auditor can be found only 10% responsible, but nonetheless be held liable for 100% of the judgment. How can this be fair?

We understand the policy reasons behind continuing joint and several liability for small investors, whose interests the CBCA regime protects, but we do not support its continuation for sophisticated investors.

The CBCA reforms were intended to address the concern that a joint and several liability regime essentially requires deep-pocket defendants to act as de facto insurers for the capital markets. The fact is, though, that professional liability insurance has become largely unavailable within the international insurance market. As a result, the large auditing firms in Canada are self-insuring their risks and would not be able to satisfy the type of catastrophic judgment that could result under the current joint and several liability regime.

The Senate banking committee examined auditor liability and, picking up on such concerns, said that it is both unfair and contrary to the public interest to require auditors to pay the share of a loss that is attributable to the wrongdoing of others, such as the owners and managers of a business, its directors, investment bankers, and others. A further review of liability concerns by the Senate banking committee in 2003 reiterated the need to review federal laws to ensure that the accounting profession benefits from modified proportionate liability.

The second policy reason for limiting liability is inconsistent legislation. The retention of joint and several liability in federal financial institution legislation makes it inconsistent with the CBCA. The laws of this land are already complex enough without their being inconsistent. Modified proportionate liability has been studied long and hard by the Senate banking committee, the result being landmark recommendations for reform.

On the one hand, the Department of Finance acknowledges that the CBCA reforms were needed in order to address the unfairness inherent in the joint and several liability regime. On the other hand, the department believes that although financial institution legislation should use the CBCA as a reference point, it should not be amended to allow proportionate liability. Finance apparently concludes that having regimes that are inconsistent in their application constitutes good public policy. We disagree.

The third policy reason for limiting liability is keeping in step with our major trading partners. We believe Finance's views are at odds with a trend toward limiting liability that has emerged in other jurisdictions. Examples include the Private Securities Litigation Reform Act in the U.S., and the laws of 39 U.S. states and Australia include some form of proportionate liability. The U.K. has just introduced legislation that will enable shareholders to agree to limit an auditor's liability. A number of continental European countries also have some form of limitation, and the European Union is contemplating further reforms.

The Canadian securities administrators have recommended both a proportional liability and caps on liability in concert with the civil liability disclosure regime under the secondary markets. The Ontario government has moved to adopt such reforms, and the B.C. government has gone further in passing legislation that extends liability reform to the primary market.

● (1600)

At the federal level in Canada, however, despite the strong recommendations of the Senate banking committee and the subsequent CBCA amendments in 2001, we've stalled in our adoption of liability reforms. As a profession, we are seeking leadership from the federal government in taking the CBCA reforms further.

A fourth policy reason for limiting liability is quality audit services. The retention of joint and several liability impedes access to quality audit services. There are a number of reasons for this.

One is people. Strong, high-quality audit firms need good people. The simple fact is that if audit partners are subject to significantly more exposure than they would be in other occupations, they will increasingly choose other occupations and audit quality will suffer. Partners are now saying they don't want to do public company audits; students on campus are asking about liability risk.

Another reason has to do with efficient capital markets. The audit business should evolve to providing assurance around new forms of financial and non-financial information. However, with joint and several liability, auditors will be unwilling to take on this risk and, in some cases, will likely look for ways to reduce their scope to limit their liability. This is not good for efficient capital markets.

Another reason is audit cost. Joint and several liability needlessly increases audit cost, as firms are compelled to settle litigation rather than risk an award of damages that could be catastrophic.

Another reason is audit choice. Strengthening investor confidence means safeguarding access to rigorous professional audit services. However, the risk posed by joint and several liability is causing many audit firms to shed or decline clients, meaning that some higher-risk clients who may be vital to our growth as a country may not have access to the best professional services. In contrast, eliminating joint and several liability removes a significant barrier to entry to the public company auditing business.

As you reflect on the impact of joint and several liability on the CA profession, it is extremely important to emphasize that this is not just a big CA firm issue. A recent survey of small and medium-sized CA firms on legal liability issues found that 83% said the issue of liability is important; 73% reported a moderate to significant increase in professional liability costs over the past five years; 64% reported that liability-related issues are deterring them from taking on assurance engagements; and 58% said that liability-related issues are making it difficult for businesses to access quality assurance services. As these statistics indicate, the issue of liability reform runs across the spectrum of firms.

So far, I've talked about the reasons for adopting liability reforms. However, we understand some concerns have been expressed. The finance department's primary objection to adopting liability reform is that the current joint and several liability framework is intrinsic to a regulatory approach that emphasizes the role of the board of directors, management, and independent advisers—such as auditors. Finance argues that introducing liability reforms could undermine this approach and would result in those responsible for the preparation of financial information being less attentive to their duties.

We absolutely agree that the role of auditors is intrinsic to the regulatory framework within which we all operate. In order to be a strong link in this framework, the profession must deliver high-quality audit services, the very thing joint and several liability threatens. As such, we must challenge the government's reasoning for retaining this regime, as it will have the opposite effect to that intended.

There are also fundamental forces already at play to ensure we are diligent and attentive to our duties. For example, our success as a profession rests on our reputation for quality. If we lose trust, we lose business. There is, therefore, strong incentive to maintain that trust.

A series of substantive measures have been taken in the wake of recent business failures. Work on a new, tougher, independent standard was accelerated to reflect global standards and the rigorous requirements of the SCC. A stronger enforcement body, the Canadian Public Accountability Board, has been put in place to provide oversight for public company audits. More has been done, and will continue to be done, to ensure an emphasis is placed on quality.

Liability claims are huge. It defies logic to suggest that auditors would run the risk of being held more responsible by the courts by being less attentive in carrying out their duties. Being held liable for a $50 million loss rather than a $500 million loss will not make professionals less inclined to adhere to rigorous professional standards. We also understand that Finance believes a proportionate liability regime would be unduly complex and difficult to administer. We submit, as did the Senate banking committee, that the model is already there under the CBCA.

In the end, concerns over the application of joint and several liability are as applicable to claims brought in relation to entities formed under financial institution legislation as those formed under corporation legislation.

Let me conclude. Finance argues that liability reforms would work against the regulatory regime; we believe just the opposite. Canada's chartered accountants are proud of the intrinsic role we play within that regime. Rather than threaten it, adopting modified proportionate liability would have a positive effect by restoring fairness so that parties are responsible only for their share of a loss; being consistent with reforms adopted under the CBCA and recommended by the Senate banking committee; ensuring continued access to rigorous, high-quality audit services; modernizing laws and keeping us in step with key trading partners; and continuing to provide the protection afforded by joint and several liability to small investors.

● (1605)

Thank you, and I would be pleased to answer any questions you may have.

The Chair: Thank you, Mr. Dancey.

We're doing well on time. I want to thank the witnesses for keeping their briefs to the time allocated.

For the members, we'll go to a first round of seven minutes, and then you'll have to let me know if want to ask questions because we'll try to get to the relevant questions and not just have members speak for the sake of speaking.

Mr. Penson.

Mr. Charlie Penson (Peace River, CPC): I don't think that's going to be the problem. We're not going to have enough time to cover the issues here today. There are several complex issues, Mr. Chairman.

I'd like to start with Mr. Dancey.

Mr. Dancey, we've certainly heard a lot from chartered accountants who do auditing on this issue. The point you're making, I gather, is that if a company does not provide you or your members with accurate information when they do auditing and there's a judgment against them, that company may not have the ability to pay even though they've basically been found liable. Your auditing firm may only have a small liability or basically no liability but would still have to pay the claim. Is that what you're getting at?

Mr. Kevin Dancey: Yes. I think the issue is very simple in the sense that—and that's a very good observation—the key issue is that if an auditing firm is only 5% responsible or 1% responsible, it can be held liable for 100% of what that claim could be. So it's without regard to the firm's degree of fault, and that's the big issue.

When you have claims that are measured in terms of the market capitalization of companies, you can see that the potential claims could be very large, could be catastrophic, and yet even though the auditors might be only 1% responsible, they could be held liable for 100% of that claim, even though management, directors, and others were more to blame.

Mr. Charlie Penson: Mr. Dancey, what I've heard from a number of firms that have talked to me is that if this goes through the way it is, there will be a lot fewer people doing auditing in the future because they will not want to have that risk exposure. Is that what you're telling us?

Mr. Kevin Dancey: I think you are already seeing that, because of course joint and several liability is already in the federal financial institutional legislation. What you're seeing is a number of audit firms shedding clients; they are just declining to do the audit work for those clients. In some cases, this may be quite justified. I think from a policy perspective it is often some of those higher-risk clients that are vital to the growth of this country, and they need access to very high-quality, professional services.

Mr. Charlie Penson: I want to move on, but your answer is proportional liability, and the model is already used by some other countries. Is that right?

Mr. Kevin Dancey: Yes, and it is already used in the CBCA. It's modified proportionate liability, so it does protect the small investor. The small investor still is protected by joint and several liability, and it's been recommended by the Senate banking committee twice.

Mr. Charlie Penson: Thank you.

Mr. Law, you are from the Canadian Bankers Association. What's wrong with the concept of having shareholders find out if their directors have a conflict of interest?

● (1610)

Mr. Warren Law: In principle, I don't think there's anything wrong with it. I think if you look at the provisions in the Bank Act and at the provisions the Canadian securities administrators have set out in their national instruments, there's adequate protection. The problem, though, is that we have this common-law obligation. This is going back to a case that was decided back in the early part of the 19th century that made it very clear that unless there was a specific exemption, there was this overriding duty for a bank to keep its affairs confidential with respect to customers.

I think it makes sense because of the fact that banks, in my view, are unique in a way. When you look at their capital structures, when you look at the kinds of stakeholders they have, when you look at the overall macroeconomic importance of banks, when you look at the key role banks play in the payment system, and when you look at the kinds of businesses they carry on—primarily the lending of money and the arrangement of debt transactions—I would submit to you that banks have a special role to play, and this has been reflected in the more onerous obligations that banks have.

Mr. Charlie Penson: Let's just explore that. I'm sorry, we don't have much time, so I want to explore that a little bit further.

I thought we were talking about the shareholders' ability to see whether the directors had a conflict of interest.

Mr. Warren Law: That's correct.

Mr. Charlie Penson: So how does confidentiality enter into that? This is not a customer. You're talking about a customer relationship, aren't you?

Mr. Warren Law: Yes. That's the concern about this provision, that if you give a shareholder access to board minutes or committee minutes with respect to a material lending transaction that was discussed, you could be inadvertently disclosing information about a customer, obviously. That, in my mind, is....

Mr. Charlie Penson: How does that pertain to conflict of interest?

Mr. Warren Law: Under the bill there is a mechanism for disclosing conflicts of interest of directors and officers. If a director has a conflict of interest, for example, because of the fact that he or she sits on the board of another company, and it's that company that is the customer of the bank, the fact that he or she has to disclose the conflict of interest, as required by the legislation, may give a tip-off to a shareholder that in fact there is this loan taking place.

Mr. Charlie Penson: I want to bring Ms. Black into this, because I gather you're saying you don't have a concern from the privacy point of view with it.

Ms. Heather H. Black: No, we don't. I stand to be corrected on this, but I believe we are probably dealing mostly with corporate customers.

Mr. Warren Law: This is not a privacy legislation issue. We're not dealing with the inadvertent disclosure of personal information. But it could mean that information about a customer is disclosed. If this amendment were to go through, if shareholders were given access to corporate documents, such as excerpts from board minutes, excerpts from committee minutes, there could be an inadvertent disclosure of customer information.

Mr. Charlie Penson: So that customer could be a private citizen.

Mr. Warren Law: It could be a private citizen; it could be—

Mr. Charlie Penson: I want to ask Ms. Black, then, in the event of that happening, would you be concerned?

Ms. Heather H. Black: I don't like to be in the position of saying no, we don't have a privacy concern, but I think in this situation the likelihood of the disclosure of personal information is relatively low, and we have to consider the public interest in having good corporate governance. That's the context in which we approached it.

Mr. Charlie Penson: Okay. I'll follow it up later, if I get some more time.

The Chair: Thank you, Mr. Penson.

Monsieur Loubier.

[*Translation*]

Mr. Yvan Loubier (Saint-Hyacinthe—Bagot, BQ): Thank you, Mr. Chairman. Before beginning, I would like to welcome Ms. Jennifer Maisonneuve, who is an intern with my colleague from Quebec City. She is from McGill University and is doing a training program under the Women in House program, which is designed to get women interested in public affairs. I would therefore like to welcome her and say that I hope she continues along this path and will be working with us someday.

I have three questions, which are along the same lines as those asked by Mr. Penson. My first is to Mr. Law and to Mr. Traversy.

Are banks the only institutions in the situation you have just described, or could it also apply to insurance companies?

● (1615)

[*English*]

Mr. Gregory Traversy: Mr. Chairman, this isn't one of the concerns we have with the bill. As you heard during our opening remarks, we're very focused on that one issue concerning greater certainty for policyholders. We've looked very carefully at the issue Mr. Law has flagged, but it isn't an area we have concerns with.

[*Translation*]

Mr. Yvan Loubier: So you are the only ones concerned about this within the Canadian Bankers Association?

[*English*]

Mr. Warren Law: Yes, I think we are, and I think this reflects the uniqueness of banks. We find ourselves in a very unique position, because of the fact that there was this case—decided many years ago, but it set out a very clear statement of principle that banks have to follow: you have to keep customer information confidential.

I mentioned that there are exceptions to this rule. For example, if a bank were to be served with a subpoena by a legal authority, we would have to disclose information. If it's an issue of public interest, I think that's another exception to the rule. But the rule is very clear—and this dates back many years before privacy legislation and, as I said, is independent of privacy legislation—you have to keep customer information confidential. To the extent that you allow a shareholder, wearing his or her shareholder's cap, to have access to board minutes or other corporate documents, you run the risk of having information about the customer—and that could be a different person—disclosed.

I think it's a very serious problem. It requires an amendment to this act.

[*Translation*]

Mr. Yvan Loubier: I see.

I would like to ask you a question, Mr. Dancey. You made some comparisons with a number of countries, particularly the United States. Have there been any movements to strengthen modified proportional liability in the United States particularly since the Enron scandal and the others which followed? What is the current regime? Has there been a movement on the part of the American authorities to strengthen the level of liability? That would explain why a joint and several liability scheme is proposed here.

[*English*]

Mr. Kevin Dancey: Yes, that's a very good question. I think the answer comes in a couple of different parts.

As it relates to modified proportionate liability, that was in the Private Securities Litigation Reform Act in the U.S., which was enacted in 1995. There are 39 U.S. states that have adopted modified proportionate liability. So there has not been a real change in modified proportionate liability, to my recollection—although I'm not a lawyer in the U.S.—since the Enron and WorldCom scandals.

Where the issue has been, of course, is in the Sarbanes-Oxley Act, which has brought down a number of new rules on what companies can and cannot do and what the reporting obligations are for various companies. As that act relates to the profession of chartered accountants, the key changes—not just with Sarbanes-Oxley—that have happened in our profession over the last couple of years in both the United States and Canada are that we now have a new, tougher independent standard that we must comply with, and we are also now a regulated business.

The CA profession used to be a self-regulated profession. We are now a regulated business under the auspices of the Public Company Accounting Oversight Board in the U.S. and the Canadian Public Accountability Board, which is chaired by Gordon Thiessen.

[*Translation*]

Mr. Yvan Loubier: Perfect.

Mr. Traversy, on page 6 of your brief, you deal with the issue of insider reporting. You say that your association is already subject to provincial securities rules. In that case, why, in your opinion, has an additional requirement been added to Bill C-57?

● (1620)

Mr. Gregory Traversy: Mr. Chairman, I will invite my colleague Frank Zinatelli to answer that question.

[*English*]

Mr. Frank Zinatelli (Vice-President and Associate General Counsel, Canadian Life and Health Insurance Association Inc.): Thank you, Chair.

The act makes some really valuable improvements to the rules having to do with insider reporting. We noted that the approach taken by the CBCA was different from what is being done in the Insurance Companies Act in that they simply left it to the provincial rules. But of course this can be accommodated under the ICA as it is by providing a regulation to do that. It is my understanding that officials are certainly looking at that very seriously. So we expect that perhaps even without a change to the act, the same goal may be achieved through the implementation of some regulation after the legislation is passed.

[*Translation*]

Mr. Yvan Loubier: So if you were to propose an amendment to the provisions of Bill C-57 regarding insider reporting, you would prefer, for example, that reference be made to compliance with the rules of securities commissions rather than defining other standards, other rules in this regard.

[*English*]

Mr. Frank Zinatelli: Yes, it will be necessary for a regulation to be made to achieve the same goal if the legislation is not amended.

Mr. Gregory Traversy: But we do not require an amendment to the act to achieve this important objective. It can be done purely through regulation, subsequent to passing the bill in its current form.

Mr. Frank Zinatelli: That is correct. We simply wanted to bring it to your attention because there are two ways to go on this. One way is to have a legislative amendment and the other way is through regulation.

[*Translation*]

The Chair: Thank you, Mr. Loubier.

Ms. Boivin.

Ms. Françoise Boivin (Gatineau, Lib.): Thank you, Mr. Chairman.

Like my colleague, I have had the pleasure of being accompanied all day today by Christina Marcotte, from McGill University. I would like to acknowledge her presence here. It is a pleasure to see young people interested in politics as part of the Women in House program. I will not make a political statement, but it has been very pleasant.

We need more women in politics and there should perhaps be a few more in financial circles as well, from what I can see. That is the only political joke I will allow myself today.

Having said that, my first question is for Ms. Black.

You say, in your most recent annual report, the one for 2004, that the number of complaints about financial institutions is higher than that registered for all other sectors and that it has been that way since 2001, in other words the year that the act came into force. The complaints would be attributable to decisions made by some employees who omit to comply with the policies and procedures of their company, rather than to systemic problems.

What kinds of policies are they not complying with?

[*English*]

Ms. Heather H. Black: I would not like to give the impression that banks are not conforming to the act. In the early days there were a few problems with certain practices and policies of the banks. I think we could say that they have largely been dealt with by financial institutions.

What we have been seeing latterly is really due to the human element. This could lead one to the conclusion that financial institutions are not training their employees properly, but I think on the whole they are doing a pretty good job at it. Often the employee in question is a customer service rep, who is trained to be helpful, and who can often get suckered, if you will—pardon my language—into assisting by providing information that perhaps ought not to have been provided.

We have not, to date, uncovered any serious, systemic problems in financial institutions.

Ms. Françoise Boivin: So there's nothing to really worry about.

Thank you for that.

● (1625)

Ms. Heather H. Black: No.

[*Translation*]

Ms. Françoise Boivin: I would now like to turn to you, Mr. Law, because of all the comments we have heard, the amendment that you are calling for is perhaps the most direct. In fact, you are asking us to repeal, to withdraw the proposed amendment to the subsection that would be, once adopted, subsection 204(2).

In light of the explanations you have provided to my colleagues, both Conservative and from the Bloc, I am not sure that I fully understand exactly what your concern in this regard is, as the subsection reads as follows:

> (2) The shareholders of the bank may examine the portions of any minutes of meetings of directors or committees of directors that contain disclosures under subsection 202(1), or the portions of any other documents that contain those disclosures, during the usual business hours of the bank.

That seems very limited to the disclosure function and it gives me the impression that the amendment, since it truly targets shareholders of the bank, aims to ensure that shareholders are simply in a position to examine the minutes, in the context of a specific event, in order to see if the member of the board truly disclosed his interest.

Perhaps Ms. Black could correct me, but when requests are made for a specific information to which we are entitled but which include other information to which we are not entitled, some words may be whited out. Receiving documents that have been heavily whited out is not new. So I have some trouble understanding the concern of the Canadian Bankers Association in that regard.

[*English*]

Mr. Warren Law: I agree it's a very limited section, but it could have very wide-ranging effects. We're talking about material transactions here. So we're talking about transactions that concern large amounts of dollars.

If a shareholder were to receive information about a transaction that was not made public at that point in time, I think you'd have very serious ramifications. I mentioned the fact that it would expose the bank to a tipping contravention under provincial securities legislation. Tipping is something that securities legislators are putting particular focus on these days. You may recall the Rankin case that was recently decided in the Ontario courts. The rule dealing with tipping is that you can't let someone know a material fact before it's been made public.

But walk through this scenario. A shareholder under the proposed subsection 204(2), if it's passed, seeks access to the minutes of a bank's board meeting. The board meeting's minutes make reference to a loan of a material nature. The shareholder would have access to those minutes, because under the proposed subsection 204(2), they've been given this access and as a result would have access to information that may not be public at that time. It's a grave concern from a tipping standpoint, and it would expose the bank to a contravention of its common-law duty to keep the affairs of its customer confidential.

Ms. Françoise Boivin: So you don't think it would be possible to block out certain information that doesn't concern the divulgence of the interest.

Mr. Warren Law: You would think it would be easy, wouldn't you? You'd think so if the minutes simply stated that Madame X, who is a director of the bank, left the meeting. But even if Madame X is the director of only one other company, a shareholder can quickly infer what's happening here. Why did Madame X leave the company? She must have had a conflict of interest. What other companies is Madame X a director of? She's a member of this company. Aha, there must be something happening; let's buy shares in the other company.

Ms. Françoise Boivin: Thank you.

Mark, I think you wanted to....

Mr. Mark Holland (Ajax—Pickering, Lib.): Mr. Chairman, could I follow up on that...?

The Chair: Sorry.

Ms. Wasylycia-Leis, go ahead.

Ms. Judy Wasylycia-Leis (Winnipeg North, NDP): Thank you, Mr. Chairperson.

[*Translation*]

First of all, like Mr. Loubier, I too want to point out that I'm very proud to have a student from McGill University with me as part of the Women in House program. It is a great pleasure for me to be accompanied by Shannon Beddoe wherever I go throughout the day. That makes political life very interesting, doesn't it?

● (1630)

[*English*]

The Chair: I don't understand why they hooked women up with women. What is wrong with hooking up the woman with one of the male MPs? I'm not sure.

Ms. Judy Wasylycia-Leis: The more we get together, the more we can take over.

The Chair: You guys are giving them bad ideas.

Ms. Judy Wasylycia-Leis: I would also like to thank all of the representatives here this afternoon to talk about Bill C-57. It's good to have some of the concerns expressed.

Folks here will know there's some urgency around trying to pass this bill—not from the point of view of an election, but from the point of view of one part of this bill dealing with the Co-operators in particular. They need the changes in this bill because they're fast approaching the $1 billion threshold at which, under the current rules, they must change their whole way of doing business. They're now at about $900 million, close to the $1 billion mark. We feel some urgency to ensure that the Co-operators are allowed to continue as they have been, through this bill. But we also don't want to ignore important concerns raised here today.

The first I want to address is that raised by the Canadian Life and Health Insurance Association. Mr. Traversy and Mr. Zinatelli, I'm wondering if the issue you raised, which I understand to be fairly basic, fundamental.... Is there any reason to believe this couldn't be handled as a housekeeping matter at our committee? Is there any controversy around it that you can tell? Is there any reaction from the department?

Mr. Gregory Traversy: That is a very good question. We've had an opportunity to discuss it repeatedly with Finance officials. To the very best of our knowledge, there is no other side to the dialogue. It's something that I think is seen as a very worthwhile, somewhat technical, housekeeping amendment. We're not aware of any controversy or any other issues swirling beneath the surface.

We do feel very strongly that the bill would be very weak without it, because you'd then be in a situation where various appointed actuaries could be making up their own definitions of fairness in a perfectly legally acceptable manner. The act would just say fairness and would not provide any further guidance, so everything would be up for grabs.

We very much want to make sure that everyone is using the same professional and regulatory standards when they look at these key fairness issues. To the best of our knowledge, it's just as simple as that—we hope.

Ms. Judy Wasylycia-Leis: Then you would prefer that, although you said earlier it could be handled under the regulations. Was that a separate issue?

Mr. Gregory Traversy: That was another issue.

Ms. Judy Wasylycia-Leis: Oh, okay, sorry. I'm glad you clarified that.

Mr. Gregory Traversy: Yes, this one really has to be in the statute, as opposed to just being in the regulations. The other one was about the insider trading reports.

Ms. Judy Wasylycia-Leis: I appreciate that clarification. I'm hoping, then, that we'll be able to proceed with that amendment with all-party support. I'll be interested to see what other folks have to say.

With respect to the Canadian Institute of Chartered Accountants, Mr. Dancey, why is there this discrepancy between this legislation and the CBCA?

Mr. Kevin Dancey: That's a very good question. We don't think there should be a discrepancy between these two pieces of legislation.

In my opening remarks I talked about that a bit. There are a number of reasons that modified proportionate liability should be in this legislation. It has been studied long and hard by the Senate banking committee. They started their study in the late nineties. They had their first report in 1998 and their second report in 2003. Both the Kirby and Kolber reports spoke to this particular issue and recommended that modified proportionate liability be incorporated into the federal financial institution legislation.

The arguments that Finance seems to be putting forward—and I tried to allude to this—are that they think retaining joint and several liability will improve the regulatory regime within Canada. Our view is that it will have the opposite effect.

A strong regulatory regime within Canada requires auditing firms to be able to provide high-quality audit services. That means you need good people, you have to provide assurance around more financial and non-financial information as the business world evolves, and you have to make sure there is that good access to quality audit services. Joint and several liability will ensure that does not happen.

The second reason they put forward is that if you're joint and severally liable, that will keep your feet to the fire. With the potential size of claims these days, your feet are still going to be to the fire because the claims are still going to be very large. The Senate banking committee actually looked at that particular issue and said that the auditors' feet will still be to the fire under a modified proportionate liability regime. Again, we believe that Finance has just not analyzed the issue of incentives correctly.

The third reason that Finance put forward is that it would be difficult to introduce modified proportionate liability in the federal financial institution legislation. Our view—which is also the view of the Senate banking committee—is that the model is already there in the CBCA and it could be easily incorporated into the federal financial institution legislation.

While in a superficial context it may seem there is some credence to the reasons Finance has put out there, we just don't think they've been analyzed deeply enough to get to the real answer, which is that modified proportionate liability should be a consistent piece of legislation across all corporate legislation at the federal level.

● (1635)

The Chair: Thank you, Ms. Wasylycia-Leis.

Ms. Judy Wasylycia-Leis: Am I done already?

The Chair: Yes.

Ms. Judy Wasylycia-Leis: Could I get back on the list?

Could I actually ask one quick follow-up question?

The Chair: I would never say no to you, Judy.

Ms. Judy Wasylycia-Leis: Thanks.

It seems like a reasonable proposal to me. Did you look at where we could amend the act and whether or not it's possible to accommodate your request in a fairly succinct way so that we would not actually hold up the process, but we could still accomplish what you want done?

Mr. Kevin Dancey: As a former ADM in the Department of Finance, you always defer those kinds of questions to the people who are actually drafting the legislation. But let me say this. The regime is already there in the CBCA. There is a separate part within the CBCA that introduces modified proportionate liability.

No, we don't think it would be that difficult to do.

Ms. Judy Wasylycia-Leis: There's a Senate committee to refer it to as well. Isn't that right? There must also be reams of documents.

Mr. Kevin Dancey: Yes. The Senate banking committee has looked long and hard at this issue.

Ms. Judy Wasylycia-Leis: Okay. Thank you.

The Chair: Would your recommendation be that we eliminate the paragraph? Is that what I understood?

Mr. Kevin Dancey: No. I think the recommendation would be that the bill as currently drafted does not incorporate modified proportionate liability, which is in the CBCA. We would like the department to look at the provisions that are in the CBCA.

Yes, there could be some changes that have to be made if that is incorporated under the federal institutional legislation, but the framework is there to incorporate modified proportionate liability into Bill C-57.

The Chair: Thank you.

I have a few more members on my list. I have Ms. Ambrose, Mr. Bouchard, Ms. Minna, and then Mr. McKay, for five minutes.

Ms. Rona Ambrose (Edmonton—Spruce Grove, CPC): I'll ask Mr. Penson.

The Chair: Mr. Penson, go ahead.

Mr. Charlie Penson: I think we need some clarification from Ms. Black.

We've heard the Canadian Bankers Association, Mr. Law, suggest that there should be an amendment to Bill C-57.

Ms. Black, I need to know whether you support the idea of the bill being amended along Mr. Law's line of reasoning.

Ms. Heather H. Black: I don't know that it's up to me to support it or not support it. Mr. Law has good reasons that he has presented to you for requesting such an amendment.

Mr. Charlie Penson: Maybe I can phrase it a little differently then. If the committee were to endorse and put Mr. Law's amendment in the bill, would you have any concerns?

Ms. Heather H. Black: No, sir, I would not.

Mr. Charlie Penson: The reason is because it's a public benefit. Is that what you're saying? Would that outweigh any privacy concerns?

Ms. Heather H. Black: We don't have major privacy concerns. In the way we are reading this provision on disclosure, a director must disclose an interest in a contract or a transaction. In the process of that disclosure and the subsequent disclosure to shareholders, it's extremely unlikely that there is going to be a disclosure of personal information. In our view, it's going to be almost entirely, if not entirely, corporate information.

If the provision is there, we don't have a problem with it. If the provision is not there, it's the same thing.

● (1640)

Mr. Charlie Penson: Maybe I could switch to Mr. Law.

If it's almost entirely sure that it's going to be corporate information, what is the problem with that?

Mr. Warren Law: Corporations can be customers of banks.

Mr. Charlie Penson: They are, of course.

Mr. Warren Law: Of course, they are. Therefore, if you inadvertently or unwittingly disclose the name of a corporation that is a customer, it is in breach of a fundamental tenet of banking.

I agree with Ms. Black's analysis that we're not talking about privacy legislation issue here.

My concern is not with the inadvertent disclosure of personal information, as that term is defined under our privacy legislation. It's the fact that you may be disclosing the affairs of a customer.

Mr. Charlie Penson: It would be commercial.

Mr. Warren Law: In most instances it would be a commercial situation.

Mr. Charlie Penson: That would give an advantage to somebody along the way. Is that what you're saying?

Mr. Warren Law: It could give an advantage to someone. If there are public companies involved, it would be contrary to the tipping provisions under the securities legislation.

Mr. Charlie Penson: Okay. Those are all my questions.

Thank you.

The Chair: Thank you, Mr. Penson.

I now have Mr. Bouchard.

[*Translation*]

Mr. Robert Bouchard (Chicoutimi—Le Fjord, BQ): Thank you, Mr. Chairman. I also thank Ms. Black and each and everyone of you for your excellent presentations.

My first question is for Ms. Black.

You said that in your opinion, this bill is not excessive, and does not cause any problems with regard to personal information. I also gathered that there were more complaints than in any other sector, as a member just said.

Have you looked at ways to reduce the number of complaints? Do you think that this bill, as it stands, could reduce the number of complaints?

[*English*]

Ms. Heather H. Black: Mr. Chairman, I don't see a link between the bill and the numbers of complaints that we might or might not get under the private sector privacy act.

The reason there are a large number of complaints against banks and other financial institutions, it seems to us, is that everybody has a banker and these institutions are a large target.

It's not a statistic that really discloses anything about the nature of privacy protection in financial institutions. In fact, I would like to emphasize that as far as we are concerned, the financial institutions are some of our better privacy corporate citizens, if you will.

Mr. Law has talked about the banks' long dedication to customer confidentiality, and I think that shows. The complaints we have had have largely been what we would call “one-offs”—a mistake sometimes, or someone not following the bank's policies. As far as we have determined so far, there are no serious, systemic issues with the banks.

Thank you, Mr. Chairman.

[*Translation*]

Mr. Robert Bouchard: My second question is for Mr. Allinson. You spoke of proportionate liability and joint and several liability. Could you explain the existing criteria for identifying these two types of liability? Could you explain how the criteria are established for defining proportionate liability and joint and several liability?

● (1645)

[*English*]

Mr. Kevin Dancey: I don't think it's so much the actual criteria.

That's a good question, though, in the sense that it's really about, what does the law say the liability is? Is it proportionate, or is it joint and several? If the law says it is joint and several, that simply means that you are joint and severally liable for the amount of the claim, whatever that claim might be and regardless of what your share of the blame is versus the share of other people; you are on the hook for 100% of the claim even if you're only 1% responsible. Under proportionate liability, if you are 10% responsible, then you are responsible for 10% of the claim. As for determining what the percentage is, that's up to the courts to decide what your proportionate responsibility is.

I think the other important distinction to bring into mind is that what we are asking for is not pure proportionate liability; it's modified proportionate liability. There are a couple of key distinctions in that. One is that it retains joint and several liability for the small investor. So for the small, unsophisticated investor, it's still joint and several liability. Again, if the auditor was only 1% responsible, if it's in relation to small investors, the auditor would still be liable for 100% of the claim.

That is the design of the framework that is within the CBCA today. It is modified proportionate liability, and we think that would be a fair regime for the federal financial institution legislation as well.

The Chair: Merci, Monsieur Bouchard.

Next is Ms. Minna, then Mr. McKay, and then Ms. Wasylycia-Leis.

Hon. Maria Minna (Beaches—East York, Lib.): Thank you, Mr. Chairman.

I too have the honour of introducing a young woman who is with me today from McGill University, Aleana Young, who has been very busy today attending a lot of the events. She's going to be the prime minister some day—well, after a few others. The others all have a shot. We have a cabinet in this group: ministers, prime ministers.... That's the future.

First of all, I want to say to Mr. Traversy that I rather like your amendment. From what I can see it seems to me like a logical thing to do. Unless somebody tells me somewhere around the table otherwise—that I'm misinterpreting in agreeing with you—I think it's a good idea. So I'll leave that.

I'm glad for the clarification, Mr. Dancey, that you just gave, because I wasn't quite understanding the modified liability. You would amend the act basically by removing the joint and several liability and introducing a clause that talks about modified proportional liability. We would have to describe that in the act, would we not?

Mr. Kevin Dancey: Yes, you would.

Hon. Maria Minna: You were talking about what modified actually means. How it would apply would have to be....

Mr. Kevin Dancey: Yes. The actual CBCA contains a separate part, which is not very long, that defines modified proportionate liability.

Hon. Maria Minna: You're happy with that definition, then?

Mr. Kevin Dancey: It would be a very good framework for incorporating into the federal financial institution legislation. There could be some changes the department would want to make, but it's a very good framework, yes.

Hon. Maria Minna: I think we're meeting with the officials tomorrow; maybe we'll ask them about some of the suggestions that were made today.

I have one final question to Mr. Law. How would shareholders, if we were to remove this, get the information? I think part of what we're trying to do is to get transparency and access to information for shareholders. I'm trying to find out how we can compromise. I know you've said the Senate has a report, but I think the intent here was to try to broaden that a bit.

Mr. Warren Law: I think it's very important to protect shareholders and very important to have transparency in corporate governance. I'd like to think the banking industry is the leader in this area. If you were to look at the Bank Act, for example, there are numerous provisions that already deal with the protection of shareholders and the disclosure of conflicts of interest.

Again, I go back to the point I made at the beginning, that banks on many levels have been recognized as being unique—not better than any other kind of financial institution, clearly, but they have a unique role to play. I think it's reflected in the size of the Bank Act, in the fact that particular attention has been put on the corporate governance obligations of banks. If you look at the Bank Act in this area, you have specific provisions dealing with the number of affiliated directors who can be on a board; there is a very detailed provision dealing with the disclosure of conflicts of interest by both directors and officers; there's a need to abstain from voting at a meeting; there's a need to actually leave the room if there's a conflict of interest.

Then look at the obligations a bank that is a public company has under the Canadian securities administrators' national instruments, things such as the fact that a director has to disclose whether or not he or she is independent; the fact that a director has to disclose whether or not he or she serves on any other public company board; the fact that a director has to disclose, each year, a five-year employment history.

I think when you take the existing corporate governance regime that applies specifically to banks, shareholders do in fact have adequate protection that there is adequate disclosure. A real concern, when you get down to it in this provision, is the fact that you have a collision course. You have a collision course between the proposal to give shareholders access to certain corporate information of a bank and this other provision that has been part of the fundamental common law applying to banks for many years: “Thou shalt not disclose confidential information of customers.” The two, in my mind, cannot co-exist.

● (1650)

Hon. Maria Minna: Thank you. I think we need to take a look at that.

Here is one very quick final question, Mr. Dancey. When you said the joint and several liability would still apply to small investors, what is “small”? Do you have a definition for small?

Mr. Kevin Dancey: I believe the definition of small in the regulations to the CBCA is that a small investor is one who has an investment of $20,000 or less in the particular entity.

Hon. Maria Minna: So it's really small.

Mr. Kevin Dancey: Yes, and that clearly is a regulation that can be changed from time to time, but it's a monetary limit on the amount of the investment that an individual has in the particular entity.

The Chair: Thank you.

Mr. McKay, and then Ms. Wasylycia-Leis.

Hon. John McKay (Scarborough—Guildwood, Lib.): Thank you.

Mr. Dancey, I think the nub of this argument has to do with the uniqueness of financial institutions. The uniqueness of financial institutions is that they all have depositors or policyholders of some kind or another. That, in and of itself, makes them different, separate from other corporate entities. So what we are talking about here is who bears the liability in the event of loss. Your argument effectively is that depositors should bear the liability in the event of loss rather than the auditor. Isn't that the nub of the argument?

Mr. Kevin Dancey: That's an excellent observation, but I don't think I would agree with that for a couple of reasons.

One is that as it relates to deposit holders, they are generally insured by the CDIC. For deposit holders, it used to be up to $60,000. I believe it's now up to $100,000 that each deposit holder is insured for their amount under the CDIC.

Hon. John McKay: Let me just stop you on that one.

CDIC is essentially a self-insuring organization. All depositors pay some level of insurance for their $100,000 GIC, or whatever. So you're still shifting the liability. Even though the depositors have effectively bought insurance, you're still shifting the liability away from the accounting profession towards the depositors. The depositors have had absolutely nothing to do with a default or a financial corporate failure in some other institution.

Mr. Kevin Dancey: Yes, but there are two points I would make to that.

Let's not lose sight of the fact that the CDIC is an insurance company. It does charge premiums to cover any losses. Effectively what that argument says is that when the CDIC has to make a claim, they really want to take the position that they have reinsured that loss to the accounting profession even though that profession may only be 1% responsible and is not actually charged a reinsurance premium for being the de facto insurer for the capital markets. So I think as you walk through that argument it does lose some credibility.

I have one other point, if I may. Remember as well that under modified proportional liability, the unsophisticated investor, the small investor, can still benefit from joint and several liability. That is there with the $20,000 limit that is in the CBCA right now.

● (1655)

Hon. John McKay: But effectively what would have to happen is that if the Canada Deposit Insurance Corporation took your argument to its maximum, it would therefore have to change its premium structure, because there has been a shift in liability away from the accounting profession towards the depositor, whether it's a depositor who is insured or whether it's a small depositor, any form of deposit. That's essentially your position: please get rid of this joint and several liability and reduce our exposure.

Mr. Kevin Dancey: No, I don't think it is as simple as that. Whether the CDIC would have to change its premium or not is an issue for CDIC, and I wouldn't want to prejudge what they may or may not do.

I think the most important point and the value, really, that is there as part of the regulatory regime—which is there for CDIC, it's there for OSFI, and it's there for the Department of Finance—is that auditors play a very integral part of the regulatory regime within Canada, within the oversight of companies, whether they be corporate companies or financial institutions. In the long run, for us to fulfil that role, you need a very strong audit profession providing high-quality audit services. The effect of this retention of the joint and several liability is that it will lead to weaker audit firms with weaker people not doing as good a job as they could. That, in the long run, is a very negative impact in terms of us fulfilling our mandate within the regulatory regime within Canada.

Hon. John McKay: I appreciate that the audit profession as a sub-profession of the accounting profession has undergone some very difficult times, but frankly, that has nothing to do with the issue before us today. You are here—and rightfully so—advocating for a position to ultimately shift liability away from accountants and onto depositors, who are probably the most innocent of all of the entities. Where your argument works is certainly with respect to other corporations.

The shareholder is on the hook in another corporation. The directors are on the hook. The management is on the hook. But surely the uniqueness of a financial institution is that the depositor should not be taking the risk of negligence on the part of the audit profession in any way, shape, or form. Therefore when you take on the file, that is a known going in by your profession, and presumably you scale your fees accordingly.

Mr. Kevin Dancey: If modified proportionate liability was the right regime for financial institutions, but for deposit holders...I guess I'd question why that wasn't brought forward as part of Bill C-57. Instead, nothing has been brought forward with respect to modified proportionate liability—simply the retention of joint and several liability. So that's one observation. If modified proportionate liability makes sense for all the other investors and creditors of the business except the deposit holders, one would think that drafting would have come forward as part of Bill C-57, if there were some special issue vis-à-vis deposit holders. But that's not what we see in front of us. In fact, what we see in front of us is joint and several liability retained for everybody, which means we have inconsistent laws. That makes for a very difficult regime to sustain.

As to the shifting of liability, I really want to make the point that chartered accountants and auditors are not looking to avoid their responsibilities. If we're to blame, we expect to pay for that, but if we're only 1% responsible, we don't expect to be on the hook for 100% of the claim, particularly when the claims are often determined on the market capitalization of companies, and catastrophic risk could lead to the annihilation of the firm.

● (1700)

The Chair: Thank you.

Thank you, Mr. McKay.

Ms. Wasylycia-Leis is next, and then Ms. Ambrose.

Ms. Judy Wasylycia-Leis: Thank you. I didn't get a chance to deal with the issues raised by the Canadian Bankers Association. I'd like to start by asking Heather Black a question.

I know you said this recommendation to delete proposed subsection 204(2) would have little impact on privacy concerns, or it wouldn't matter in terms of the privacy question whether it was in or out. But I'm wondering if it's not important to have this kind of provision in law, from the point of view of transparency and accountability to the public. It just seems that to delete it would be going in the wrong direction of everything we're talking about.

Ms. Heather H. Black: As I said in my opening remarks, we are privacy experts. We are not experts in corporate governance and accountability. Speaking for myself as a citizen, I guess I would tend to agree with the honourable member that the more accountability and transparency you have, the better. But there really isn't a privacy issue here.

Ms. Judy Wasylycia-Leis: You've heard the arguments today. Couldn't any corporation make the case about keeping their minutes to themselves to protect client privacy? Doesn't that defeat the purpose of the legislation?

Ms. Heather H. Black: Yes, I would agree with that.

Ms. Judy Wasylycia-Leis: Let me ask Mr. Law.

As I read proposed subsection 204(2), it sounds pretty important for us to keep in. In the briefing notes it says it permits shareholders to access during the usual business hours of a bank that part of minutes of meetings of directors or the portions of any documents that contain disclosures of interest of directors or officers in material contracts or transactions with the board.

It seems to me that kind of wording is something Canadians expect to see these days. One last thought would be that in some ways we're further behind Americans when it comes to openness and transparency around how our corporations, including banks, are being run. I would have a hard time justifying the deletion of this at this point in our history.

Mr. Warren Law: That's a good question.

What is the important thing is the protection of shareholders. What shareholders expect is disclosure and accountability from their directors. I get back to the point that is a common thread, interestingly enough, that has run through this session—the uniqueness of financial institutions. Therefore, a provision that applies in the CBCA might be okay and may not have an effect of a negative nature, but when you apply the provision to a financial institution, it may.

Now, fortunately, that doesn't happen very often. As a result, the Department of Finance was able to effectively—I think in a very effective way—export the provisions dealing with corporate governance from the Canada Business Corporations Act to the financial institutions. That's why we have Bill C-57. But there are exceptions, and this exception stems from the fact that banks are unique, and that has already been reflected in the legislation that applies to banks. That is reflected in the very comprehensive corporate governance regime that we already have applicable to banks. That also is reflected in the Canadian securities administrators' national instruments that apply to banks as public reporting issuers.

To get back to the issue of protection of shareholders, I get back to the need for transparency. When you look at the provisions that are in the Bank Act, when you look at that CSA national instruments, I would submit to you very strongly that indeed, we don't follow anyone in this area. Banks in particular are corporate governance leaders. If you were to compare with the corporate governance standards in other countries, I would submit to you that we are leaders.

I do have a vantage point to add to this. In addition to being with the CBA, I'm chairman of the corporate governance committee of the International Banking Federation. I see corporate governance standards throughout the world. I submit to you that the corporate governance standards in Canada are very effective and protect shareholders very effectively.

● (1705)

Ms. Judy Wasylycia-Leis: I appreciate your answer. I guess I still have some difficulty with your answer, though. On the one hand, you're suggesting that banks are unique. I'm having trouble understanding how that really would apply. Wouldn't trust companies have a similar difficulty in terms of this provision?

Secondly, I guess I'd just ask...I mean, I think banks, if they are unique, are unique in the sense that Canadians expect that there's a certain obligation on the part of those institutions, as chartered banks, to be more open and transparent than other corporations, and there's a higher standard there that has to be met. I think the perception right now among the public is that the banks are not meeting their obligations in that regard.

Mr. Warren Law: Well, perceptions may be one thing, but we're here to discuss what the legal obligations of the banks are. I would submit to you that banks are already subject to a higher corporate governance standard. I would submit to you that they owe duties that other companies, business corporations, do not have.

Your question to Ms. Black was with respect to whether or not banks and other financial institutions should be subject to the same corporate governance standards that apply under the companies that are governed by the CBCA. Following that tenor, I would submit to you that indeed, yes, to the extent that it's possible, it makes a lot of sense to apply the same standards to banks as are applied to other corporations. It makes sense; it makes it easier for everybody.

But there are exceptions, and you have to recognize that in some cases there are special rules applying to banks, and this is one case.

I get back to the point that I made, that from a realistic standpoint we're going to have a collision course. We're going to have a collision course because you have this obligation to have shareholders access board minutes, and you have this duty of banks, on the other hand, to keep confidential the affairs of their customers.

The two, in my view, do not mesh together.

The Chair: Thank you, Ms. Wasylycia-Leis.

Next is Ms. Ambrose. Then Mr. Holland wants to ask a quick question, and so does Mr. McKay.

Ms. Ambrose.

Ms. Rona Ambrose: Thank you, Mr. Chair.

I just wanted to follow up on what Judy was talking about and ask a question of Mr. Law. You spoke about bank shareholders when you referred, I believe, to Madame Boivin's question. My initial concern was along the lines of privacy, so I thank Ms. Black for clarifying some of that, but when you were answering her questions, you were saying the uniqueness of banks relates to the fact that banks have corporations as customers and the information that's disclosed about a corporation. My understanding is that's why you're asking for this amendment.

Could you just flesh it out a bit for me? You talked about bank shareholders. Can you talk about the potential effect on shareholder value, or shareholders of the corporations that are customers of the bank, if this amendment is not in Bill C-57? Is there any effect on them, either direct or indirect? Is there potential for harm to those customers or those shareholders?

Mr. Warren Law: No, there clearly is not. I take that position, and again I refer to the existing corporate governance regime that applies to banks and the extensive corporate governance rules that apply, both under the Bank Act and under the Canadian securities legislation.

Ms. Rona Ambrose: But I thought it was your argument that the amendment was to protect your corporation customers.

Mr. Warren Law: It's there to protect customers and their confidentiality, their secrecy.

Ms. Rona Ambrose: You don't see any concern that if the amendment were not there, there might be a direct impact on shareholders of those corporations that are your customers? I'm not following.

● (1710)

Mr. Warren Law: No. I don't follow you either.

Ms. Rona Ambrose: What I'm trying to get at is, who is helped by this amendment?

Mr. Warren Law: When you say “the amendment”, you're talking about proposed subsection 204(2)?

Ms. Rona Ambrose: Yes. I mean the amendment you're proposing.

Mr. Warren Law: Do you mean the amendment in Bill C-57, or the amendment I am proposing to the amendment? That's the confusion.

The proposal in Bill C-57 is that shareholders would have access to corporate documents. Why would they have access? They would have access so that the shareholders would be able to verify whether a director or an officer had disclosed a conflict of interest in accordance with the Bank Act. Okay?

Ms. Rona Ambrose: Yes. But your concern was that...?

Mr. Warren Law: My concern is that going through this process of making a disclosure could very well result in customer information being inadvertently disclosed, if there's a connection between the director who has made the disclosure and the customer.

Ms. Rona Ambrose: When you say "customer", you said it's not the bank shareholders. You're not concerned about that—it's about your customer corporations?

Mr. Warren Law: The concern is to make sure we keep confidential the affairs of our customer.

Shareholders have other ways to make sure appropriate transparency takes place within a bank. I would submit to you that together, the existing corporate governance regime in the banks and the provisions the Canadian securities administrators have brought out that apply to banks certainly provide sufficient transparency.

Ms. Judy Wasylycia-Leis: On a point of information, when the word "banks" is used, are we talking about just the major banks, or trust companies as well?

Mr. Warren Law: It's just banks.

Ms. Judy Wasylycia-Leis: It's just banks. There's no similar problem in terms of trust companies?

Mr. Warren Law: No. That's because of this court case.

The Chair: Mr. Holland, you have two minutes. Mr. McKay, you have two minutes. Then—

Mr. Mark Holland: Thank you, Mr. Chair.

I do have a question for Mr. Dancey in just one second, but first I have a question for Mr. Law on the issue that's being discussed.

What concerns me as committee members are discussing this issue—and certainly Ms. Black discussed it to some extent—is that I haven't seen any overpowering need to place these additional restrictions into being.

As we go forward as a committee, we're going to have to look at the risks and rewards of this. Obviously there's a potential risk of customer information being disclosed, which is obviously undesirable relative to what we gain by this being in place. We're going to have to review that. I do have some concerns.

Mr. Dancey, in your exchange with Mr. McKay about modified proportionate liability, you seem perhaps to be open to the idea that when it comes to depositors, it might make sense not to make changes there, but to extend the concept of modified proportionate liability elsewhere. Was I hearing that? Might you be amenable to that idea?

Mr. Kevin Dancey: I can't speak entirely on behalf of the CICA, but certainly what I would encourage is more dialogue around this issue. What we've not had is the right dialogue around this issue, and what you have in Bill C-57 is an absence of anything that relates to modified proportional liability, despite the fact that the Senate looked at this long and hard—Senator Kirby in 1998 and Senator Kolber in 2003—and both of their reports recommended modified proportional liability for federal financial institution legislation.

Certainly, from where I sit, it would be very good to have the dialogue around the issue.

Mr. Mark Holland: And I agree. Listening to this unfold, and based on my other understanding of it, I think there are some concerns that I also have with respect to depositors that maybe we could work on, but I also understand and agree with wholeheartedly the notion that if there is only 5% or 10% responsibility and 100% liability, that doesn't add up, particularly when you're talking about potentially very large cases.

Mr. Kevin Dancey: Huge ones.

Mr. Mark Holland: I'm sensitive to that. I think we need to have further dialogue.

I'm cognizant of the fact that I don't have any more time. I did have other questions, but I'll yield the floor.

The Chair: Thank you.

Mr. McKay, very quickly, please.

Hon. John McKay: Very quickly to Mr. Law, I take it that in practice the way conflicts of interest are disclosed is kind of a one-time general notice to the board. Is that correct?

● (1715)

Mr. Warren Law: There's provision for that in the Bank Act.

Hon. John McKay: So it's kind of a generic disclosure, then, at that point. And I take it that since the amendments were made to the Canada Business Corporations Act, which contains this provision, no issue has really arisen. Your argument is based on the uniqueness of a bank. Is that correct? All right.

For my own clarification here, your argument is that the common law has created a liability.

Mr. Warren Law: It has created an obligation.

Hon. John McKay: An obligation to disclose.

Mr. Warren Law: No, to keep confidential.

Hon. John McKay: To keep confidential. Doesn't this legislation therefore address that common-law concern you have raised?

Mr. Warren Law: How do you suggest that it does?

Hon. John McKay: I'm asking for a point a clarification here, because I'm not quite sure. I've been trying to follow your point on what the common-law concern is.

Mr. Warren Law: The common-law obligation reflects the uniqueness of banks, because this is why the courts decided what they did. They decided you have to keep customer information confidential. This provision requires you to open the kimono, as it were, with respect to information that's contained in your corporate records. It's not just directors' minutes. It could be committee minutes. It could be any other corporate document. If there's a reference in a corporate document to a customer, that's where the concern is.

Hon. John McKay: So here we're dealing with statute law modifying the impact of that common-law decision.

Mr. Warren Law: It's not modifying at all. It's on a collision course with it.

Hon. John McKay: Okay. Then we get down to the public policy reason as to whether that's a good idea or not.

Mr. Warren Law: Yes, and how can banks comply with both of them at the same time.

The Chair: Thank you, again.

To the members, just quickly, if you have any amendments

[*Translation*]

Please send them in as soon as possible.

[*English*]

We didn't set a time

[*Translation*]

But it would be good to have them by tomorrow.

[*English*]

I think it would help if we could have them by tomorrow.

[*Translation*]

In this way, on Thursday, we will know how long it will take.

[*English*]

Hon. John McKay: Mr. Chair, could I have a quick point of order? I know you would appreciate it.

Colleagues, we have a bit of an issue with respect to Mr. Shaver. Three of the parties that I've been able to determine don't want to call Mr. Shaver unnecessarily. The Conservative Party wishes to do so. My problem is that I have to make a decision as to whether we arrange to have Mr. Shaver here or whether we can wait. I am asking for your consideration to waive his appearance.

Mr. Charlie Penson: I would ask, Mr. Chairman, that the chairman organize for Mr. Shaver to appear before our committee prior to our Thursday meeting for a short appearance. The principle is what's involved here, and we ought to have Mr. Shaver appear.

The Chair: So there's no consent.

Thank you.

The meeting is adjourned.

Published under the authority of the Speaker of the House of Commons

Publié en conformité de l'autorité du Président de la Chambre des communes

Also available on the Parliamentary Internet Parlementaire at the following address:
Aussi disponible sur le réseau électronique « Parliamentary Internet Parlementaire » à l'adresse suivante :
http://www.parl.gc.ca
