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ECONOMIC ACTION PLAN 2014 BILL, NO. 1

Fourth Report of Banking, Trade and Commerce Committee on Subject Matter—Debate Adjourned

Speech by:

The Honourable Diane Bellemare

Tuesday, June 3, 2014

THE SENATE

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[*Translation*]

ECONOMIC ACTION PLAN 2014 BILL, NO. 1

FOURTH REPORT OF BANKING, TRADE AND COMMERCE COMMITTEE ON SUBJECT MATTER—DEBATE ADJOURNED

The Senate proceeded to consideration of the fourth report of the Standing Senate Committee on Banking, Trade and Commerce (subject matter of Bill C-31 (Parts 2, 3, and 4 and Divisions 2, 3, 4, 8, 13, 14, 19, 22, 24 and 25 of Part 6)), tabled in the Senate on May 29, 2014.

Hon. Diane Bellemare: Honourable senators, I rise today to speak to the fourth report of the Standing Senate Committee on Banking, Trade and Commerce, but I am not moving that it be adopted.

Our report provides a good summary of the comments heard during this pre-study. It is rather long because we had to study several divisions. I encourage you to read it.

Some divisions of this report deserve our careful consideration, specifically Division 14 of Part 6, which would amend the Insurance Companies Act in order to permit the demutualization of mutual property and casualty insurance companies, and Division 25 of the same part, which amends the Trade-marks Act.

What these two divisions have in common is that they raise important questions about property rights. In addition, it is not clear that the short-term benefits of the proposed measures will exceed the medium- and long-term costs for Canadian society.

Division 14 of Part 6 would give the Governor in Council the authority to make regulations respecting the demutualization of federal mutual property and casualty insurance companies or general mutual companies.

Here are a few facts concerning the problems associated with demutualizing these federally regulated mutual companies.

There are more than 95 mutual property and casualty insurance companies in Canada. This sector is undergoing a major restructuring. Mutual companies account for 20 per cent of the general insurance sector, while federal mutuals account for 10 per cent of the market.

[*English*]

On the legal side, subsection 237(1) of the Insurance Companies Act permits a federal mutual to demutualize in accordance with regulations, with the approval of the Minister of Finance. Regulations that define the framework of the demutualization of federal life mutual companies were adopted in the 1990s. However, there are no regulations that define the framework for the demutualization of federal property and casualty mutual companies, because no company had yet expressed the desire to demutualize.

According to the testimony of the Canadian Association of Mutual Insurance Companies, many mutual life insurance companies disappeared when they were permitted to demutualize in the 1990s. As François Pouliot reported in the journal *Les affaires* on February 11, 2014:

[*Translation*]

> At the time, the demutualization of the life insurance sector led to a major consolidation of the sector, and a number of subscribers made a lot of money when they received shares.

The Canadian Association of Mutual Insurance Companies called this "legalized theft from past generations."

The Standing Senate Committee on Banking, Trade and Commerce heard from the primary groups affected by this issue: Economical Insurance, which wants to demutualize, and three associations, including the Insurance Brokers Association of Canada, the Canadian Association of Mutual Insurance Companies and The Co-operators Group.

The problem and the issue with Division 14 can be summarized as follows. In 2010, Economical Insurance, a general insurance mutual company, approached the Department of Finance to request that it adopt the rules for the demutualization process that would transform this general insurance mutual into a joint-stock company.

One of the questions that needs to be addressed in this regulation is the following: Who owns the surplus that the mutual accumulated over more than 140 years? Does this $1.6 billion surplus belong to the 940 existing mutual insurance policyholders, as Economical Insurance claims, or does it belong to the 900,000 existing insured parties, or is the surplus a public good that also belongs to past generations and must be distributed accordingly, as the other three groups we heard from claim? These groups are certainly not opposed to having the government set rules for the demutualization of a mutual. However, they recommend that the government pay particular attention to how the surplus is distributed. They want the surplus to be distributed with the objective of, and I quote:

> eliminating the circle of self-interest.

In French:

> Que le surplus soit réparti de manière à éliminer le cercle de recherche d'avantages personnels.

Those are some comments I took from the Canadian Association of Mutual Insurance Companies website.

Honourable senators, surely you agree with me that this issue warrants our attention, especially since we know that 32 per cent of people who have mutual insurance policies with Economical and who are claiming a stake in the surplus are directors and employees or former employees or brokers. We don't know who the other 68 per cent are, but they may well be related to that first group.

The government has already said that it will not allow Economical Insurance to divide the $1.6 billion surplus among the 940 insured members, as was the case when life insurance companies demutualized. However, we don't know what principles will guide that process. A number of stakeholders, including Economical Insurance, stand to make substantial gains from demutualization. The courts are going to have to get involved.

As the Insurance Brokers Association of Canada said, when it comes to mutual property and casualty insurance companies' surpluses, the property rights are not clearly defined. I would like to quote the testimony we heard:

[*English*]

> Turning to the question of what is the relationship between policyholders and the mutual itself. First, unlike mutual life insurance companies, there is no direct connection between present constituents, i.e., the policyholders, and the assets of the mutual. The constituents of P&C mutual insurers subscribe to their policies on an annual basis and once their policy expires, so too does their membership in the mutual.
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> Second, and flowing from the first, is that the assets of a mutual are essentially community assets built up over the generations of those living in the community.
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> Third, as such, present policyholders have no more right to claim the assets of the mutual than past policyholders or the other way, present and past policyholders both have their participation built up, through capital, the ability of the mutual to be able to offer this "protection," this insurance, in essence, the sole purpose for the mutual's existence.
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> In light of the above three points, it should be clear that it is conceptually difficult, if not impossible, to determine a clear line of property rights flowing from policyholders to P&C mutual's assets.

• (1710)

[*Translation*]

In this legal and historical context, how is it possible to propose robust regulations when the basic principles are not included in legislation on which there is a national consensus? Wouldn't it be better to include in the insurance act the nature of the property rights with regard to the mutual surplus? It seems to me that we cannot leave this to the courts or to regulations.

That is what Quebec does. It provides that in the event of the liquidation or dissolution of a financial cooperative, all the members choose to pay the surplus to one of three legal entities: another cooperative, a federation of cooperatives or the Conseil québécois de la coopération et de la mutualité.

What is more, allowing the demutualization of mutual property and casualty insurance companies without studying the impact on Canada's entire insurance and financial security sector would expose the entire sector to undesirable and possibly irreversible consequences.

Mutual insurance companies first came to be in the first half of the 19th century in response to Canadians' need for financial security when there were no private insurance companies. Mutual insurance companies played and still play an essential role in rural communities. They insure at least 75 per cent of Canadian farmers. They are present in every province. Quebec has at least 26 mutual property and casualty insurance companies in its regions.

Federal regulations on the demutualization of federal mutual property and casualty insurance companies will not have a direct impact on the provincial mutual insurance companies, which are governed by provincial law. Nonetheless, they create a precedent that could have an indirect impact on the survival of provincial mutuals by encouraging some people to develop a demutualization plan in order to get their hands on the accumulated surplus.

The mutual insurance sector continues to thrive in the 21st century. As an alternative to private insurance, it meets needs in several sectors known for their common interests, including agricultural sectors. Mutuals are extremely adaptable because they care more about their members' needs than about profit. Today, the principles that guide mutual insurers inspire a number of economic initiatives, such as crowdfunding, which is popular in the cultural sector.

Financially, they are well managed. According to the Canadian Association of Mutual Insurance Companies, mutual insurers' surpluses relative to millions of dollars in total gross premiums written are, on average, higher than those of companies with shares.

Honourable senators, I believe that mutual property and casualty insurance companies deserve our support for their activities. We should protect the surpluses accumulated by generations of Canadians. Why not draw on Quebec legislation or even French legislation? If demutualization occurs, French legislation requires that the company's surplus or the proceeds of its sale, whichever is higher, be distributed to other mutual insurance companies or to charities.

I think that property rights are of the utmost importance and should be addressed via legislation, not by regulation.

[*English*]

I repeat: The issue of property rights seems to me to be so major that it should be dealt with in legislation and not by regulation.

[*Translation*]

Honourable senators, the purpose of my intervention is to alert the government to the broader implications of the demutualization of Economical.

Honourable senators, I would like to talk about Division 25, but I will be brief because I do not have much time left. This division would amend the Trade-marks Act to add several provisions relating to three international treaties that the federal government seeks to ratify: the Madrid Protocol, the Singapore Treaty and the Nice Agreement.

Some of these provisions — including the elimination of the requirement to declare the use of a trademark when it is being registered — have triggered an outcry from a number of groups.

Right now, when a trademark is registered, the applicant must fill out a form to indicate how the trademark is being used or the applicant's intention to use it in the next three years.

The Canadian Chamber of Commerce, Canadian Manufacturers & Exporters, the Canadian Bar Association, as well as a group of more than 228 Canadian intellectual property experts, unanimously denounced the negative consequences for Canadian companies, as well as the potential constitutional consequences of eliminating the requirement to declare the use of a trademark at registration. That is why they are asking that this division be withdrawn or, at least, that the clauses amending sections 16, 30 and 40 of the Trade-marks Act be withdrawn and that consultations be held to determine what adjustments are needed.

However, Industry Canada argues that eliminating this provision will make it easier for companies to register trademarks and that there is still a requirement to declare the use of a trademark.

Nonetheless, if we take a closer look, we can see that if these provisions are passed, it will be up to the company that wants to use a trademark previously registered by another company that is not using it to prove that the registered trademark was not used in the three years after registration.

Honourable senators, I don't want to discuss the details of the bill before us. I simply want to point out how much criticism there has been of the elimination of the requirement to declare the use of a trademark at registration. The criticism comes from credible groups. The department should perhaps look into this. I think this is reasonable, especially since Canada can sign the treaties such as the agreement with the European Union without having to remove the requirement to declare the use. That is actually what our American partner decided to do; our partner signed the three treaties without eliminating the requirement to declare the use of a trademark.

I say this because I think it is our role, as senators, to speak out when we realize what we are hearing; I feel that responsibility.

Despite everything, I would like to assure my colleagues that I will vote for Bill C-31 because this budget contains a lot of good points overall and deserves to be passed. However, I would like to alert the government to take note of these observations in future proceedings.

Thank you for your attention.

Hon. Senators: Hear, hear!