

## The Pension Protection Act Receives Royal Assent

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### Introduction

The *Pension Protection Act*, [SC 2023, c 6](#) (the “Pension Protection Act”), was first introduced in the House of Commons by Marilyn Gladu, Member of Parliament for Sarnia-Lambton, on February 3, 2022. Despite being a private member’s bill, the Pension Protection Act received broad support from sitting members of all political parties and, having passed a vote on the third reading in the Senate on April 18, 2023, ultimately received royal assent on April 27, 2023. The enactment of the Pension Protection Act amends the *Bankruptcy and Insolvency Act*, [RSC 1985, c B-3](#) (the “BIA”), and the *Companies’ Creditors Arrangement Act*, [RSC 1985 c C-36](#) (the “CCAA”), to ensure that claims in respect of solvency deficiencies and other unfunded liabilities of pension plans are paid in priority in the event of insolvency proceedings.

### Background

The notion of granting “super priority” status for unfunded pension liabilities in the event of an employer’s insolvency is not new. In response to well-publicized, large-scale insolvencies, including Nortel, Indalex, Eaton’s, Grant Forest and Sears Canada, a number of private member’s bills have been introduced since the early 2000s, with each aimed at improving the standing of pension plan members who historically have been unable to receive their full pension entitlement upon their employer’s insolvency due to the priority afforded to claims of other creditors pursuant to the BIA or CCAA. As was noted in debates before the Senate, prior attempts to introduce similar legislation had been made with Bill C-501 in 2010, Bill C-405 in 2018, Bill C-253 and Bill C-259 in 2020, and most recently Bill C-225 in 2022.<sup>1</sup> However, prior to the Pension Protection Act, all attempts to introduce such legislation were ultimately unsuccessful. In designing this legislation, Ms. Gladu acknowledged that she drew inspiration from these previous bills, incorporating those portions that had received support from Members of Parliament and avoiding those elements that were deemed contentious.<sup>2</sup>

### Effect of the Pension Protection Act

The BIA and CCAA provide super priority status to certain liabilities in insolvency proceedings, attaching superior interests over those of other secured and unsecured creditors.<sup>3</sup> Prior to the enactment of the Pension Protection Act, pension plan liabilities in Canada were granted super

<sup>1</sup> Bill C-228, “An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Pension Benefit Standards Act, 1985,” 2<sup>nd</sup> reading, *Debates of the Senate*, 44-1, No 92 (14 December 2022) at 1610 (Hon. David Wells) online: <<https://www.parl.ca/LegisInfo/en/bill/44-1/c-228>>.

<sup>2</sup> Bill C-228, “An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Pension Benefit Standards Act, 1985,” 2<sup>nd</sup> reading, *House of Commons Debates*, 44-1, No 51 (1 April 2022) at 1340 (Marilyn Gladu) online: <<https://www.parl.ca/LegisInfo/en/bill/44-1/c-228>>.

<sup>3</sup> See CCAA, ss 6(3) and 6(5); BIA, ss 60(1.1), 81.1 through 81.4.

priority status under the BIA and the CCAA over most other claims, but only in respect of (i) amounts deducted from an employee's remuneration for contribution into a pension fund, and (ii) unpaid "normal costs" (within the meaning of the *Pension Benefits Standards Regulations, 1985*, [SOR/87-19](#)) or other unpaid defined contribution amounts payable by an employer into a pension fund.<sup>4</sup>

The Pension Protection Act amends the BIA and the CCAA to extend the super priority status for pension plan liabilities to also include (i) "special payments" (as determined in accordance with the *Pension Benefits Standards Regulations, 1985*, [SOR/87-19](#)), required to be paid by an employer to the pension fund to liquidate an unfunded liability or a solvency deficiency, and (ii) any amount required to liquidate any other unfunded liability or solvency deficiency of the pension fund.<sup>5</sup>

This means that no CCAA plan of arrangement or BIA proposal can be approved unless such amounts are to be paid, and the Court is satisfied that the employer can and will make such payments.<sup>6</sup> Furthermore, security for such amounts will be granted over all assets of the debtor in the event of bankruptcy or receivership.<sup>7</sup> In the event of bankruptcy, claims in respect of pension amounts will nevertheless be subordinate to claims in respect of an employer's unremitted payroll source deductions and certain unpaid wages, as well as certain goods and products delivered to the employer.<sup>8</sup>

### Scope of Changes

There has been some debate as to whether the scope of the Pension Protection Act is intended to apply in only federally-regulated pension plans, or whether the legislative intent is for the protections to also apply to provincially-regulated pension plans. In this respect, it is worth noting that amendments to the BIA and the CCAA apply to "prescribed pension plans". For purposes of both the BIA and CCAA, a pension plan is "prescribed" if it is regulated by an Act of Parliament or the legislature of a province.<sup>9</sup> Because the term prescribed encompasses both federally and provincially-regulated plans, this appears to indicate that Parliament's intent is for the amendments introduced by the Pension Protection Act to apply to any employer subject to the BIA or CCAA, irrespective of whether the pension plan that employer contributes to is subject to federal or provincial jurisdiction.

<sup>4</sup> See CCAA, s6(6)(a); BIA, ss 60(1.5), 81.5 and 81.6.

<sup>5</sup> Pension Protection Act, ss 2 through 5.

<sup>6</sup> CCAA, s 6(6)(a); BIA, s 60(1.5).

<sup>7</sup> BIA, ss 81.5 and 81.6.

<sup>8</sup> BIA, s 81.5(2).

<sup>9</sup> *Bankruptcy and Insolvency General Rules*, [CRC, c 368](#), s 59.1; *Companies' Creditors Arrangement Regulations*, [SOR/2009-219](#), s 3.

## Transition

Although the Pension Protection Act has received royal assent, there is a transition period for pension plans existing as of the day before royal assent (April 26, 2023). This transition period will delay the enforceability of the amendments to the federal insolvency statutes for a period of four years, meaning that the super-priority afforded to pension plan funding deficiencies will not take effect until April 27, 2027. As noted in the House of Commons, the purpose of this transition period is to allow companies to get their “funds in order before implementing the priority”.<sup>10</sup> However, pension plans introduced after April 26, 2023, will be subject to the new rules immediately. While not yet released, it is anticipated that further clarity regarding the application of the amendments introduced by the Pension Protection Act will be provided by way of regulations to the BIA and CCAA.

## Implications

As echoed in debates before the House of Commons and Senate alike, the objective of the Pension Protection Act is to prioritize the payment of unpaid pension amounts and “protect Canadian workers.”<sup>11</sup> However, the new super priority created by the Pension Protection Act in favour of unfunded pension amounts could have a significant impact on secured creditors, as well as employers who sponsor defined benefit pension plans, and may trigger negative and unintended consequences. For this reason, the introduction of the legislation was met with opposition by organizations representing lenders and employers with defined benefit pension obligations.<sup>12</sup>

Lenders and other secured creditors will ultimately be forced to stand further down in line to those pension priorities. As a result, lenders will face an increased risk of not obtaining full recovery against insolvent debtors who sponsor defined benefit pension plans.<sup>13</sup> It will also be challenging to monitor and quantify the associated risk associated with unfunded pension liabilities, which due to their fluctuating nature will likely be difficult to ascertain at any given time.<sup>14</sup>

From the perspective of employers who sponsor defined benefit pension plans, it may become more difficult to access capital through credit given the increased risk facing lenders. The adverse impacts facing such employers could include: (i) higher interest rates on loans, or lenders applying larger reserves, resulting in increased debt servicing costs, (ii) unfavourable terms being introduced in loan agreements, which impose burdensome covenants or events of

<sup>10</sup> *Supra* note 2 at 1340.

<sup>11</sup> *Supra* note 2 at 1335.

<sup>12</sup> Bill C-228, “An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Pension Benefit Standards Act, 1985,” 3<sup>rd</sup> reading, *Debates of the Senate*, 44-1, No 112 (18 April 2023) at 2120 (Hon. David Wells) online: <<https://www.parl.ca/LegisInfo/en/bill/44-1/c-228>>.

<sup>13</sup> Bill C-228, “An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Pension Benefit Standards Act, 1985,” 3<sup>rd</sup> reading, *Debates of the Senate*, 44-1, No 109 (28 March 2023) at 1710 (Hon. Diane Bellemare) online: <<https://www.parl.ca/LegisInfo/en/bill/44-1/c-228>>.

<sup>14</sup> *Supra* note 12 at 2150 (Hon. Tony Lafreda).

default tied to pension funding deficits, or (iii) an inability to borrow altogether if the employer is a non-investment grade company.<sup>15</sup> As a result, if employers wish to mitigate some of these unintended adverse consequences, they may turn to “converting” their defined benefit pension plans to defined contribution plans, or winding up their defined benefit pension plans altogether.

It remains to be seen whether the Pension Protection Act serves its stated objective of protecting workers and preserving pension benefits in the event of insolvency, and, if so, at what cost. While the intent behind enhanced pension protection is certainly laudable, it may be that the consequences of introducing such protections are so adverse to employers that the amendments to the BIA and CCAA serve the unintended result of spurring an accelerated move away from defined benefit pension plans in the private sector and eroding the very thing that the legislation was introduced to protect.

<sup>15</sup> Letter from the Association of Canadian Pension Management to the Honourable Peter Fonseca, Member of Parliament, Chair, House of Commons Standing Committee on Finance (17 October 2022) at pg. 2 online: <<https://www.acpm.com/getmedia/92d90dde-b38b-4972-9234-a4a982037469/ACPM-C-228-Submission-Oct17-2022-Final.pdf>>.