Bill C-228: Expanded pension protection receives royal assent

July 10, 2023

On April 27, 2023, the federal government passed legislation to improve protections for members of defined benefit pension plans. This legislation, the *Pension Protection Act* (PPA), amends the *Bankruptcy and Insolvency Act* (BIA) and the *Companies' Creditors Arrangement* Act (CCAA) to give "super priority" to registered pension plan funding deficits during employer insolvency proceedings.

The changes will come into effect on April 27, 2027, providing companies and corporate lenders a four-year transition period for assessment, preparation and action. The expanded prorities will have an impact on companies with defined benefit pension plans and parties involved with such plans, including lenders and acquirers. For context, we compare below the former pension protections of the BIA and CCAA with the newly expanded protections under the PPA and offer guidance to employers and lenders for addressing some likely implications.

Pension protections under the BIA and CCAA before the PPA

Prior to the PPA, the BIA and CCAA granted super-priority protections to the following:

- amounts deducted from employees' remuneration for payment to the pension fund;
- normal costs and defined contributions payable by the employer to the pension fund; and
- amounts payable from the employer to the administrator of a pooled registered pension plan.

By means of a charge over the debtors' assets, these unfunded pension liabilities took priority over all other claims in bankruptcy and receivership proceedings, subject to defined exceptions. Until those amounts were provided for, courts would not approve either a BIA proposal to creditors or a CCAA plan of compromise and arrangement.

Defined benefit pension plan deficits, on the other hand, ranked low as "unsecured creditors" during corporate insolvency. The purpose of the PPA was to address

pensioner vulnerability during large corporate insolvencies and to avert reductions to pension payments such as happened in the bankruptcies of Nortel Networks and Sears Canada.

Expanded protections under the PPA

The PPA has changed the BIA and CCAA priority regimes by granting super priority status to defined benefit pension plan deficits in insolvency proceedings. The PPA has extended the priorities to include:

- special payments that the employer is required to pay to the pension fund to liquidate an unfunded liability or a solvency deficiency; and
- any amount required to liquidate any other unfunded liability or solvency deficiency of the fund.

Having regard to the proposed changes under the PPA, a Court considering a BIA proposal or a plan under the CCAA relating to an employer with a registered defined benefit pension plan, may approve same only if provisions are made for the payment of certain amounts to the pension fund.

The PPA also amended the federal *Pension Benefit Standards Act, 1985* to improve oversight and transparency, requiring that an annual report on the success of pension plans in meeting funding requirements be tabled in each House of Parliament.

How will the PPA affect you?

The PPA will affect all companies that become insolvent if they have an underfunded defined benefit registered pension plan. Companies that sponsor defined benefit pension plans and the lenders to those companies, have until April 27, 2027 to review the increased risks flowing from the extension of super priority status to unfunded pension liabilities.

Lenders will face new uncertainty from the prospect of being primed by the significant costs of unfunded liabilities or solvency deficiencies, which may be unknown prior to an insolvency filing. In preparation, lenders may wish to:

- review their portfolio to determine which borrowers provide defined benefit pension plans affected by the PPA amendments;
- consider reporting requirements for relevant borrowers as to the solvency of their defined benefit pension plans; and
- impose stricter or more tailored financial covenants for borrowers with defined benefit pension plans.

Meanwhile, companies may face increased business costs due to lenders restricting capital in response to heightened risk. Employers with defined benefit plans should begin by addressing unfunded liabilities and solvency deficiencies. In addition, employers may wish to:

- consider whether a defined benefit pension plan meets business requirements over alternative retirement saving schemes, such as defined contribution benefit plans;
- address the likelihood of negotiating changes to collective agreements; and
- consider de-risking their defined benefit plans, through investment strategies or annuity purchases.

Acquirers will also want to place additional scrutiny on target companies that sponsor a defined benefit pension plan.

For more information on Bill C-228 and steps companies and lenders can take now to manage the BIA and CCAA-related risks arising from Bill C-228, please reach out to any of the key contacts listed below.

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