

Pensions at Work: Employer Insolvency and the Pension Plan¹

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The intersection between pensions and insolvency law, two very technical and complicated areas, has gained increasing importance over the past several years with such high profile restructurings as Algoma Steel, Air Canada and Stelco. Layered on top of the complexities are constitutional issues of jurisdiction and paramountcy, labour laws, equity issues and financial realities. This paper explores the current state of the law with respect to the priority given over an employer's assets for unpaid pension contributions and the pension deficit both outside and on bankruptcy as well as recent legislative initiatives aimed at addressing perceived deficiencies in the federal insolvency regime.²

PENSION FUNDING IN THE ORDINARY COURSE

In the ordinary course, an employer who sponsors a pension plan is required to make contributions to the plan in accordance with the funding regime established under the *Pension Benefits Act* (the "PBA"). This generally requires that the employer contribute, on a monthly basis, all current service costs and minimum special payments, if any, owing to the plan as set out in the most recently filed actuarial valuation for the plan.

¹ Presented at the Ontario Bar Association Annual Institute, February 5, 2008

² This paper explores the interplay between Ontario pension legislation and the federal bankruptcy regime.

OUTSIDE OF BANKRUPTCY – CCAA

An employer who seeks protection from its creditors under the *Companies' Creditors Arrangement Act* (the "CCAA") may seek relief from making pension contributions in the initial order providing such protection. In fact, the model initial order drafted by the Commercial List User's Committee that would grant such protection provides that the employer "is entitled but not required" to make "contributions to pension plans".³ The model order language has been upheld even where the pension plan is referred to in a collective agreement.⁴

In reality, however, an employer under CCAA protection will generally continue to make current service contributions, but may rely on the above language in the initial order to stop making special payments. This practice has been palatable due in part to the perception in the insolvency bar that in the CCAA context, special payments, insofar as they relate to pre-filing service, are viewed as being akin to a pre-filing obligation and current service akin to wages. This practice is bolstered by the legislative amendments discussed below.

Priorities where the Plan is On-Going

Contributions

The *PBA* establishes a deemed trust in favour of the administrator over the assets of the employer in the amount of contributions that are due but unpaid pursuant to subsection 57(3) of the *PBA* (the "Deemed Trust").⁵ Unpaid contributions consist of both or either of special payments (monthly payments necessary to amortize a plan deficit) and current service costs. In addition, the administrator has a lien and charge over the employer's assets in the amount of the Deemed Trust pursuant to subsection 57(5) of the *PBA* (the "Lien").

The relative priorities of the Deemed Trust and the Lien, vis-a-vis other creditors are as follows. Generally, priority between two creditors will be determined by order

³ Commercial List User's Committee CCAA Model Initial Order, para 6 which states:

"THIS COURT ORDERS that the Applicant shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;"

⁴ *Collins & Aikman Automotive Canada Inc., Re*, 63 C.C.P.B. 125. At the time of writing, leave to appeal to the Ontario Court of Appeal is being sought.

⁵ Please see Appendix A for relevant statutory provisions.

of registration and perfection of the security interest or statutory lien. Notwithstanding this general rule, the Deemed Trust will have priority over a security interest in accounts or inventory or their proceeds or inventory and its proceeds⁶; however, the Deemed Trust would not have a priority over any purchase money security interest in inventory or its proceeds,⁷ or a *Bank Act* security.⁸

The Lien does not enjoy the same priority as the Deemed Trust. Neither the *PBA* nor the *Personal Property Security Act* (the “*PPSA*”) provides explicitly for such a super priority and to date there is no case law in favour of such a super priority. Stakeholders would therefore seek to rely on the common law governing priorities. As against unsecured creditors, the *PPSA* specifically provides that priority will be determined when the statutory lien has arisen (i.e. when the “Lienholder has taken possession or otherwise done everything necessary to make the lien enforceable in accordance with the provisions of the Act creating the Lien.”⁹).

The ineffectiveness of the Lien outside of bankruptcy is relatively insignificant given the priority of the Deemed Trusts. In any event, the policy reason for creating the Lien as described in the Report of the Royal Commission on the Status of Pensions in Ontario¹⁰ was to create an enforcement mechanism for the Deemed Trusts on bankruptcy given a recognition by the author that the Deemed Trusts would most likely be unenforceable in bankruptcy. Despite the province’s efforts and as discussed below, the Lien has also been determined to be unenforceable in a bankruptcy.

Deficit

While a plan is ongoing, there is no priority for a pension plan deficit.

⁶ Subsection 30(7) of the *PPSA*

⁷ Subsection 30(8) of the *PPSA*

⁸ *Abraham v. Canadian Admiral Corp.*, 19 C.C.P.B. 1.

⁹ Subsection 20(2) of the *PPSA*

¹⁰ Vol. 2 pp. 148-149

Priorities where the Plan is Wound-up

Contributions

In addition to the amount deemed to be held in trust under subsection 57(3) of the *PBA*, on the wind-up of a plan contributions accrued but not yet due or paid are also deemed to be held in trust pursuant to subsection 57(4).

Subsection 57(4) is generally intended to capture contributions not yet made to a plan due to a mid-month plan wind-up. (The Deemed Trust (created pursuant to subsection 57(3)) and the deemed trust created pursuant to subsection 57(4) together are referred to as the “Deemed Trusts”).

Deficit

Where a plan is wound up, paragraph 75(1)(b) of the *PBA* requires that an employer pay to the pension fund the amount of the deficit on wind-up related to employment in Ontario (the “Section 75 Deficit”).

Although no case speaks directly to whether the Section 75 Deficit is subject to the Deemed Trusts, two statements in obiter from the Ontario courts have been made on the issue. The first, made by Farley J. in *Toronto Dominion Bank v. Usarco*,¹¹ where the Court held that the Deemed Trusts secure both current service contributions due and accruing and special payments. Farley J. also added that the Section 75 Deficit (then contained in section 76 of the *PBA*) would not be secured by the Deemed Trusts. At p. 245 he states:

“It therefore appears to me that the deemed trust provisions of subsections [57(3) and (4)] only refer to the regular contributions together with those special contributions which were to have been made but were not. In this situation that would be the regular and special payments that should have been made but were not...together with any regular or special payments that were scheduled to have been made by the wind-up date, July 13, 1990 but were not made. *This is contrasted with the obligation of Usarco to fully fund its pension obligations*

¹¹ (1991), 42 E.T.R. 235 (Ont. Gen. Div.) (“*Usarco*”)

as of the wind-up date pursuant to section 76(1). It is recognized in these circumstances however, that the bank will have a secured position which will prevail against these additional obligations as to the special payments, which have not yet been required to be paid into the fund. Sadly it is extremely unlikely that there will be a surplus after taking care of the bank to allow the pension fund to be fully funded for this (the likelihood being that the wind-up valuation of assets and liabilities of the pension fund will show a deficiency).”
[Emphasis added]

It should be noted that the Section 75 Deficit payments were not at issue in *Usarco* because the deficiency had not yet been established given the time frames established under the Regulations to the *PBA* (the “PBR”) and the practicalities in calculating what are, on the date of a plan wind-up, unknown amounts.¹² The reasoning in *Usarco* is appealing for the reason that the opposing view (i.e. that the Section 75 Deficit is subject to the Deemed Trusts) would necessarily disrupt previously established priority positions as the amounts of Section 75 Deficit Payments became known.

Usarco was most recently cited with approval in *Ivaco Inc., Re*¹³ where the Ontario Court of Appeal states at paragraph 44:

At para. 11 of his decision, the motions judge said that both unpaid contributions and wind-up liabilities are deemed to be held in trust under s. 57(3). In his earlier decision in *Toronto-Dominion Bank v. Usarco* (1991), 42 E.T.R 235, Farley J. said, at para. 25, that the equivalent legislation then in force under the *Pension Benefits Act, 1987*, S.O. 1987, c.35 referred only to unpaid contributions, not to wind-up liabilities. I think that the statement in *Usarco* is correct, but I do not need to resolve the issue on this appeal.

¹² Section 31 of the PBR prescribes that the Section 75 Deficit must be paid by five annual special payments beginning on the effective date of the wind-up (the “Section 75 Deficit Payments”). Subsection 31(2) of the PBR requires that the amount of the first annual Section 75 Deficit Payment (due on the wind-up date as per subsection 31(1) of the PBR) be calculated with reference to the wind-up report that must be filed within 6 months of the effective wind-up date.

¹³ 56 C.C.P.B. 1

Pension Benefits Guarantee Fund (“PBGF”)

Where an employer is unable or unlikely to pay the Section 75 Deficit Payments, the Superintendent may declare that the PBGF applies to the plan in respect of Ontario members.¹⁴ Where this occurs, the deficit with respect to certain benefits under the plan will be funded out of the assets of the PBGF.¹⁵ The Superintendent has a lien on the assets of the employer in the amount of any payment out of the PBGF in respect of the plan (the “Superintendent’s Lien”).¹⁶

Again the *PBA* and *PPSA* are silent with respect to intended priority of the Superintendent’s Lien, and as such the discussion above relating to the Lien is applicable.

ON BANKRUPTCY

Priorities where the Plan is On-Going

Bankruptcy of the sponsoring employer is a ground for which the Superintendent would have the discretion to order the wind-up of a pension plan. Although there may be instances where the Superintendent would not exercise this discretion, the discussion below relates to a wound up plan.

Contributions

The *Bankruptcy and Insolvency Act (Canada)*¹⁷ (the “*BIA*”) creates a regime for establishing the relative priority of creditors. Section 67(1)(a) of the *BIA* excludes property held in trust from a bankrupt’s estate.

THE DEEMED TRUSTS

The *BIA* establishes a priority for certain types of deemed trusts,¹⁸ however, established case law provides that a deemed trust under a provincial statute like the *PBA* is not enforceable under the *BIA*, in part because a statutory deemed trust is

¹⁴ Section 83 of the *PBA*

¹⁵ Section 84 of the *PBA*

¹⁶ Section 86 of the *PBA*. Where the PBGF applies, the PBGF will not insure deficit amounts relating to benefit increases that have been made to a plan within three years of wind-up and as well as certain other items. Generally, the PBGF will guarantee the first \$1000 per month of a plan member’s eligible pension benefit. The portion of the member’s benefit that exceeds \$1000 per month will generally be reduced in accordance with the funded ratio of the plan.

¹⁷ R.S.C. 1985, c. B-3 as amended.

¹⁸ See ss. 67(2) and (3)

not a “classic trust” wherein assets are held separate and apart from the bankrupt’s.¹⁹

The recent Ontario Court of Appeal case of *Ivaco* affirmed the unenforceability of the Deemed Trusts in bankruptcy and went a few steps further. Contrary to the position advocated by the Superintendent, the Court concluded that: (i) in the absence of specific language in the *PBA* requiring so, the Deemed Trusts do not require actual segregation of unpaid contributions into a separate account; (ii) the *CCAA* and *BIA* are part of a single regime and there is no gap between the *CCAA* and the *BIA* in which the Deemed Trusts may be executed; and (iii) it is not improper to put a company into bankruptcy in order to render the Deemed Trusts unenforceable.²⁰ On this third point, note also *General Chemical Canada Ltd., Re*²¹ where the Ontario Superior Court follows the reasoning provided by the same court in *Ivaco Inc. Re*²² to deny the Superintendent’s motion to restrain the voluntary assignment of the employer into receivership under the *BIA*.

THE LIEN

An unsuccessful attempt was recently made to enforce the Lien on bankruptcy in the case of *Re General Chemical Canada Ltd.*²³ The Ontario Court of Appeal determined that for the purposes of the Lien, the administrator of a pension plan is not a secured creditor and thus does not have an enforceable lien. Note that the administrator in *General Chemical* has sought leave to appeal to the Supreme Court of Canada, a decision on which has not been made at the time of writing.

Deficit

As noted above, *Usarco* and *Ivaco*, albeit in obiter, indicate that the Deemed Trusts do not apply to a Section 75 Deficit (i.e. they are not subject to the Deemed Trusts). Presumably for the same reasons that the Deemed Trusts would not apply to the Section 75 Deficit, the Lien would also not be applicable. In any event, neither the Deemed Trust nor the Lien has been found to be enforceable on bankruptcy.

¹⁹ *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24 (SCC)

²⁰ Note that the Supreme Court of Canada granted leave to appeal *Ivaco*; however, the parties settled and withdrew the matter.

²¹ 51 C.C.P.B. 297

²² 47 C.C.P.B. 62

²³ 61 C.C.P.B. 266

PBGF

Although there has been no case law on whether the Superintendent's Lien for payments out of the PBGF is enforceable on bankruptcy, there are a few reasons why it may not be. First, the language of subsection 86(1) of the *PBA* states that such lien is over the assets of the employer and on bankruptcy all of the employer's assets rest in the trustee. In addition, recognizing the Superintendent's Lien in a bankruptcy would be an attempt by the province to legislate priorities in bankruptcy, something that is strictly within the purview of the federal government. As such, it is doubtful that the Superintendent's Lien would be enforceable on bankruptcy.

LEGISLATIVE REFORM

In 2005, the federal government attempted to bring about change to the priority for unpaid current service costs through Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts* ("Bill C-55"). Although Bill C-55 received royal assent in November 2005, it was not proclaimed into law due to a variety of controversial provisions contained in the bill and in order to allow time for additional review by the Senate.

Most recently in December 2007, the federal government sought to amend certain sections of Bill C-55 through Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005* ("Bill C-12"). Bill C-12 has received royal assent but, like Bill C-55, has not yet been proclaimed. Bill C-12 "tweaks" the relevant pension priority sections.

Bill C-55 and Bill C-12 provide a priority for unpaid current service contributions under the *BIA* and require that any proposal under the *BIA* or plan of arrangement under the *CCAA* provide for the payment to the pension plan of current service costs unless the parties agree otherwise.

The balancing of the compelling and competing interests of pension benefit security on the one hand and enabling an employer to continue operations and employment for its employees on the other is a role for Parliament. However, the courts have been called upon to interpret conflicting legislation and administer this balance. It is in the best interests of all stakeholders (employees, employers and the employer's lenders who advance the funds required to operate the enterprise) that the interplay between pension and insolvency law is clear. The recent spate of pension law reform initiatives and attempts by the federal government to address certain perceived inequities in the insolvency regime is welcome so long as certainty is maintained.

Appendix A

Statutory Provisions

Pension Benefits Act

Trust property

57. (1) Where an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.

Money withheld

(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

Accrued contributions

(3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.

Wind up

(4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

Lien and charge

(5) The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to the amounts deemed to be held in trust under subsections (1), (3) and (4).

Liability of employer on wind up

75. (1) Where a pension plan is wound up in whole or in part, the employer shall pay into the pension fund,

(a) an amount equal to the total of all payments that, under this Act, the regulations and the pension plan, are due or that have accrued and that have not been paid into the pension fund; and

(b) an amount equal to the amount by which,

(i) the value of the pension benefits under the pension plan that would be guaranteed by the

Guarantee Fund under this Act and the regulations if the Superintendent declares that the Guarantee Fund applies to the pension plan,

(ii) the value of the pension benefits accrued with respect to employment in Ontario vested under the pension plan, and

(iii) the value of benefits accrued with respect to employment in Ontario resulting from the application of subsection 39 (3) (50 per cent rule) and section 74,

exceed the value of the assets of the pension fund allocated as prescribed for payment of pension benefits accrued with respect to employment in Ontario. R.S.O. 1990, c. P.8, s. 75 (1); 1997, c. 28, s. 200.

Guarantee Fund declaration

83. (1) Subject to section 89 (hearing and appeal), the Superintendent shall by order declare, in the circumstances mentioned in subsection (2), that the Guarantee Fund applies to a pension plan. 1997, c. 28, s. 204 (1).

Conditions precedent

(2) The Superintendent shall make the declaration if,

(a) the pension plan is registered under this Act or is registered in a designated province to provide for the reciprocal application of this Act;

(b) the pension plan provides defined benefits that are not exempt from the application of the Guarantee Fund by this Act or the regulations;

(c) the pension plan is wound up in whole or in part; and

(d) the Superintendent is of the opinion, upon reasonable and probable grounds, that the funding requirements of this Act and the regulations cannot be satisfied. R.S.O. 1990, c. P.8, s. 83 (2); 1997, c. 28, s. 204 (2).

Guaranteed benefits

84. (1) If the Superintendent by order declares that the Guarantee Fund applies to a pension plan, the following are guaranteed by the Guarantee Fund, subject to the limitations and qualifications as are set out in this Act or are prescribed:

1. Any pension in respect of employment in Ontario.

2. Any deferred pension in respect of employment in Ontario to which a former member is entitled, if the former member's employment or membership was terminated before the 1st day of January, 1988 and the former member was at least forty-five years of age and had at least ten years of continuous employment with the

employer, or was a member of the pension plan for a continuous period of at least ten years, at the date of termination of employment.

3. A percentage of any defined pension benefits in respect of employment in Ontario to which a member or former member is entitled under section 36 or 37 (deferred pension), or both, if the member's or former member's employment or membership was terminated on or after the 1st day of January, 1988, equal to 20 per cent if the combination of the member's or former member's age plus years of employment or membership in the pension plan equals fifty, plus an additional $\frac{2}{3}$ of 1 per cent for each additional one-twelfth credit of age and employment or membership to a maximum of 100 per cent.

4. All additional voluntary contributions, and the interest thereon, made by members or former members while employed in Ontario.

5. The minimum value of all required contributions made to the pension plan by a member or former member in respect of employment in Ontario plus interest.

6. That part of a deferred pension guaranteed under this subsection to which a former spouse of a member or of a former member is entitled under a domestic contract or an order under the Family Law Act.

7. Any pension to which a survivor of a former member is entitled under subsection 48 (1) (death before commencement of payment). R.S.O. 1990, c. P.8, s. 84 (1); 1997, c. 28, s. 205; 1999, c. 6, s. 53 (20); 2005, c. 5, s. 56 (26).

Bridging benefits

(2) For the purpose of this section, where a member or former member has at least ten years of continuous employment with the employer, a deferred pension or a pension benefit includes bridging benefits. R.S.O. 1990, c. P.8, s. 84 (2).

Part year

(3) In determining the combination of age and membership or employment for subsection (1), one-twelfth credit shall be given for each full month of age and for each full month of continuous employment or membership as of the date of termination of employment. R.S.O. 1990, c. P.8, s. 84 (3).

Definition

(4) For the purpose of this section,
"pension benefits" includes any benefits or options elected under section 74 (combination of age and years of employment). R.S.O. 1990, c. P.8, s. 84 (4).

Lien for payment out of Guarantee Fund

86. (1) Where money is paid out of the Guarantee Fund as a result of the wind up, in whole or in part, of a pension plan, the Superintendent has a lien and charge on the assets of the employer or employers who provided the pension plan. R.S.O. 1990, c. P.8, s. 86 (1); 1997, c. 28, s. 206.

Pension Benefits Act, R.R.O. 1990, Regulation 909

31. (1) The liability to be funded under section 75 of the Act shall be funded by annual special payments commencing at the effective date of the wind up and made by the employer to the pension fund. O. Reg. 712/92, s. 19.

(2) The special payments under subsection (1) for each year shall be at least equal to the greater of,

(a) the amount required in the year to fund the employer's liabilities under section 75 of the Act in equal payments, payable annually in advance, over not more than five years; and

(b) the minimum special payments required for the year in which the plan is wound up, as determined in the reports filed or submitted under sections 3, 4, 5.3, 13 and 14, multiplied by the ratio of the basic Ontario liabilities of the plan to the total of the liabilities and increased liabilities of the plan as determined under clauses 30 (2) (b) and (c). O. Reg. 712/92, s. 19.

(3) The special payments referred to in subsections (1) and (2) shall continue until the liability is funded. O. Reg. 712/92, s. 19.

Personal Property Security Act

20. (1) Except as provided in subsection (3), until perfected, a security interest,

(a) in collateral is subordinate to the interest of,

(i) a person who has a perfected security interest in the same collateral or who has a lien given under any other Act or by a rule of law or who has a priority under any other Act, or ...

(2) The rights of a person,

(a) who has a statutory lien referred to in subclause (1) (a) (i) arise,

(i) in the case of the bankruptcy of the debtor, at the effective date of the bankruptcy, or

(ii) in any other case, when the lienholder has taken possession or otherwise done everything

necessary to make the lien enforceable in accordance with the provisions of the Act creating the lien;

Deemed Trusts

30. (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the Employment Standards Act or under the Pension Benefits Act.

Exception

(8) Subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

Bankruptcy and Insolvency Act (Canada)

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

Bill C-55 - An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts

Amendments to the *Bankruptcy And Insolvency Act*

67. The Act is amended by adding the following after section 81.2:

81.3 (6) For the purpose of this section and section 81.4, "compensation" includes vacation pay but does not include termination or severance pay.

81.5 (1) If the bankrupt is an employer who participated or participates in a prescribed pension plan for the benefit of the bankrupt's employees, the following amounts that are unpaid on the date of bankruptcy to the fund established for the purpose of the pension plan are secured by security on all the assets of the bankrupt:

(a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;

(b) if the prescribed pension plan is regulated by an Act of Parliament,

(i) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits

Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(ii) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985; and

(c) in the case of any other prescribed pension plan,

(i) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(ii) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, if the prescribed plan were regulated by an Act of Parliament.

(2) A security under this section ranks above every other claim, right, charge or security against the bankrupt's assets, regardless of when that other claim, right, charge or security arose, except

(a) rights under sections 81.1 and 81.2;

(b) amounts referred to in subsection 67(3) that have been deemed to be held in trust; and

(c) securities under sections 81.3 and 81.4. (3) If the trustee disposes of assets covered by the security, the trustee is liable for the amounts referred to in subsection (1) to the extent of the amount realized on the disposition of the assets, and is subrogated in and to all rights of the fund established for the purpose of the pension plan in respect of those amounts.

Amendments to the *Companies' Creditors Arrangement Act*

126. Section 6 of the Act is renumbered as subsection 6(1) and is amended by adding the following:

(5) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment, immediately after the court sanction, of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985; and

(iii) in the case of any other prescribed pension plan,

Bill C-12 - An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005

Amendments to Bill C-55

99. Subsection 39(2) of the Act is amended by adding the following after the enacted subsection (1.6):

(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

**106. Section 126 of the Act is replaced by the following:
126. Section 6 of the Act is replaced by the following:**

6. (6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations,

1985, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the Pension Benefits Standards Act, 1985, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the Pension Benefits Standards Regulations, 1985, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision,

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