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December 21, 2018

Re: Consultation Document
Enhancing Retirement Security for Canadians

Mr. Schaan,

I am writing to you today in response to your request for submissions in connection with the above-mentioned Consultation Document pertaining to retirement income security ("**RIS**") for Canadians. First, by way of introduction, I am a chartered professional accountant, fellow chartered insolvency and restructuring professional, member of the Canadian Association of Insolvency and Restructuring Professionals ("**CAIRP**") and of the Insolvency Institute of Canada ("**IIC**"), and a licensed insolvency trustee. I have been practising in the field of insolvency since 1983, and I am fairly involved in professional matters for CAIRP and IIC. I have attached as Appendix A, a recent copy of my CV for your information on my background.

As a preliminary comment, I will specify that my practice is almost exclusively in the area of commercial insolvency and restructuring mandates. While some of the topics addressed in the Consultation Document touch upon insolvency concepts or may have an insolvency implication, I feel compelled to point out that from my perspective, the issue of RIS for Canadians is not principally an insolvency problem. Inasmuch as the RIS takes the form of a deferred compensation,[1] the insolvency legislation can provide a measure of protection against a loss resulting from the insolvency of the employer, but it should not be the only or even the principal way of protecting the employees' interests. The reasons why the solution to employees' or former employees' protection cannot be strictly or even primarily insolvency-based are explained in particular in my submission to Industry Canada[2] in connection with the Discussion document on the statutory review of the *Bankruptcy and Insolvency Act* ("**BIA**")[3] and the *Companies' Creditors Arrangement Act* ("**CCAA**")[4], in the submissions made by CAIRP and IIC in connection with proposed Bills C-476, C-487, C-501, S-214 and S-216

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1 A defined benefit or "**DB**" plan, a defined contribution or "**DC**" plan, a long term disability or "**LTD**" plan or some other plan that spreads payments of compensation or benefits over time.

2 Letter to Paul Halucha dated July 14, 2014. A copy of the letter can be provided to you on request.

3 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended.

4 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended.

(40th Parliament[5] and in an article I wrote that was published in the Annual Review of Insolvency Law.[6]

As I was invited to comment on the Consultation Document, I have done so, however in several instances the proposed solutions are not insolvency-based or do not have, from my perspective, a significant insolvency impact. In those situations, the reader will bear in mind the lack of any qualification I have to make such comments other than my advancing age which makes RIS an issue that is certainly front and center.

As a last word of caution, I point out that the comments herein are mine alone, and do not necessarily reflect the opinions of CAIRP, the IIC, my colleagues at my firm or my professional colleagues in general.

The comments herein address a preliminary position on the issues, to address broad principles. Specific recommendations regarding some of the issues may depend on a more fulsome discussion of the stakes and the objectives sought in implementing legislative changes or initiatives that aim at improving RIS for Canadians.

For purposes of my comments, I propose to follow the same order as that in which issues are presented in your consultation document, although I have also added a "general comments" section to outline my views on other avenues the government might explore to enhance RIS generally. My comments, then, are as follows:

1. Issue/Background

Given my earlier comment regarding my advancing age, I can only applaud the objective of the exercise as set out in the "Issue" paragraph. Indeed, all Canadians deserve a safe, secure and dignified retirement and there is a real need to address retirement security for all Canadians. A report published in August 2017 by Healthcare of Ontario Pension Plan ("**HOOPP**") mentions that there is a worrisome rising trend in senior poverty, in that the rate of senior poverty, which had been declining between 1976 and 1995, has been steadily rising since 1995, such that 12.5% of seniors are now living in poverty and seniors are becoming "low income" at a faster rate than the rest of the population.[7] This is in the context of an increasing life expectancy and an increasing fragmentation of the family unit, so that a great many of our seniors can look forward to living longer, poorer, and lonelier. This is a significant issue that needs to be addressed.

The issue needs to be addressed not only because of the social implications to a society of not taking proper care of its seniors, but also because of the economic costs that arise from the increasing poverty levels amongst seniors. The number of insolvency proceedings (bankruptcies and consumer proposals) among the 65 and older age group has more than

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[5] The submissions were made in respect of Bills C-476, C-487, C-501, S-214 and S-216 (40th Parliament, 3rd session). CAIRP's submission is dated June 25, 2010 and IIC's submission is dated August 31, 2010. A copy of the submissions can be provided to you upon request.

[6] *Employee protection in insolvency proceedings – Reviewing the performance and setting the objectives*, in 2010 Annual Review of Insolvency Law (Janis P. Sarra, ed.), Thompson Reuters Canada Limited. A copy of the article can be provided to you upon request.

[7] Seniors and Poverty – Canada's next crisis? Research paper dated August 2017 by Healthcare of Ontario Pension Plan, accessible at https://hoopp.com/docs/default-source/newsroom-library/research/hoopp-research-article---senior-poverty---canada-next-crises.pdf.

doubled in the period from 2007 to 2016, going from 6,600 to 13,700 cases,[8] while the total number of insolvency proceedings has increased by 24.3%, from 101,300 to 125,900 cases.[9] The 65 and older age group, because of their particular income earning potential challenge, is the only age group where the overall number of bankruptcies has grown in that period.[10]

I am however not convinced that the most significant cause of concern is the security of pensions, wage and benefit entitlements for workers or retirees.

It would seem to me that the main cause of concern would rather be the availability of pension, etc., for workers and retirees. There is a large focus being placed on the loss of current pension income or future pension income entitlements because of enterprise failures of large enterprises such as Nortel, or more recently Sears. It is true that the loss of pension entitlement in these large insolvencies is deplorable, but we should not lose sight of the fact that these represent only a very small portion of the overall workforce, and that most of the Canadian workforce does not have access to any registered pension plan ("**RPP**"), whether such a RPP is a defined benefit ("**DB**") or defined contribution ("**DC**") plan. The data I extracted from Statistics Canada's reported information suggests that in 2017, only 34% of the overall Canadian workforce was a participant in an RPP and that 22.9% of the workforce was participating in a DB plan. If we consider that approximately 12% of the workforce is from the public sector and educational services, which typically have access to a DB plan, this leaves a very small portion of the general population that has access to either a DB or a DC plan. The evolution of the workforce in Canada since 1976, indicating which of the employees participated in a DB or DC plan, is presented below:[11]

year/Number (in thousands)	**1976**	**1986**	**1996**	**2006**	**2016**	**2017**
No of employees (total)	9,747.50	12,008.50	13,420.10	16,396.00	18,079.90	18,416.40
Employees with a RPP	3,902.50	4,668.38	5,149.91	5,690.58	6,261.82	6,262.89
Employees where RPP is a DB Plan	3,645.13	4,295.69	4,535.39	4,600.58	4,203.84	4,212.35
Public sector and education	1,321.50	1,535.90	1,719.60	1,990.10	2,197.30	2,246.00
year/%	**1976**	**1986**	**1996**	**2006**	**2016**	**2017**
No of employees total	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
Employees with a RPP	40.0%	38.9%	38.4%	34.7%	34.6%	34.0%
Employees with a DB Plan	37.4%	35.8%	33.8%	28.1%	23.3%	22.9%
Public sector and education	13.6%	12.8%	12.8%	12.1%	12.2%	12.2%
DB plans vs All RPPs	93.4%	92.0%	88.1%	80.8%	67.1%	67.3%

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[8] Source – Office of the Superintendent of Bankruptcy, Ten Year Insolvency Trends 2007-2016, Annex D and figure 12, accessible at www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03805.html#a07.

[9] Source – Office of the Superintendent of Bankruptcy, Ten Year Insolvency Trends 2007-2016, Annex D and figure 2, accessible at www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03805.html#a07.

[10] Source – Office of the Superintendent of Bankruptcy, Ten Year Insolvency Trends 2007-2016, Annex D and figures 6 to 12, accessible at www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br03805.html#a07.

[11] Source – Statistics Canada, https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1110009701#timeframe (Pension plan data) and https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1410002301#timeframe (labour force characteristics).

The information in the table above suggests that the biggest threat to retirement income security is not the loss of pension through insolvency proceedings, but rather the availability of retirement income itself, and the problem seems to become more pronounced with time.

In the background section of the of the consultation document, it is mentioned that “Funding pressures as a result of these trends have been particularly acute for DB pension plans in which the promised benefit level is backed by the employer. (…) Traditionally, DB plans have been the predominant type of pension arrangement among employers offering employee pension plans. However, some employers have responded to DB plan funding pressures by closing their DB plans to new hires.”

Firstly, I will point out that employers are not only closing their DB plans to new hires, in many instances they are terminating the DB plans and replacing them prospectively by DC plans for both new and current employees. This is imposed on employees as a change in working conditions that the employee may or may not accept, however the consequence if the employee does not accept the change is termination of the employment, not reinstatement of the DB plan.

Although DB plans may have been very popular in the past, this has been changing for some time now. The table above indicates that while 93% of employees who had an RPP in 1976 participated in a DB plan, this number had decreased to 81% in 2006 and to 67% in 2017. The drop in popularity of the DB plans is even more pronounced when we consider that the RPPs for public sector and educational services employees (and some others) are typically DB plans.

It may be a bit too simplistic to attribute the slow demise of the DB plans to funding pressures. We should not forget that DB plans gained in popularity because employers considered them a relatively cheap way to attract and retain labour – the plans were meant to be funded over time using actuarial assumptions that were considered overly conservative, such that employers could count on an investment yield that would provide the income stream to the retirees at a relatively low cost for the employer, with the added benefit of pooling the longevity risk among the employee group. In effect, if you are going to invest some money for the retirees’ post retirement income, the benefits of the market changes should accrue to the employer and not the employee. That situation changed somewhat when financial crises caused a decrease in the plan assets, thereby making employers realize they have a risk. Employers are sophisticated players however, and they can recognize that the markets go through cycles, such that the funding pressures of DB plans should not be a determinant factor in the choice of offering or not a DB plan to employees, since employers should perceive them as a temporary problem. And to the extent that some employers used the downward trend in the market as a rationale to stop offering DB plans to their employees, we would then expect this trend to reverse when the market improves, and the trend shows no sign of a reversal.

Looking at the decrease in the percentage of DB plans as compared to all RPPs, I note that the decreases seem to coincide with the entry in the work force of the groups described as Generation X (birth years from mid 1960s to early 1980s) and Millennials (birth years from early 1980s to late 1990s). These demographic groups who have entered the workforce starting in the mid-1980s, have marked differences from the previous demographic groups, in terms of lifestyle choices, and this has a profound impact on their working life. Baby Boomers are characterized by their loyalty, work ethic, steady career path, and compensation in their

working life. Generation X show a preference towards an improved work-life balance with a heightened focus on individual advancement. Millennials place an emphasis on producing meaningful work and finding a creative outlet, which results in frequent changes in employment and a career path that is more dynamic and less predictable.[12]

The lifestyle choices preferences of Generation X and Millennials makes it such that they change employment often, may have several careers over their working lives, and indeed may end up working in a field that is completely different from the subject matter they studied. This type of career profile is not very compatible with the DB plan structure, where benefits become vested after the employee has been at the employ of an employer for an extended period of time.

The result of this new employee profile is that employers have to focus a lot more on attracting employees than retaining them, as an attempt at retaining employees with these characteristics is pretty futile. As such, in setting up an attractive compensation package, the value of a DB plan is of much less importance than the other components, such as the direct compensation, the health benefits, workplace environment, etc.

As a result, I would surmise that the change in demographics is much more a factor in the decrease in popularity of DB plans than the vagaries of the stock-market. Perhaps trying to promote these plans as a solid foundation of a sound RIS system is a dangerous endeavour, as there seems to be strong indications that these are slated to disappear, unless demographic changes occur.

If we believe that the days of DB plans are numbered and we observe from the data in the table above that the number of Canadian employees who are participants in a RPP is decreasing as a percentage of the total number of Canadian employees, then the logical conclusion is that the focus of a sound RIS must be towards ensuring the availability of a plan or focusing on saving for retirement, rather than analysing how to enhance the protection mechanisms for DB plans that increasingly do not require protection because they are sponsored by employers who are essentially the government.

2. Proposed solution – Amending insolvency legislation

This proposed course of action has been looked at before, many times, and comments on the pitfalls of such an option were given in my previous submission to Industry Canada in July 2014, in an article I wrote for the Annual review of Insolvency Law in 2010, and in the submissions made by CAIRP and IIC to the government in connection the study of Bills C-476, C-487, C-501, S-214 and S-216 (40th Parliament, 3rd session).[13] The commentaries made in these submissions and articles are still relevant.

As regards pension plans, providing a “super priority” to ensure that unfunded pension liabilities are paid ahead of claims of secured creditors would carry a very high risk of hampering the access to credit, as the secured lenders would then have no way to monitor risk. The unfunded liability is an estimate made from a series of calculations that may take some time to perform, and will change with time based on stock market changes. As such,

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[12] Source – Wikipedia, retrieved December 2, 2018 from https://en.wikipedia.org/wiki/Millennials.

[13] See footnotes no. 2, 6 and 5, *supra*.

the exposure of lenders to a “super priority” that cannot be known or predicted is likely to cause a contraction of the credit, due to a risk that is difficult to assess or manage.

That contraction of credit could affect solvent companies’ access to the credit markets, and would therefore affect the economy as a whole. As well, this contraction of credit may have the perverse effects of triggering the insolvency of a business that could otherwise be solvent and/or restricting an insolvent business’ access to interim financing during the restructuring process, which would be counterproductive to the objectives of insolvency legislation and would not be helpful to the goal of protecting retirement income of workers.

As regards employee claims for the termination of employee benefits (for example, availability of life insurance coverage, long term disability benefits or health and medical care benefits), the problem is the same from the secured lenders’ perspective. While the exposure can be estimated at any point in time in respect of any employee’s existing benefit, it is difficult or impossible to predict what will be the future costs of these benefits, if the employer is self-insured. The uncertainty regarding the exposure could then be expected to translate into a contraction of the credit.

Furthermore, inasmuch as the proposed protection takes the form of a “super priority”, such protection could be illusory if the assets are insufficient to cover the entire unfunded pension deficit or employee benefit program. The creation of a “super priority is merely a method of reallocating scarce resources amongst the stakeholders, and does not ensure that the resources will be sufficient to fully cover the super priority claim.

3. Proposed solution – Solvency Reserve Accounts

While this proposed solution would provide additional flexibility to remove surpluses from the pension plan in case there is an over-contribution that arises from the accumulation of special payments, I doubt that this proposed solution would help protect against an insolvency loss.

Presumably, the working hypothesis is that plan sponsors will be more inclined to contribute greater amounts to a plan that is presenting a solvency deficit, if they believe that the plan’s deficit situation is temporary and they know that the funds can be withdrawn once the plan assets have regained their values.

To consider that such a SRA would help alleviate insolvency losses, we have to assume that the main reason for a failure to make the required special payment is a fear by management that the payment will result in an over-contribution that cannot easily be recovered. That seems unlikely, since managers are well aware of the calculations that drive the pension deficits and could then either trigger an actuarial re-calculation or seek to extend the special payment contributions over time in order to avoid an over-contribution situation. As well, the working hypothesis as set out above presupposes that the plan sponsors have sufficient resources to make additional payments when the plan is in a deficit position, with the expectation that the funds can be withdrawn later.

It seems far more likely that the failure to make the scheduled special payments is triggered by cash flow pressures, and this situation would not change just because the special payment is made in a SRA. I believe it is more likely that the SRA will be ignored in favour of enhanced cash flow because in a context of a restructuring, cash preservation is essential.

4. Proposed solution – Pension Funding Relief

It would seem to me that this proposed strategy would only work as a long term solution if the plan is kept unchanged, with minimal changes in the business model. Given the increasing tendency to effect restructurings through asset sales whereby a new entity purchases the assets and continues the business through a different corporate shell, I'm not sure this is a solution to the problem once a restructuring process has been engaged, save for exceptional circumstances.[14]

I could see the merit of pension funding relief in situations where an insolvency restructuring process can be averted.

To the extent that it represents a *quid pro quo* in the context of obtaining relief measures that are desirable for the business seeking such relief, I believe it is reasonable that these be subject to a requirement that the business abide by certain specified criteria or conditions, such as a prohibition on dividend payments while the measures remain in place. This of course requires that the specified criteria or conditions be predictable and transparent so that a business can request and expect to obtain the relief measures with full knowledge of what will be expected in return, to ensure that the measures would not be subject to a lengthy negotiation which would be counterproductive.

5. Proposed solution – Transfers to self-managed accounts

This proposed strategy would not necessarily protect the retirement income at the point of insolvency, as this measure would essentially transfer to the employee or former employee the risks and rewards of the investment fund.

It is acknowledged however that an obligation to convert the entitlements to the funds in the plan into an annuity in the event of a plan termination because of an insolvency process may disadvantage employees or former employees, because this obligation often arises at the worst time in the economic cycle, when the market value of the fund is low and the price of annuities is high.

As such, it seems likely that the risk of further loss by waiting for the market down cycle to reverse is slight, as compared with the immediate loss sustained because of an obligation to convert all pension entitlements to an annuity at an inopportune time. As a consequence, I believe that any measure designed to allow flexibility for the beneficiaries upon termination of the plan because of insolvency is a worthwhile endeavour and should be explored.

6. Proposed solution – Clarify benefit entitlement

This proposed measure appears to be more closely related to a legislative clarification to prevent a misinterpretation of the legislative intent, rather than a measure to protect employees or former employees at the point of insolvency.

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[14] For example where the deficit is not overwhelming and/or where the restructuring is effected by way of a simple compromise with the creditors.

If a plan is in a deficit position, there has to be some realization of the loss as otherwise its financial deficit will accelerate. The improvement in the plan can only come from allocating more resources to the plan on an on-going basis, from future resources, and a legislated prohibition to making changes to benefits cannot in itself correct the solvency related problem. If a plan is in a deficit position, the liabilities have to be adjusted by lowering the benefits of current or future retirees, or plan contributions have to increase to replenish the asset base, but continuing benefits without adjustment for retirees in the absence of corrective measures will only accelerate the solvency deficit ratio deterioration and create a shift in values between various groups of beneficiaries of the plan, depending on their life expectancy.[15]

7. Proposed solution – Corporate governance options

A solution premised on corporate governance safeguards presupposes that the corporate behavior is responsible for the creation of a deficit. That is not always the case. This proposed practice of restricting dividends and compensation when the market forces cause a pension deficit might lock some companies out of access to some capital or talent when it is needed. More research is needed to gauge the impact of such a measure.

As regards disclosure issues, I cannot comment on the effectiveness of measures to “shame” corporations into exhibiting good behaviour. It would seem to me that usually, strategies to exhibit good behaviour or social responsibility are not implemented just for altruistic reasons, but are rather a marketing exercise to enhance the corporate image, for a better market visibility, positioning or reputation. If that is the case, measures designed to promote good social behaviour are likely to be implemented when things go well, and are at risk of being ignored or set aside if difficult times arise.

8. Proposed solution – Enhanced “look-back” period

This proposed solution in effect increases directors' liabilities, as it is illusory to believe these will be recovered from the recipients, so it may very well restrict access to talent when it is needed.

This may also penalize directors and managers for market changes over which they have no control, which would be fundamentally unfair.

It is important to ensure that if we put punitive measures in place, it is to correct bad behaviour, not situations over which the managers have no control. And in such a case, it is important to clearly define and measure the improper corporate behaviour that is sought to be avoided.

From a practical perspective, these types of changes could have unintended consequences due to the perceived risk by managers or directors that their compensation might be clawed back or that their personal liability could be engaged. The unintended consequences might include:

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[15] *Time to Pay the Piper: Pension Risk Sharing, Intergenerational Equity and Dissonance with the Conceptual Paradigm of Insolvency Law in Canada*, in 2010 Annual Review of Insolvency Law (Janis P. Sarra, ed.), Thompson Reuters Canada Limited. A copy of the article can be provided to you upon request.

- Discouraging talented managers from acting as directors.
- Accelerating the shift amongst employers from DB to DC plans.
- Increasing compensation rates for management, as an additional risk premium.
- Legislation shopping, if the measures are introduced in a particular corporate statute (such as the *Canada Business Corporations Act*[16]) and not in others.

As well, more research is required to assess the criteria that could be used to gauge what constitutes "excessive" bonuses or compensation in the circumstances. The assessment of what may constitute an excessive compensation for an executive is likely an "eye of the beholder" issue. I am certain that comparing a polling survey of executives and a polling survey of hourly employees as to what constitutes excessive compensation would yield vastly different results, likely with either result being an incorrect assessment.

9. Proposed solution – Enhanced transparency in the CCAA process

I am uncertain why this proposed solution is suggested in respect of CCAA proceedings only, as there is no significant policy concern that should cause a difference between the CCAA and the BIA on this issue. The only significant difference is that entities that avail themselves of the relief contemplated by the CCAA tend to be larger, such that a larger portion of these might have a DB plan, however there is no reason why an entity that takes advantage of Division I of Part III of the BIA could not also have a DB plan.

That said, the retirees already have representation, either through the plan administrators, or through the union if there is a collective bargaining agreement ("**CBA**"), or sometimes on their own right as an interested group.

Some of the measures that are suggested may have merit, however I am not sure they are any help in protecting the DB participants – if the entity lacks resources to cover a pension deficit, the improved transparency and increased participation might help plan members understand why their benefits need to be adjusted, and may give them a voice in negotiating a reduction of the plan liabilities, but these would not in and of themselves prevent a financial loss if the participation in the plan makes the business non-viable.

That said, the insolvency proceedings are supposed to help provide a level playing field so that debtors and creditors can come together and negotiate a compromise that will provide a better result than an outright liquidation and will avoid the social costs associated with a business failure. This process cannot occur efficiently if there is an informational imbalance or a marked disequilibrium in the negotiating forces. As such, measures that are designed to promote the efficient sharing of relevant information to affected stakeholders should be a worthwhile endeavour.

The Consultation Document also suggests that the restructuring system could be enhanced if there were a requirement in the CCAA that parties be subjected to an obligation to act in good faith. Since restructurings are intended to be not a renegotiation of a contract, but a transparent process for relief because of financial hardship, it would seem that good faith is a

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[16] *Canada Business Corporations Act*, R.S.C. c. C-44, as amended.

must, on the part of all parties. I would therefore consider it appropriate if specific provisions in the CCAA (and the BIA) made reference to this obligation on the part of all stakeholders.

While I think that the provision is warranted, I would also point out that some additional research and discussion is necessary to assess how such a provision requiring good faith could be monitored and enforced, as it is likely that if stakeholders are not acting in good faith because of a collateral, hidden motive, such situation may not be readily apparent.

10. Overall comments

As indicated earlier in this document, I am very much afraid that due to competitive forces, DB plans are a dying breed, and may very well be slated to disappear. They existed in the past because the employers perceived them to be relatively cheap and an enhancement to attract workers that would then be retained for an extended length of time. In the current environment, it seems that workers change jobs more often, and very rapidly, such that the existence of a DB plan is no longer a significant selling point to attract workers - the employer is perpetually looking for and replacing workers, on a very high turnover. That makes the DB Plan quite impractical. Employers now perceive the DC plans as more practical and of equivalent cost, but with lower risk (as the risk and reward is shifted to the employee). Unfortunately, this preference in favour of the DC plans means that one interesting aspect of the DB plans disappears, namely the pooling of the longevity risk amongst the workforce, but that cannot be the basis to existence of employer-sponsored DB plans if they no longer adequately meet the realities of the workplace.

As well, given that a very significant portion of the workforce does not have access to a RPP, let alone a DB plan, it would seem that the path towards enhancing RIS for Canadians should focus more on making a plan available for employees and encouraging retirement savings, than protecting the DB plans.

In that regard, perhaps the RIS system would benefit from the following changes:

- Increase the employer/employee contributions to CPP/QPP with a view to make the CPP/QPP benefits more meaningful in terms of post-retirement income. This essentially forces employers to participate in some portion to a DB plan and forces the employees to save towards retirement, as the CPP/QPP is essentially a DB Plan. This would enhance the second pillar of the RIS system by providing a higher revenue to all retirees.

- Increase/invest in education of the population to promote a sound retirement savings practice, including making more room for tax deductions to encourage retirement savings. This would enhance the third pillar of the RIS system.

- Consider the possibility of compelling employers to offer a retirement plan to all employees, in a manner similar to the program implemented recently by the Province of Quebec.[17] Under that program, employers that have 5 or more employees have to offer a voluntary retirement savings plan ("**VRSP**") and enrol employees in that plan. They are not compelled to contribute to this plan, but they are responsible to inform the employees of its existence and availability, and employees can contribute to this plan up to the

[17] *Voluntary Retirement Savings Plan Act*, CQLR c. R-17.0.1.

allowable limits under tax legislation. The plans are intended to be relatively simple, flexible, and with low administrative costs. It is certain that because of the separation of competences between the federal and provincial levels, such a system could not be implemented across Canada without participation from the provinces, however the federal government could study the experience in Quebec so far and if it appears the program is successful, it could work with the other provinces towards implementing something similar.

To the extent however that enhancing protection for DB plans or LTD type plans is considered a must as part of any revision of the RIS system, I would recommend that any measure implemented to protect the possible deficit of DB plans or liability under LTD type plans should follow the following principles:

- The measure should depend as little as possible on relief arising from insolvency statutes. The best protection measure for a DB plan is having funding rules that are designed to prevent the occurrence of a deficit in the first place. As such, emphasis should be placed on better monitoring of the plans' financial positions; a conservative approach to contributions based on estimated yields; a taxation incentive to maintaining the funds fully funded; and transparency on corrective measures when the fund shows signs of an impending deficit.

  The comment applies equally to LTD type plans, as there will be less risk associated with such plans if the potential future liability is covered by a properly segregated fund.

  The reason why the measure should depend as little as possible on relief from insolvency statutes is that at the point of insolvency, there is much uncertainty regarding the value of the assets of the insolvent employer, in particular if the going concern assumption is in doubt. The loss in value of the assets in a context of an outright liquidation, the need to provide for the professional fees required to administer the insolvent estate and the competition for resources to cover other socially important claims such as payroll source deductions, environmental claims, decommissioning costs, etc., make it uncertain that sufficient resources will exist to protect the employees' benefit claims.

- For the reason mentioned in the paragraph above, to the extent there is a need to protect employees against the impact of a deficit in a DB plan or an obligation arising from a LTD plan, a measure that does not rely on the underlying value of the assets is preferable. This can be accomplished by spreading the risk of loss among all employers, for example by establishing a national system of pension benefit guarantees funded by premiums charged to all employers who have DB plans.

- To the extent that a "super priority" is considered as a "fall back" measure in the event of insolvency, the super priority should be transparent, known and predictable, in order to avoid or limit the disruption in the credit availability. Secured creditors are risk adverse and will seek to limit their risk exposure when granting a credit facility to a borrower. It is almost unavoidable that if super priorities are introduced to downgrade what the secured lender believes to be its asset backing in the event of a loan default, there will be some contraction in the credit facility to account for the incremental risk. This contraction is likely to affect the economy in general, and cause problems at the point of insolvency by curtailing access to funds that would be necessary to carry out a restructuring through the interim financing contemplated in section 50.6 BIA and section 11.2 CCAA.

However, if the super priority charge is in an amount that can be monitored, is known and limited, the secured creditors should be better able to factor this risk in their credit making decisions, thereby allowing market forces to adjust without an inordinate disruption. This is what occurred for example with the introduction of the super priority for employees' unpaid wages, under sections 81.3 and 81.4 of the BIA. At the time, the lenders were generally in agreement to say that the implementation of this measure would affect the availability of credit. However, the fact that the priority was limited to an amount of $2,000 per employee[18] allowed the lenders to factor in the additional risk, such that the contraction in credit was limited and could be counteracted by competitive forces in the lending sector when liquidity abounds. The same way, the super priority for pension plan amounts contemplated in sections 81.5 and 81.6 BIA did not have an appreciable impact on the availability of credit, even though the amounts are not subject to a maximum, because the super priority was limited to an amount that can readily be ascertained (current cost arrears, DC plan contributions and amounts withheld form employees) and monitored.

As such, a super priority for unpaid arrears that are due and have not been contributed on their due date might be an option that, while affecting credit (perhaps only temporarily), may be manageable for the lenders.

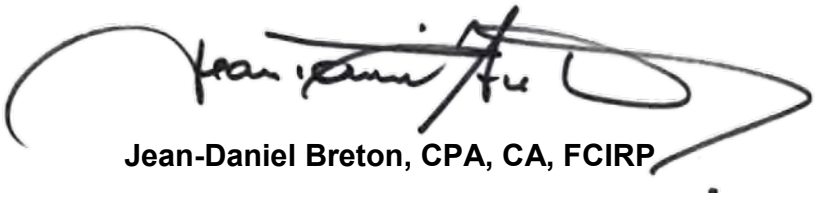
In terms of providing for transparency and predictability, from the perspective of the lenders, the best choice (other than no priority at all) would be a super priority for arrears to a maximum amount and the second best choice would be a priority for arrears.

- Measures designed to increase transparency, oversight and communications, such as increased corporate reporting and disclosure requirements, are not likely to be inappropriate – one cannot be against virtue – but the measures have to be designed to be unobtrusive and should not cause an administrative burden that might affect their competitive position as compared with other entities in the marketplace.

- Finally, to the extent that a measure is implemented to promote good corporate behaviour, the measure has to be carefully thought out to ensure that it punishes egregious behaviour but not occurrences that are beyond management's control, as otherwise the measures would hamper corporate access to talented managers, or the cost of talent will increase substantially to factor in the additional risk for the managers of the punitive measures.

I hope you will find the foregoing helpful. I am available to discuss the foregoing with you at your convenience.

Yours truly,



Jean-Daniel Breton, CPA, CA, FCIRP

[18] Except in respect of the disbursements of a travelling salesperson, but that is not relevant to the discussion herein.

Jean-Daniel Breton, CPA, CA, FCIRP, LIT

Senior Vice-President, Ernst & Young Inc., Montréal Office

Since 1983, Jean-Daniel Breton has been practicing in corporate finance, particularly in the areas of the restructuring of companies having financial difficulties and insolvency.

Education/Professional designations

- Licensed insolvency trustee, 1989
- Chartered Insolvency and Restructuring Professional (CIRP), 1987, (designated fellow in 2012)
- Chartered Professional Accountant, 1983
- Diploma in accountancy, Concordia University, 1982
- Bachelor of Commerce, Concordia University, 1981

Experience

Participated in engagements requiring services related to financial consulting with debtors and creditors, strategic planning, receivership, bankruptcy, proposals, and arrangements under the *Companies' Creditor Arrangement Act*, etc., in a variety of industries, such as paper, printing, retail trade, technology, needletrade and manufacturing.

Professional activities

Responsible for delivering the commercial bankruptcy and proposal portions of the training sessions organized by the CIRP Qualification Program ("**CQP**") (formerly the National Insolvency Qualification Program, or "**NIQP**") for candidates preparing for the National Insolvency Examination from 1997 to 2018.

Participant on numerous committees of the Canadian Association of Insolvency and Restructuring Professionals ("**CAIRP**") and the Quebec Association of Insolvency and Restructuring Professionals ("**QAIRP**") and CQP relating to insolvency and restructuring professionals' training programs and student education, revising the teaching materials used by CAIRP and CQP members and students, developing a competency map and syllabus and preparing examinations to monitor the progress of candidates through the program.

Past member of the Board of directors of CAIRP and member of several committees of CAIRP, such as the Intervention Committee, the CIRP Qualification Program Committee, the Course Material Review Committee and the Exam Oversight Committee.

Member of the editorial advisory board of, and contributing author to the Annual Review of Insolvency Law (Carswell)

Member of the main organising committee and co-chair of the technical programme committee for the INSOL conference in Vancouver, in 2009

Contributing author to Banking and Law Review, a publication of the IIC

Past member of the Board of directors of IIC, member of the IIC Intervention Committee, and member of various past committees and task forces.

Responsible for preparing and participating in various seminars and conferences as a speaker, including professional development conferences for the members of the CAIRP, QAIRP, OCPAQ and IIC, professional development seminars for the employees of Ernst & Young Inc., professional development seminars for bankers, conferences organized by Editions Yvon Blais, conferences organized by The Canadian Institute, conferences organized by the faculty of law of University of British Columbia, etc.

Participant on committees formed to advise Industry Canada on the insolvency law reform process

Responsible for preparing and delivering part of a course in the diploma in accountancy program at Concordia University in 1994 and 1995.

Memberships and other activities

- Ordre des comptables professionnels agréés du Québec (OCPAQ)
- Canadian Association of Insolvency and Restructuring Professionals (CAIRP)
- Quebec Association of Insolvency and Restructuring Professionals (QAIRP)
- Insolvency Institute of Canada
- Formerly director and treasurer of Équipe de Natation de Saint-Lambert