PIONAIRS SUBMISSION

TO

INDUSTRY CANADA

STATUTORY REVIEW DISCUSSION PAPER

OF

THE BANKRUPTCY AND INSOLVENCY ACT

And

THE COMPANIES' CREDITORS ARRANGEMENT ACT

15 July 2014

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1.0 EXECUTIVE SUMMARY

On this five year review of the *Bankruptcy and Insolvency Act* ("BIA") *and the Companies Creditors Arrangement Act* ("CCAA"), it is timely to re-examine and to strengthen the position of retirees in underfunded defined benefit plans of debtor companies. The manner by which retirees are disadvantaged is significant.

- Whether in proceedings under the BIA or under the CCAA, retirees have little or no priority or protection with respect to the underfunding, with their claims being consistently subordinated to those of secured creditors, and placed on a par with those of unsecured creditors.

- Their claims on an individual basis can be very substantial. Workplace pensions constitute an important part of their retirement income and retirement planning. Retirees and their spousal beneficiaries have little or no ability to replace lost pension income.

- Retirees have no clear standing in insolvency proceedings, and generally do not have the financial and organizational resources to participate in such proceedings effectively.

- Pensions were part of retirees' compensation during their working lives. Unlike all other creditors, pension plan members have no ability to protect themselves against the risks inherent in the pension promise and contract by requiring security or increased compensation to account for risk. They have protections under pension legislation, but those protections are given no force and effect in insolvency proceedings.

- Retirees have contributed to the debtor company during their working lives, as contrasted with lenders, especially DIP lenders and speculative purchasers of the company's indebtedness. Labour is as necessary to a company's survival and well-being as financing, in fact more so, as a matter of equity, funding the company's pension plan should be afforded at least as much priority as is given to such creditors.

- One disadvantage faced by retirees was that neither the CCAA nor the BIA establishes how and by whom such retirees will be represented in either set of proceedings. The Pionairs are recommending that the Superintendent of Financial Institutions be asked to prequalify representation for DB plan retirees and that the CCAA and BIA contain provisions for the recognition of the Superintendent's selection.

- Another disadvantage is that DB plan retirees have few resources to pay for expert legal and actuarial expertise in CCAA or BIA proceedings and the Pionairs recommend that such funding sources be clarified in the acts so that the retiree representatives are at no disadvantage to other creditors.

- Currently the claims arising from a DB plan pension deficit are considered unsecured claims and the Pionairs recommend that ranking be given equivalent to that of *normal* cost or at least a preference to all other unsecured claims for reasons of equity both as regard to other creditors in liquidation, and with regard to the ability of a debtor to reorganize in CCAA.

As a matter of equity, and of fundamental fairness in relation to the other creditors in liquidation, and in reorganizations under the BIA and the CCAA, the Pionairs principally recommend that the BIA and the CCAA be amended to the following effects:

1. The deemed trust provisions in the *Pension Benefits Standards Act*, 1985 ("PBSA") with respect to special payments due but not paid be given force and effect in insolvency proceedings, as priority charges under the BIA and as conditions for the approval of plans of arrangement under the CCAA.
2. The remaining unfunded liability in the pension plan after wind up be accorded the same creditor status given to unpaid *normal* costs or at least preferred creditor status ahead of unsecured creditors
3. The status of retirees with respect to participation as creditors in insolvency proceedings be given clear recognition,
4. Established retiree organizations are recognized as having the right to represent retirees in insolvency proceedings, with reasonable funding for professional and organization expenses. The Superintendent of Financial Institutions prequalifies representation for DB plan retirees, in accordance with provisions in the CCAA and BIA for the recognition of the Superintendent's selection. Funding sources are clarified in both statutes so that the retiree representatives are at no disadvantage to other creditors
5. Recognition is given to the protection of supplementary pensions to a reasonable level as a separate category of creditors whose claims are aggregated.

Our comments in this submission on various aspects of the administration of the BIA and CCAA reflect our experience as previous participants (2003-2004) in a CCAA proceeding and an understanding of those statutes.

2.0 INTRODUCTION

The Air Canada Pionairs sincerely appreciate the opportunity to provide to the Honorable Minister of Industry Canada a submission on issues which may assist in the Statutory 5 year Review of the *Companies' Creditors Arrangement Act and the Bankruptcy and Insolvency Act*.
The Air Canada Pionairs are a federally registered not-for-profit organization that advocates on behalf of Air Canada's 29,000 retirees of whom more than 15,000 are members. The Pionairs have a mission to communicate with members, initiate activities' of interest to members and advocate to maintain pension plan security as promised, committed and contracted by the sponsor of its individual defined benefit plans. The issue is becoming increasingly critical as a result of global economic turmoil; low investment interest rates, and continuing economic cycles particularly affecting the Air Transport Industry.

Our recommendations reflect two objectives:

> *To strengthen the security of the pension promise and commitment that have been made to members of defined benefit pension plans, and*
>
> *To recommend revisions to the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act to achieve consistency with the Pension and Benefits Standards Act 1985 and other legislation affecting the security of Private Pension plans*

> This submission is prepared from the perspective of retirees who are a beneficiaries of defined benefit pension ("DB") plans regulated by the *Pension Benefit Standards Act 1985* ("PBSA") and from that of retirees who, in addition, receive supplementary retirement benefits - such as SERPs (Supplementary Employee Retirement Plans), or RCAs (Retirement Compensation Arrangements) - associated with those DB plans necessitated by the requirements of the Income Tax Act. The submission will highlight the strong and well protected situation in which such retirees find themselves prior to their former employer being in bankruptcy or undergoing financial reorganization, as compared to the virtually unprotected, low ranking ordinary creditor status that exists for those same retirees when that employer finds itself in proceedings under the BIA and CCAA. The submission recommends, among others, the changes required to remedy this inconsistency to better accord with the generally accepted objectives of insolvency law.

While the private sector trend in Canada is away from DB plans and towards variations of defined contribution pension ("DC") plans, in which retirees do not face the same sponsor uncertainties as do their counterparts in DB plans, the continuing risks associated with DB plans that became evident in the late 1990s and early 2000s remain of great concern to very large numbers of DB plan retirees.

The global and national economic turmoil, and market volatility along with many sponsors' lack of concern for their contractual commitments and obligations to their employees, creates an uncertain and unsatisfactory national condition for the nation's elderly citizens. These are individuals in the twilight of their lives that placed their trust in the commitment by their employers to provide a defined pension as a portion of their earnings. These are individuals who require and should be granted elements of certainty for their incomes and livelihood at a time when it is most needed.

The Government initiated actions to "Strengthen the Legislative and Regulatory Framework" of these plans in the Budget of 2009. Now is an opportunity to ensure the elements to protect their elderly citizens are in fact put in place. Now is the time to bring the BIA/CCAA into alignment with the PBSA and Parliament's intent for the Security of the livelihood of its senior citizens and update the *Bankruptcy and Insolvency Act*. When pension plans are left adrift financially due to deliberate or unfortunate financial failure of the plan sponsor, the efforts of retirees who worked a lifetime to earn a retirement income need to be recognized as a loan to the plan sponsor by the employees. When the sponsor enters proceedings under the BIA the status of this loan should have the same status and recognition by the insolvency courts as all other lenders, investors, or suppliers.

While Finance Canada has taken positive steps to assist Air Canada, through revisions to the PBSA, and Pension Plan Funding Relief measures in 2004, 2009, 2013, it is evident that there is a need for the government to be consistent, and that the co-ordination of the BIA/CCAA with the PBSA is a mandatory element in achieving the legislative requirements of the PBSA.

The Pionairs recognize the magnitude of the task; however, as advocates for all the Air Canada retirees, and as members of the Canadian Federation of Pensioners, we believe that now is the time to correct the financial imbalance long enjoyed by plan sponsors and corporate creditors. Many G8 nations and other nations have accepted their responsibilities and enacted legislation to correct these inequities (Paul M. Secunda: International Treatment of Pension and Wage Claims in Company Insolvency Proceedings Report, September 2013)

The Pionairs as members of the Canadian Federation of Pensioners fully support the submission which the Federation is providing to Industry Canada in response to Industry Canada' request of 16 May 2014 for comment on the statutory review of the *Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*

3.0 BACKGROUND

3.1 Pension Exposures

Before the event of insolvency under the BIA or CCAA, DB employers are obliged to **fully fund** any pension plan solvency deficit in accordance - in the case of federally regulated pension plan sponsors – with the provisions of the PBSA. That obligation under the PBSA clearly recognizes that the relationship between a DB plan sponsor and an employee, retiree, or other DB plan beneficiary typically exists and evolves over several decades and will often encompass - noting that one sponsor may have multiple plans - thousands, or even tens of thousands of individuals and hundreds of millions, or even billions of dollars in assets and obligations.

In the late 1990's and early 2000's many industries in Canada began to experience the impact of the increased globalization and competitiveness that is referred to in the 'Introduction' to Industry Canada's Statutory review document. At the same time, the funds being invested to provide DB benefits were experiencing unprecedented financial market volatility and beginning to experience a regime of Government supported lower interest rates different than those inherent in the actuarial assumptions underlying the payments of those benefits. Successive governments in Canada, their revenue agencies, and pension regulators were very slow to respond, if they responded at all, to create an incentive or requirement for employers who had DB plans: to change their funding practices, to make up pension deficits more quickly, or to create larger pension surpluses in response to financial market volatility than were required by the PBSA. The result was predictable. Members of some DB plans were either thrust into supporting employer pleas (some of whom were in CCAA) for change to the regulations under the PBSA including long extensions of the five-year period permitted to make up DB deficits under the PBSA, or found themselves as ordinary creditors in CCAA or BIA proceedings.

3.2 Deemed Trusts

For federally-regulated defined benefit plans, the PBSA specifies those amounts which are to be held separate from the employer's monies, and which are deemed to be held in trust for active and retired pension plan members, and to form no part of the estate of the employer in liquidation, assignment, or bankruptcy. These amounts encompass:

- The monies in the pension fund
- Prescribed payments, which would include normal costs and special payments due but not paid
- Payments due but not paid required under a distressed plan workout scheme
- Members' contributions deducted but not remitted to the pension plan
- Other amounts due to the pension plan from the employer including
    - The face value of a letter of credit should it not be honoured by the issuer
    - Special payments due in the year of the employer's insolvency

Under the *Ontario Pension Benefits Act* ("PBA") the deemed trust with respect to defined benefit plans encompasses members contributions deducted but not remitted, normal costs and special payments, and also on wind up, the unfunded liability of the plan. The PBA also provides for a lien and charge against the employer's assets for these amounts. The *Ontario Personal Property Security Act* further provides for a charge for these amounts against inventory and receivables in priority to other secured creditors.

The BIA, however, gives a super priority, and the CCAA gives protection, only to member contributions deducted but not remitted and to normal costs. We would point out that normal costs only arise to the extent there are still active plan members; normal costs simply cover pension accruals going forward, and those accruals are part of the active plan members' compensation.

Insolvency courts have refused to give effect to the deemed trusts under pension legislation, not only in proceedings under the BIA but also in proceedings under the CCAA, on the basis that such deemed trusts or charges must be explicitly set out in the insolvency legislation to be given effect. Accordingly, amounts other than normal costs and employer contributions deducted but not remitted become in a bankruptcy under the BIA unsecured and un-prioritized debts of the debtor company, and under CCAA proceedings, even in liquidations, given no protection.

Pensioners, unlike other creditors, are involuntary creditors. While employed, they were required to take part of their compensation through accruing benefits under the pension plan. If they see the plan is underfunded, they do not have the option of receiving cash instead of accruals, nor of receiving additional salaries or wages to compensate for the risk, nor of securing the pension obligation other than through protective pension legislation. The protections built into pension legislation, whether they are funding requirements, deemed trusts or a lien and charge against assets, are meaningless unless they are given force and effect in the event of the insolvency of the employer.

The value to a pensioner of a pension earned during his or her career with the debtor company, can be very substantial, easily hundreds of thousands of dollars. Where a plan is wound up and is perhaps 70% funded, the loss of value, given the court's interpretation of insolvency legislation, makes the retiree a substantial creditor of the debtor company. That loss of value cannot be made up by the pensioner, who has little or no earning power at this stage of life.

Federal and provincial governments have, over the past several years, recognized that some encouragement and assistance needs to be given to middle income Canadians and their employers so that these Canadians make adequate provision for their retirement. It is inconsistent to decry the lack of retirement savings of middle income Canadians, and then to permit the depletion of pensions, which constitute a significant part of the retirement savings of those with workplace pensions.

PART 1

The Pionairs recognize many of the elements in the Statutory Review are not within their purview. The following comments are therefore designed to respond only to those issues raised in the Review which pertain to the Pionairs and retirees' concerns in general.

4.0 PENSION SECURITY IN CANADA

4.1Current Pension Status as a Creditor

The security of promised, contracted pensions is far from the guaranteed retirement funding anticipated by retirees of defined benefit plans. In a corporate restructuring or distribution of assets in BIA, the unfunded pension liabilities, namely those funds that are due to retirees which were committed, promised, or contracted, rank at the bottom of the creditor list, and have the status of unsecured creditors. The result is virtually all of an insolvent (BIA) corporation's assets are distributed to secured lenders, bond holders, hedge funds and everyone with a security interest other than the elderly pensioners. These pensioners are the only group of all creditors who provided services to the corporation, are not granted equivalent security status as other suppliers and who do not have the ability to recreate their earning power and re-instate their income stream. In many instances, although they did everything right to establish a retirement income and remain worry free, they are deprived of that earned right due to antiquated and unfair BIA legislation.

Ronald B. Davis, in the IRPP study No. 16 March 2011 succinctly outlines the inequality of creditor status for pensioners under the BIA:

1. *Unpaid suppliers of identifiable goods supplied within 30 days of bankruptcy; right to repossess such goods*

2. *Farmers, fishers, and aqua culturists for unpaid goods delivered within 15 days of bankruptcy; secured charge on all inventory*

3. *Unremitted source deductions for income tax, employment insurance and CPP; amount equal to deductions held in trust and not available to other creditors*

4. *Unpaid employees; secured charge over all current assets up to a maximum of $2000 per unpaid employee.*

5. *Pension contribution arrears; secured charge over all assets in the amount of any unpaid normal cost contributions and any employee contributions deducted but not remitted to the pension fund.*

6. *Secured creditors, all property over which they hold security up to the amount still owing on loan*

7. *Preferred creditors; each higher-ranking preferred creditor paid in full before the next lower-ranking creditor receives payment*

8. *Unsecured creditors; any remaining value divided among them in the proportion of the value of their claim to the total claims of all unsecured creditors. This includes any remaining shortfall in the pension assets.*

There can be no doubt that current Canadian legislation is highly prejudicial to the basic rights of individuals who provided services based on committed agreements, but who are treated by the law when a corporation is in BIA, in contravention to normal contractual legislation (e.g. a contract of employment with a stated remuneration). While current PBSA legislation requires all arrears in contributions for special payments which are due to the pension fund that come due at the time of bankruptcy but have not been paid be treated as a deemed trust. This legislation does not encompass payments required to assure that pensions which have been contracted continue to be paid at the amount agreed to by the employee (and subsequent retiree) and the corporation.

Unlike the situation for lenders, bondholders, hedge funds, whose amounts owing constitute a sum at one period in time, a pension is a dynamic sum which requires a continuous stream of payments (which also were contractually agreed and in some cases contributed by the employee over a period which was perhaps longer than the time available for repayment), (e.g. if a person works and contributes to a pension plan over 40 years and retires at 65, the likelihood of his pension lasting until age 105 is highly unlikely and well exceeds the actuarial ages published by the Canadian Institute of Actuaries).

4.2 Employer Debt

Concern has been voiced by many parties that large pension debt creates a risk which can affect lender attitude towards a company. There are however many other elements which can affect a lender's risk consideration

- Lack of sound and experienced management
- Inventory control and delivery
- Over extension of the business
- Competitive environment
- Product quality
- Responsiveness of regulatory requirement
- Cash flow and capital availability.

Other factors e.g. weather, war that are beyond the control of the debtor company

4.3 Pension Shortfalls

Pension shortfalls may occur due either to interest rates, market performance, and ineptness of management or financial practices. Any of these issues will affect the decision of lenders in regard to their lending and credit assessment.

In many instances (see BIA cases below), corporations have utilized the Bankruptcy Court to protect assets for creditors whose motivation was to acquire such assets for their own objectives

while relieving the corporation of its legally required obligations to their employees and elderly retirees. It is inimical that legislation should be in place which allows entities, many of whom are not Canadian owned corporations, e.g. *Indalex*, *White Birch*, etc., to acquire and to continue to acquire assets while it disenfranchises the many individuals who created the assets. As an example, virtually all the major airlines in the US entered Chapter 11 (CCAA) to enable the abrogation of their pension liabilities and shift these liabilities to the Pension Benefit Guarantee Corporation, with the result that a great number of older retirees had their pensions reduced 70 % - 50 %, depending on the amount of their contracted pensions. In Canada, similar situations arose when corporations entered BIA and/or CCAA (*Nortel, Indalex, White Birch, AVEOS*, etc.).

In some instances special payments due following bankruptcy, by their nature and dynamics may be greater than special payments due but not paid preceding bankruptcy. It is, however, not the sums which should impact the payment requirement, but recognition that payment of contracted amounts to individuals who in many instances created the assets is simple fairness and should not be negated because of the amount owing. The issue of amount has little to do with commitment, particularly when the commitment is being superseded by claims of shareholders/hedge funds that have received no commitments, but have undertaken an investment with full understanding of the risk entailed. The recognition of retirees as creditors' equivalent to other lenders may not result in achieving full receipt of the bankrupt entity but may be sufficient to permit the recipient to maintain a life standard to which they had dedicated a lifetime of labour.

5.0 COMMERCIAL ISSUES

5.1 Streamlining Companies' Creditors Arrangement Act Proceedings

5.1.1 Initial Orders

When applicable the initial orders should insure that the rights of retirees and pensioners who are the beneficial owners of the pension trust fund are included in any court mandated actions. It has been found in respect of pension plans, whose deficits which could be significant amounts, and whose owners could be among the largest creditors that when the pension plan lacks solvency it is the rights of the pensioners which are affected.

5.1.2 Once in CCAA proceedings, DB retirees' position as less than ordinary creditors leaves them no longer entitled to a fully funded pension plan. It does leave them facing the possibility of a reduced pension, and left with essentially no leverage to improve their outcome contrasted with those of competing interests, including active members of the same DB plan. If they are heard at all, it is because the Court, recognizing the retirees' position, gives the proceedings an incentive to consider their situation in the overall resolution of the debtor's restructuring plan. And, while retiree support is required by the Office of the Superintendent of Financial Institutions who oversees the PBSA for any arrangement that reduces the amount and lengthens the term of pension deficit funding, the retiree is faced with a Hobson's choice: support the change which the retiree had little or no voice in creating and in effect become a lender to the debtor, or face the possibility that their pension will be arbitrarily reduced by the Superintendent, or through a BIA proceeding and plan termination.

5.1.3 Retirees would have to petition the court in CCAA proceedings for funding to be represented in those often long and very expensive proceedings, or have to raise the funds from among themselves. Retirees cannot even access the pension investment funds created with their own contributions for the purpose of representation in CCAA proceedings.

5.2 Conflicts of Interest

5.2.1 Retirees and active members of the same DB plan have, in a CCAA proceeding, an obvious conflict of interest. Yet the CCAA (and the BIA for that matter) does not address the possibility that each might choose to resolve their position with differing or opposing objectives. Unions quite naturally seek to represent all of their actives and retirees in a CCAA proceeding, primarily in the interest of solidarity. Accordingly, retirees in the same DB plan can end up with different CCAA representation depending on whether they were formerly unionized or non-unionized. And the non-unionized retirees, particularly in the case of proceedings involving large debtors with a national profile, face the additional burden of finding representation that is not conflicted from representing them.

5.2.2 The time taken and resources required to resolve the representation issues raised in 5.1.3 and 5.2.1 can mean - in a fast moving CCAA process where there are competing interests - that the DB retiree's interest is not being fully addressed. Having to rely on the Court to resolve these issues rather than on the provisions of CCAA, or of the BIA is part of the problem and needs to be addressed.

5.2.3 There are **few** if any competing creditor interests to DB retirees that have as longstanding and financially significant a relationship with the employer as do DB retiree creditors. There are **no** competing interests, even other ordinary creditors, who do not have the ability to regularly examine and change their relationship with the debtor depending on the debtor's or even the creditor's own financial circumstances - or, who, after the fact of insolvency, have no opportunity to mitigate their losses.

5.3 Claim Mechanism and Stay Process

Within large corporations who enter CCAA the complexity of the claims in many instances would mitigate against a default mechanism since it may harm retirees' ability to develop their position and result in their inability to carry out the research on payment schedules, proposed creditor agreements without having the professional support needed to prevent a "rush to judgment" environment. In CCAA proceedings there are thousands of legal hours spent by the debtor and creditors. However without adequate representation retirees/pensioners are given no time to represent their issues adequately. A reasonable period of stay acts to the benefit of all parties and insures that all parties have an opportunity to consider the debtor's issues and prepare adequate contestations.

5.4 **Balancing Competing Interests**

5.4.1 Ordinary creditors, except for the retiree creditor, faced with the credit risk of a particular debtor have many of the same opportunities as secured creditors to manage risk or mitigate their losses when faced with a debtor in a failing financial situation. There is nothing that prevents them from selling their debt, asking for cash terms on delivery, or seeking some form of security, often by letter of credit for continuing product or service deliveries. As a general rule suppliers

to a business, diversify their customers to avoid, among other things, concentrated credit risk and price their products or service taking into account the risks of loss inherent in a relatively short planning horizon.

The DB retirees, on the other hand, can't sell their pension benefit, change the terms of their pension arrangement, or do that which other creditors can to mitigate or improve their situation. This is in spite of having had the longer relationship with the debtor and sometimes collectively a greater debt than most other creditors involved in the insolvency proceedings.

The terms of most secured loans provide for the reporting of debtor financial condition and other measures that allow for the acceleration of loan repayments or renegotiation of loan agreements. Most secured loans have provisions that allow for the creditor to sell their loans, without debtor approval, as a means of mitigation. The purchasers of such debt (as do lenders who provide debtor in possession (DIP) financing) often have no interest in the affairs of the debtor or the plan of financial reorganization beyond the minimum term necessary to recover the loan they have made. Their relationship with the debtor is new and conditioned with the full knowledge of the debtor's financial condition, and certainly in the case of DIP financing, by incorporating as security any of the remaining unsecured assets of the debtor that they can obtain. These 'new' creditors often have no incentive or obligation to support the debtor's plan of arrangement or compromise, or any obligation to act other than in their own interest. In some CCAA proceedings that interest is to sell the assets as piecemeal businesses, rather than to restructure the business as a whole, in essence, leaving the DB retiree creditors with less light at the end of a longer and smaller tunnel.

5.4.2 Good Faith Obligations

Finally:

i) In order to 'maintain a level playing field' all parties should be mandated to act in 'Good Faith' and be held accountable;

ii) The Pionairs are in agreement with the Insolvency Institute of Canada and Dr. Sarra in the treatment of EFC's, particularly credit default swaps and other financial instruments which negatively impact the value of the debtor's assets; and

iii) In some recent cases the length of time over which the proceedings transpired and the professional fees charged did have impact on the assets of the debtor, and reduced the assets available to honour pension obligations.

5.5 Enhancing Transparency

5.5.1 Assuring Debtor Transparency

Without doubt the requirement for the debtor company to maintain a creditors list throughout the CCAA process is necessary, along with all creditor transactions, in order to maintain an adequate level of transparency during the CCAA process.

It is understood that there is a cost associated with this obligation, but it is imperative that all stakeholders have visibility on the debtor/creditor proceedings to ensure that disadvantaged

creditors (retirees/pensioners) are in a position to act should they believe that they may be negatively affected by actions being taken by the debtor company.

It is particularly important for retirees and pensioners to be given an opportunity to intervene in a timely manner rather than learning of actions only after they have been transacted and the possibility of intervening is rendered much more difficult if not impossible. This real time visibility of transactions will help to ensure retiree and pensioners' rights are protected throughout the CCAA process.

5.5.2 Role of the Monitor

The monitor's reports and involvement in the CCAA proceedings are heavily relied upon by the Court and of necessity, by stakeholders. Accordingly, the Sarra Report states that "Integrity and independence are the hallmarks of a good monitor".

We believe that independence is compromised by the appointment process and practice.

Monitors are professionals with professional standards, and a legislated standard of conduct is set out in section 25 of the CCAA. The duty of the monitor under the CCAA is to the Court and not to the debtor company or any other stakeholder. The Court appoints the monitor, and the Superintendent of Bankruptcy has the legislated responsibility of monitoring the conduct of the monitor.

However, the Court appoints the monitor on the recommendation of the debtor company. The monitor exercises a great deal of judgment during the CCAA process in its reports to the Court, giving its views on the "financial condition of the debtor, the efficacy and fairness of sales processes, or DIP financing arrangements and their impartial opinion on a host of other issues". Professional standards and a legislated standard of conduct notwithstanding, we believe that there is a reasonable apprehension of bias towards the debtor company in the appointment process and in reports to the Court by the monitor. This apprehension is exacerbated if the monitor has served as the debtor company's financial advisor. Telling the creditors "trust me" as a professional is not sufficient to remove the apprehension...

Moreover, realistically, there is no effective check and balance on the monitor. We do not believe that the office of the Superintendent of Bankruptcy has the resources to effectively monitor the conduct of the monitor, except in egregious circumstances. As far as stakeholders other than the company are concerned, the monitor is required to provide notice of judicial hearings and copies of the periodic monitor's reports. No stakeholders, again, with the exception of the debtor company, has the opportunity to see or comment upon those reports before they are filed with the Court. The monitor has and feels no responsibility to the stakeholders. There is no obligation to consult with them during the CCAA process although the monitor will in practice consult with major creditors whose support is necessary for the plan of arrangement. Pension plan claimants, along with unsecured creditors generally, do not have the power to block a plan of arrangement; their consultations with the monitor during the CCAA process are by grace and favour. It is thus the more important that the monitor act and be perceived to act without bias.

It is our view that:

i) The appointment of the monitor should be made by the Superintendent of Bankruptcy in accordance with a list of approved monitors;

ii) All stakeholders, many of whom will have their own financial advisors, should have an opportunity to comment on the monitor's reports before they are filed with the court; and

iii) If the existing appointment process is continued, there should be clear and repeated disclosure in all reports filed with the court, of the appointment process, and any prior relationship the monitor has had with the debtor company.

5.5.3 Pre-filing Reports

In general, we believe that the concept of an independent pre-filing report is helpful to the court. However, there is a serious issue of independence, certainly of the perception of independence. The person that subsequently becomes the monitor prepares the report. This is of course reasonable and cost efficient. However, at this stage, the monitor has not been appointed by the court and has no statutory duty to the court. The debtor company is the client of that person, who takes instructions from the debtor company, and who is paid by the debtor company.

Again we suggest that the Superintendent make the appointment of the monitor, and the appointment by the court, with the attendant standard of conduct, be made retroactive to the preparation of the pre-filing report.

5.5.4 Conflict of Interest

As noted above, for reasons of bias or the reasonable apprehension of bias, we do not believe that a person who has a significant relationship with the debtor company should be eligible to act as monitor, whatever the gains in efficiency. We submit that "financial advisor or other person with whom the debtor company has a significant relationship" be added to the list of those ineligible to act as monitor in subparagraph 11.7 (2) (a) (iii) of the CCAA.

Again, if such a person is permitted to act as monitor, the nature of the relationship should be disclosed clearly in all documents filed with the court.

Further, it should be clear in the legislation, as it is not presently, that such a person is not released from personal liability in respect of the role of such person prior to the appointment as monitor.

5.5.5 CBCA Proceedings

CBCA proceedings do not involve a compromise of indebtedness, although the indebtedness can be rearranged within a family of companies. Arrangements under the CBCA are less restrictive than proceedings under the CCAA, and there is no independent oversight or indeed notice to stakeholders with the exception of shareholders. The applicant company must be solvent, but as commentators have noted, this requirement can easily be avoided with the use of a shell company with subsidiaries as the applicant.

From the perspective of pension plan members, it is important that the pension plan not be stranded, with the effect that the employer that is obligated to fund the plan either on an ongoing or wind up basis does not have the financial ability to do so. Pension plan members will not be given notice of the restructuring, and although they will receive notice of a change in the employer/sponsor, will have no opportunity to raise an effective objection to the restructuring.

We agree with commentators that the requirement in the CBCA that the applicant be solvent should apply to the operating company.

We further submit that the protections in the CCAA be extended to creditors, and that legislation in the CBCA or under pension legislation provides that an arrangement under the CBCA cannot deprive pension plan members of the protections that they had in terms of funding and benefit security prior to the arrangement.

5.6 Asset Sales

5.6.1 Transparency in Asset Sale/Liquidation

The current CCAA act provides for court approval of the sale of assets by the debtor outside the course of ordinary business. As well notice is made to the secured creditors prior to the sale. This provides some good oversight of the process for secured creditors.

An improvement to the process would be the incorporation of a materiality test to ensure the interests of secured as well as unsecured creditors are considered for all asset sales including ordinary business activities. The results of the test should be available to all stakeholders prior to the sale taking place. This inclusion would likely mitigate some of the less preferred practices resulting from credit bidding

5.6.2 Liquidating CCAA Proceedings

A debtor company that cannot restructure may instead liquidate its assets. Under these circumstances, the court will be under pressure to approve the sale. Since there is no restructuring, the approval of creditors, including secured and unsecured creditors, is not required, although the court will consider whether there was such consultation. The issue is the distribution of the proceeds of the sale.

The pension plan will be wound up. It has been judicially held that the deemed trust in federal pension legislation does not apply to the proceeds of sale in those circumstances, notwithstanding what appears to be clear language in the PBSA. The pension plan members have limited protection for normal costs and employee contributions withheld but not paid, and therefore become unsecured creditors, not only for the unfunded liability of the pension plan, but also for the special payments that were due but not made.

We submit again that the deemed trust in pension legislation, be explicitly recognized and given force and effect in insolvency legislation. As a matter of public policy, the PBSA and the BIA and CCAA should be reconciled to give the intended effect to pension legislation.

6.0 ENHANCING EQUITY.

6.1 Identifying Retiree Equity

The Court, the Superintendent of Financial Institutions, and other creditors generally view a DB plan deficiency as a collective amount owed. Even where the claim of the retirees under the BIA is aggregated, the DB plan retirees still do not have adequate means to apply due diligence to the administrator's process since few if any would have the information or the ability to calculate and verify their claims in a timely period to meet the requirements of the BIA proceeding. An actuary is required, and the actuary most likely to get it right is already in the employ of the debtor. And that actuary is conflicted by their large DB plans and debtors, a huge task to get the deficit calculation right, let alone portion it out to the individual DB plan retirees, active members, and other beneficiaries. Hiring an independent actuary, even to review the work of the debtor's actuary is, in those circumstances, a very expensive undertaking. If as is usual in solvency proceedings where time is of the essence and money to pay actuaries isn't easy for DB retirees to find, DB plan retiree creditors again find themselves disadvantaged.

6.2 Maintaining Earned Equity

A further constraint faced by DB retirees once their plan has been terminated is that it is very unlikely that the annuity purchased for each retiree will be provide the same income as the fully funded retirement benefit. In fact, as we have seen from recent experience, the result is often a significant loss (estimated minimally at 35%+/-). That loss cannot, under the terms of the PBSA, be mitigated by the DB retiree by, for instance, seeking a lump sum settlement rather than an annuity to invest as a particular circumstance might warrant.

6.3 Employee Claims and Rights

6.3.1 Recognition

Recognition by the government that in the event of bankruptcy and receivership unpaid wages and vacation pay have a super priority and normal cost pension contributions due but not paid have a priority over secured creditors has taken some time to be legislated. While these recognitions of employee outstanding debts are marginal to the overall debts of full pension liabilities, they do confirm the government's acceptance, if not the Courts, that employees and retirees have rights in CCAA/BIA proceedings.

6.3.2 Rights

There are numerous reasons for the government to recognize the full claims of retirees and pensioners. Retirees who are members of DB plans have completed their lifetimes of employment. They have done so on the understanding that in their retirement years their income would be made up, in substantial part, by the pensions that had been promised and committed to them throughout their working years. Their pensions are partial compensation for the work that they have already rendered to their employer, the other part being the wages/salary they received during their working life. They have contributed to the benefit of the nation by paying taxes on their incomes over their lifetime and in retirement on their pensions. In all instances, employees have understood that part of the compensation earned for their work will be realized in the future, when they have retired from the workforce.

6.3.3 Regulations

Retirees are looking to government to put in place rules that will give assurance that the pensions that had been promised and committed to them will be delivered. In other words, they look to government to do what it can to secure for them, the most vulnerable of all creditors, the pension amounts that have already been committed, contracted and promised to them. These commitments have been the cornerstone of their financial planning for the later years of their lives.

6.3.4 Creditor Rights

Bankruptcy proceedings are about distributing the assets of the bankrupt to its creditors, where there are insufficient assets to cover all amounts owed to the creditors. All creditors deserve to be paid what they are owed. Pensioners deserve to be paid the pensions they were promised; employees deserve to be paid for all the unpaid work that they have supplied; suppliers deserve to be paid for the goods and services they have provided; lenders deserve to be reimbursed as contracted.

But all creditors cannot be made happy; some will be hurt. It is the terms of the BIA that determine the distribution but not the fairness and extent of pain felt among the creditors. A balance must be sought among the interests of the creditors. The existing schemes of priority and distributions under the CCA and the BIA do not achieve that balance of fairness.

6.3.5 Creditor Concerns

Because in many CCAA/BIA proceedings there are many types and varieties of creditors we have attempted to recognize and respond to some of the issues they have raised.

Would the requirement to fully fund pension solvency deficit affect the ability of a plan sponsor to finance itself?

Any company has a finite borrowing capacity based on its risk profile. As companies get closer to their borrowing limit, the incremental lenders require more onerous terms and conditions, including higher costs for them to provide the funding. This new funding increases the risk for existing lenders, in our case the retirees. The commitment to fund the solvency deficit is not new. It was established when the defined benefit plan was established. The amount to be funded is determined by the application of a formula every year but the commitment to fund in most cases pre-exists current lenders (we were here first).

Would a higher ranking of the requirement to fully fund the pension solvency deficit deter lenders?

Lenders fund a company on the basis they will get their money returned and receive an appropriate interest rate based on a basic interest rate plus a rate based on the individual companies risk profile. They make loan loss provisions knowing that in their loan portfolio not everyone will fully pay them back. It is in their business model, it is priced in and their business continues. They recover. However retirees cannot recover when the solvency deficit is not fully funded.

Corporate bond holders would be hurt, including many pensioners.

Provided everyone has the knowledge and information to make reasoned judgments, it is misleading to imply that intelligent bond holders would be hurt since they would make their risk judgments based on their comfort with risk. It has yet to be proved that retirement fund organizations managing assets on behalf of pensioners would participate in high risk endeavors particularly as they would also be exposing themselves to dereliction of fiduciary responsibilities.

Quantifying the solvency deficiency is a time-consuming and complicated business that could delay restructuring proceedings and make them more costly.

Experience to date confirms that dissolution of companies in BIA require 12 months or longer. The impact of special payments shortfall as a preferred unsecured creditor is only one of many issues to be resolved and is considered to have little or no effect on timing when the BIA is managed effectively and efficiently.

Sponsors in restructuring proceedings would have an incentive to wind-up their DB plans.

In most instances, winding up a DB plan preserves assets and provides that the security allocation is fair and just. It would produce significantly better results for retirees and their pensions as opposed to long drawn out negotiations in which the retirees lose assets and the administrator and others are paid from the pension plan. It would provide a just allocation between entities that have worked and contributed to their pensions and those individuals seeking high risk gain through shareholder/hedge fund/bond acquisitions post filing without having committed any labour.

Higher priority ranking for pensioners would create an unfair reallocation of value from other creditors to pension plan beneficiaries

The existing BIA legislation, as demonstrated previously has created a grossly unfair reallocation of value from the amounts due to pension plans whose members had no awareness of their risk exposure to allocation to creditors who knew and accepted the risks inherent in being shareholders/bond holders.

In addition to the problematic implications for access to and cost of credit, changing priority status builds uncertainty into the business environment, and uncertainty should be avoided wherever possible.

Legislation is designed and required to insure certainty and fairness. As currently stated, the BIA induces uncertainty in millions of Canadian citizens who, when their sponsor enters BIA, have only an uncertain future to look forward to. Business, on the other hand, is by its nature structured to be dynamic and flexible with the inherent ability to recover from financial events – retirees are not. It is a myth that uncertainty should be avoided in business, as uncertainty is the nature of business, and it is only in risk taking ventures (shareholders, bond holders, hedge funds) that uncertainty is an issue, simply because they prefer to have certainty of financial profits.

7.0 SUMMARY AND RECOMMENDATIONS FOR EMPLOYEE CLAIMS

7.1 Representation

Who it is that represents all the retiree creditors of a DB plan, be they former union or non-union members of the plan, and how that representative is selected in a timely fashion needs to be clearly and transparently established before CCAA or BIA proceedings can be considered to be inclusive of the rights of those retiree creditors, or for those proceedings to proceed in the timely, efficient, and impartial manner needed to meet the objectives of insolvency law

This may well be a matter for the Superintendent of Financial Institutions to resolve within the context of the PBSA, but unless it is resolved it cannot be considered that insolvency law is properly serving this often very large group of creditors representing a very large amount of debt. Leaving it to the Court to clarify that representation in the midst of proceedings is both an imposition on the Court and puts at risk the fairness and timeliness of the whole proceeding.

The Pionairs, in seeking this clarification regarding retiree creditor representation before a CCAA or BIA proceeding begins are simply highlighting the inherent conflict in unions and others in trying to represent active unionized employees, who have very different concerns, leverage, and mitigation opportunities in a CCAA/BIA proceeding as compared to retired members of the same plan – whether or not the retirees were formerly unionized or not unionized.

Large, long established, formally organized, inclusive retiree organizations such as the Pionairs should be given precedence in representing all the retirees of a DB plan. Where the interests of retirees and active members of a DB plan coincide, the Pionairs and other such organizations have a demonstrated record of working co-operatively with the union or other representatives of the active members. While no specific process for resolving this issue is put forward, it may be that Industry Canada could ask the Superintendent of Financial Institutions to prequalify, on a regular basis, organizations such as the Pionairs, where they exist, to represent the interests of the DB plan retirees, and for Industry Canada to incorporate, in the revised CCAA and BIA, the recognition of the retiree representations qualified by the Superintendent of Financial Institutions. There is little doubt that this will add greatly to the fairness and timeliness of CCAA and BIA proceedings when it comes to DB plan retirees.

7.2 Funding of Representation

How should the representation above be funded, to cover the cost of legal and actuarial expertise needed to meet the objectives of insolvency law?

While the Pionairs and other similar large retiree organizations may have sufficient funds to initially fund lawyers, actuaries and financial advisors in a CCAA or BIA proceeding, it is unlikely that they can sustain those costs in any but much abbreviated proceedings. Finding experts in both pension and insolvency law can be difficult even when a large segment of the legal community is not conflicted from acting for the retirees. There is a need for some certainty that the retirees of a DB plan will have a source of funds to pay for these experts. There needs to

be a charge in CCAA/BIA proceedings that the plan sponsor will provide reasonable payments for cost incurred.

7.3 Classification of Representation

Representation of Defined Benefit plan creditor claims arising from CCAA and BIA proceedings in either aggregate or in individual member terms requires addressing in this revision.

If CCAA/BIA proceedings are to be timely and efficient there seems no other way to proceed than with aggregate claims not only for registered plan members but also for supplemental plan members. Individual supplemental DB plan members have not the knowledge or resources to calculate and put forward their individual claim. The initial aggregate claims need to be prepared by the DB plan administrator's actuary, subject to review and agreement by any actuary hired by the representative of the plan members included in the aggregate claims.

7.4 Employee Claim Priority

Should the aggregate creditor claim of DB plan retirees, in the interests of equity and the recognition of existing creditor rights, be given priority over the claims of ordinary unsecured creditors? This change would prioritize and focus the debtor more strongly on pension deficit funding whenever opportunities arose.

Even this priority improvement gives very little recognition to the virtually nonexistent means by which DB plan retirees can mitigate or improve their situation when faced with plan deficits that cannot be made up following a CCAA/BIA proceeding. The ordinary creditor has many such means.

This proposed change/improvement does not impact in any way the ability of a debtor to raise interim debtor-in-possession financing nor does it displace in any way the claims of secured or preferential lenders. Lenders fund a company on the basis they will get their money back and receive an appropriate return based on demand for such debt, prevailing interest rates, and the risk profile of the debtor.

In addition and as previously detailed, the lenders make loan loss provisions knowing that not everyone will fully repay their loan. It is in their business model, it is priced in, and their life goes on. Lenders recover. Retirees cannot recover when the solvency deficit is not fully funded. It is important as we have said to recognize that the requirement of the law for the company to fully fund the solvency deficit (PBSA) generally arose a long time ago as part of employee compensation arrangement between the debtor and the now retired employee. It is that arrangement that established a defined benefit pension plan in accordance with the provisions of the PBSA and that requires full funding of the pension plan.

It is very seldom that there are not lenders willing and able to condition their loans based on prevailing conditions including where retiree creditors are already ranked.

DB plan creditor claims of non-retirees are essentially not addressed in this recommendation because they have other and often more significant means to address and mitigate their situation, and different representation to the retirees.

7.5 Other Pension Priorities

Should deficits arising from RCAs (Retirement Compensation Arrangements) and from SERPs (Supplementary Employee Retirement Plans) that are supplementary to the retirees registered defined benefit pension plan be given the same prioritization as a deficit arising from the registered plan to the extent that such SERPs are funded plans?

The *Income Tax Act* limits the amount of pension contribution that the debtor can claim as a deduction from income but the debtor is free to increase the defined benefits of its pension plans to its employees and retirees by creating RCAs and SERPs that are funded from after tax funds. These 'supplementary' plans place the retiree in exactly the same position with respect to mitigation as do the registered plan.

7.5.1 Satisfaction of Employee/Retiree Claims

Should application of funds received from sale of assets be made available to satisfy employee/retiree claims?

Both employees and retirees have provided the services for which they should be remunerated. Assets accumulated by the debtor are not necessarily distinguishable, except for identified assets provided as security to secured creditors. The homogeneous assets should be made available to employees/retirees to the same extent as preferred creditors.

Should there be employee bonuses in restructuring other than as retention awards as defined in the consultation paper?

Generally individuals who are required to design the success of restructuring are also the individuals who created/allowed events to transpire which resulted in CCAA proceedings. Awarding bonuses to individuals responsible for restructuring, re-evaluating distribution or re-evaluating debtor assets appears to be contradictory to the requirement to satisfy the claims of creditors, including pension funds.

Concurrently, these individuals continue to receive their salaries while others are unemployed. Since they have the opportunity of remaining as employees during the CCAA proceedings, the requirement to also pay bonus rewards would seem excessive. In many instances there are qualified outside experts whose talents may be more appropriate to maintain company operations.

7.5.2 Interest Claims

Should interest claims continue to be paid during CCAA proceedings and allowed to accumulate for payment at the end of the proceeding?"

The payment of interest during insolvency proceedings may result in payment to other than the asset holder at the time of commencement of CCAA proceedings and thus allow unwarranted distribution of debtor assets to individuals utilizing the CCAA proceedings for profit. We would concur with the stakeholder suggestion that interest stop accruing or being paid post filing under all circumstances.

8.0 ADMINISTRATION ISSUES

8.1 A Unified Insolvency Law

Should legislation be developed to bring about consistency between different Acts administered by different government departments?

While there are different opportunities available to debtors under the insolvency acts administered by the Department of Industry, there are also significant incongruities between the PBSA administered by Finance Canada and BIA/CCAA administered by Industry Canada. These inconsistencies have resulted in confusion and contradictory court judgments often negatively impacting retirees/pensioners. The opportunity should be taken by Industry Canada to rectify these confusing, inconsistent anomalies in government legislation, and facilitate the understanding of how an employer or proceeding can move from one regime to another.

PART II

While the Pionairs have attempted to respond to the issues raised in the Consultation Paper we believe there are a number of issues which are relevant to the 5 years statutory review and their consideration might be of some assistance.

9.0 RECENT COURT JUDGMENTS WHICH MAY HAVE BENEFITED FROM REVISIONS TO THE CCAA/BIA

9.1 Extent of Pension Protection

Under the CCAA and BIA, protection as to pension plans is given only to unremitted member contributions and normal costs. In the BIA this protection is given by a charge against the assets of the bankrupt employer in priority to most other secured creditors. In the CCAA, the protection is given by the requirement that a plan of arrangement not be approved until provision is made for the unremitted member contributions and normal costs. There is no protection in the CCAA or the BIA for due but unpaid special payments.

The law is well settled in respect of the relative priority of secured creditors and deemed trusts that are in favour of the Crown in BIA and CCAA proceedings. The Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)* in 2010 made it clear that unless the deemed trusts are recognized explicitly in the BIA and the CCAA they will not be recognized, notwithstanding explicit language in the legislation that creates the deemed trusts. Transition from the CCAA to the BIA must be harmonious, and the position of secured creditors in both statutes consistent.

9.2 Effect of Deemed Trust

There has been, however, uncertainty, as to the protection of pension deemed trusts in CCAA proceedings, particularly those created under the federal PBSA. That uncertainty has to a large extent been resolved against the interests of plan members.

In *Indalex*, decided in 2013, which dealt with deemed trusts under the Ontario PBA, the Supreme Court of Canada held that the CCAA court-ordered priority for the DIP lenders, which had the

same effect as a legislative provision, superseded the provincial statutory deemed trust because of the paramountcy of federal legislation. That case dealt with DIP financing and not ordinary secured creditors, who had already been paid out.

The recent decision in *Aveos Holding Company*, a decision by the Quebec Superior Court in November of 2013, in CCAA proceedings, which involved liquidation, dealt with the deemed trust for special payments due but unpaid under the federal PBSA. The Court held that the deemed trust created under the federal PBSA was subordinate in CCAA proceedings to secured creditors with a security interest that was created and perfected before the deemed trust arose in proceedings. Both the PBSA and the CCAA are federal legislation; timing, not paramountcy, was the issue.

The Quebec Superior Court, in *White Birch*, again after the 2012 Ontario Court of Appeal decision in *Indalex* (but before the SCC decision) denied amortization payments (past service contributions) to the pension plans in question during the CCAA process. The deemed trust under the Quebec SPPA was ineffective as it was not a real trust. Payment of those amounts would frustrate the restructuring of the company, which was the purpose of the CCAA proceedings.

Timminco, also a decision of the same Quebec Superior Court but by a different judge, also in CCAA, but considering the Quebec *Supplemental Pension Plans Act* ("SPPA") held that Section 49 of the SPPA created a trust for special payments over the assets of the employer, and that the combined effect of Sections 49 and 264 gave priority to the pension claims over secured creditors.

A clearer treatment, and preferably a recognition of statutory deemed trusts would have avoided much of the foregoing litigation.

10.0 SUGGESTED REVISIONS TO THE BIA AND CCAA AND THEIR EFFECT ON PENSIONERS

10.1 Special Payments

Special payments, both going concern and solvency deficiency, are subject to a deemed trust under the PBSA, but are not given secured status under the BIA (see section 81.5 of the BIA) nor special status under a plan of arrangement under the CCAA (see section 6(6) of the CCAA). Inasmuch as the Courts have judged the deemed trust to be ineffective in BIA and CCAA events we would suggest revisions to BIA and the CCAA which would have the effect of:

(a) Giving special payments accrued to the date of the bankruptcy or receivership under the BIA secured creditor status, ranking with normal costs, unremitted member contributions, and employer DC contributions.

(b) Giving special payments accrued to CCAA commencement protected status, ranking with normal costs, unremitted member contributions, and employer DB contributions.

(c) Giving the unfunded liability of the plan priority status ranking with normal costs or at least preferred creditor status under the BIA ranking before unsecured

creditors, either at the end of the list of preferred creditors or inserted after the pension related claims, where the applicable pension legislation provides for full funding on plan termination.

10.2. The BIA and CCAA also need to cover plans governed by other than the PBSA.

11.0 RELEVANT ISSUES FROM OTHER JURISDICTION.

11.1 Issues Considered

Over nearly a decade, a number of studies have been made by well-known individuals in the discipline of pension security in insolvency both domestically and internationally (Appendix 1).

In general the major focus appeared to be on 1) the treatment of employee wages and unpaid wages in insolvency,2) the pension systems which existed in various nations; 3) the survival of these pension systems in an insolvency and 4) the alternatives available in the event of failure of the pension system.

However little consideration has been given to the effects of underfunded pension systems and insolvency of the plan sponsor. As an illustration a short analysis was applied to the Report "International Treatment of Pension and Wage Claims in Company Insolvencies-Paul M. Secunda September 11 2013(see Schedule 1).

Schedule 1

COMMENTS

RE

PAUL M. SECUNDA'S

ANALYSIS OF WAGE AND PENSION TREATMENT

BY OECD COUNTRIES WHEN SPONSORS ARE

IN

INSOLVENCY PROCEDURES

11.2 Summary

The author provides a detailed and fair review but relies heavily on wage treatment and omits the facts following Insolvency Court proceedings, and the manner and method Courts use in marginalizing the impact of solvency on pension recipients. Further, the conclusions are somewhat at variance to those of Dr. Janis Sarra in the "Report of the Public Meeting on the Canadian Commercial Insolvency Law System", July 2012. The conclusion that "Canada's current treatment of pension benefit claims in insolvency proceedings is well within the mainstream of how most of the OECD countries treat similar claims on insolvency" can be misleading.

11.3 Analysis of Report

The following details apply to the analysis contained in Tables 1, 2, 3, 4 and 5 of the report.

TABLE 1

The table lists Canada as a Category 3 (Employer operated) when Canada has 3 pillars of retirement support: 1) Statutory, Government administered CPP/QPP; 2) Government funded plans OAS/GIS); and 3) Employer Plans and Individual Savings Plans – RRSP, RRIF. Canada is more than likely a Category 2 Nation.

TABLE 2

While it may be said that Canada has "limited bankruptcy priority and some guarantee, the specifics are that the bankruptcy priority for wages is capped at $2,000 Cdn., which barely provides sums within the poverty range and there is none for Pensions. The Guarantee for Pensions is also marginal as it applies only to one Province (Ontario) or a small portion of 38% of the population and the sum is not a full guarantee but a top up to a maximum of $1000 Cdn. per month. There are no guarantees in the other 9 Provinces or at a Federal Government level.

It can only be concluded that in comparison Country Model 2 (Robust/Limited) OECD nations, Canada does not rank and marginally qualifies as a Country Model 3.

TABLE 3

The following comments are specific to each Treatment identified in the Analysis as it relates to Canada. I) Insolvency Pensions, II) Insolvency Wages, III) Guarantee Pensions, IV) Guarantee Wages/Subrogates.

Pension Insolvency: Canadian pension legislation requires that contributions due but not paid have a priority. To date, many Canadian Insolvency Court proceedings have succeeded in marginalizing this priority. In particular, the recent case of AVEOS, a federally registered pension plan where the court found that the secured creditors had greater priority because the debts were acquired prior to the company entering CCAA. In other instances, Courts have ruled the priority invalid because the debtor company's pension plan was provincially registered and the rule of paramountcy prevailed and federal BIA/CCAA legislation has no pension priority requirement.

One can only conclude that any priority pensions may have in federal legislation is mostly ~~i~~neffective.

Insolvency Wages: There are four statutes applicable: 1) the *Wage Earner Protection Act*; 2) the *Wind Up and Restructuring Act* (essentially for financial institutions); 3) the *Bankruptcy and Insolvency Act*; and 4) the *Companies' Creditors Arrangement Act*, none of which at the onset are calibrated to each other. At the highest level, the WEPP provides up to $3646(2013) for wages and vacations earned but not paid. This sum, for an average Canadian in which the Federal Government attributed a Yearly Maximum Pensionable Earnings ("YMPE") is difficult to qualify as effective; even when the debtor and the courts agree to award the amount legislated.

One can conclude there is federal and provincial legislation which defines a poverty level payment of unpaid wages. However, there are many instances when it was not paid at all or if so after many months of protracted litigation. In relation to other OECD nations, the effectiveness of Canadian legislation is difficult to qualify as a benefit.

Guarantee Pensions: There is no pension guarantee for non-government pensions at the national and federal level in Canada. There is a level at which debtors escape their legitimate pension contract and promise to their employees. The sponsor contracts and promises their employees as part of the remuneration agreement to pay a defined/negotiated amount on retirement of the employee. It is this contract/promise which, in Canada, is continuously abrogated due to conflicts of legislation, paramountcy or other statutory elements available to the courts.

One can conclude that compared to other OECD Nations, Canada is delinquent in ensuring that retirees/pensioners obtain their retirement pensions in accordance with contracts and promises committed to by their employers and pension sponsors.

Guarantee Wages: In relation to other nations, the Report includes not only amounts of for wages due but not paid, but also includes any additional amounts required by legislation if the individual remains unemployed or terminated. In Canada, however, adherence to these payments is at the jurisdiction of the Courts since the WEPP is different legislation to the BIA and is at some variance when the debtor company is insolvent

One can conclude with specific reference to the BIA/CCAA that payments for weeks of unemployment remain at the judgment of the Insolvency Court and may not be collectable.

Subrogate: Many wage and pension claims are subrogated to guarantee funds, such as the PBGC, or insurance companies. Other wage and pension claims have such low creditor priority that they are ineffective.

TABLE 4

There is a need to effectively define the reference type in Insolvency for Pension and Wage Claims, particularly as currently exists in Canada for Wages, Pension Outstanding Contributions, and Pension Unfunded Pension Liability. They are:

Wages:The effectivity and amounts defined in legislation are inconsequential in altering the fact that the sums are insufficient to permit an individual from rising above the poverty level. In many instances, even these minor sums are strongly litigated over extensive periods resulting in little actual benefit to Canada's unemployed/retired citizens.

Pensions – Outstanding contributions: It is difficult to agree with the author's contention that such contributions are accorded super-priority status in view of the many court rulings making this suspect. Recent rulings from provincial Superior courts (AVEOS, Quebec) (Indalex – Supreme Court of Canada) confirm Canada has insufficient legislation to adequately provide for the enforcement of contracted/promised pension agreements or the federal will to provide fair, equitable and effective treatment to insolvent company retirees. The ultimate result of these conditions is at best that outstanding payments owed by a debtor in right of pensions are treated as fully unsecured.

Pension – Unfunded Pension Liability: This is the only preference type in which Canada, as a nation, is in concert with OECD Nations; namely, that this preference type is fully unsecured. It is a treatment by which Canada needs to assert its basic mission of treating its citizens fairly. In this treatment, due to existing legislation, pensioners (whose pension is often their only livelihood), are subordinated to shareholders, junk bond holders, hedge funds, etc. without having the funds, knowledge or ability to contest manifestly unfair treatment by insolvency proceedings due to lack of non-biased legislation.

It can only be concluded that Canada's fundamental philosophy of caring for its seniors and elderly is severely undermined by lack of adequate, fair and unbiased legislation and the consequent inadequacy of the federal system to render citizen' livelihoods secure.

TABLE 5

Consideration needs to be given to the Nature and Effectiveness of Pension and Wage Guarantee Schemes.

Pension Guarantee Scheme: It is critical to differentiate any Pension Guarantee Schemes by their application within a nation. Guarantee schemes exist in UK, US and Japan. They do not generally exist in Canada. To group Canada with these nations because one Province out of ten has a minor pension guarantee plan is inconsequential, particularly as it is not applicable to more than 38% of the population. There are no other guarantee schemes applicable in Canada and hence the pensioners in insolvency proceedings are fully unsecured and without any legislative security. It should be noted that the Pension Benefits Guarantee Fund in Ontario is severely limited in the amount of pension it guarantees, does not apply to some large plans, is badly underfunded in any event and the guarantees historically have become a burden on the taxpayer, many whom do not have workplace pensions.

Wage Guarantee Scheme: It is acknowledged that Canada has some minor wage protection; however, its effectiveness in terms of ability to receive the amounts defined by legislation, as well as the amounts defined is certainly inadequate to effectively assist beneficiaries in avoiding poverty.

It is reasonable to conclude that Canada's efforts to provide security for employees disadvantaged in an insolvency is marginal and, in many instances nonexistent, due to varying circumstances and ineffective legislation.

There is therefore an urgent need to bring about fair and equal treatment for the nation's citizens and particularly its seniors and retirees, who have no recourse to rectify their lack of funding for sustenance while legislation provides that such sums are awarded to corporations, risk taking shareholders, etc.

12.0 CONCLUSIONS

12.1 Canadian Pension System

Canada has a 3 pillar system to provide funding for its citizens in their retirement years.

12.1.1: Canada Pension Plan (CPP) is administered by the government and is intended to provide basic funding equivalent to 25% of the nation's Yearly Maximum Pensionable Earnings;

12.1.2: Old Age Security Pension (OAS), Government Income Supplement (GIS) funded by the government, and applicable up to a defined cap in income; and

12.1.3: Pensions sponsored by 1)corporations in favour of their employees/retirees as part of the employees employment contract and based on governance set by the employer, 2)individual Income Saving (investments), Plans,3) Registered Retirement Savings Plans which permit Canadians to set aside, free of income tax, a maximum annual amount. This amount must be redeemed as a taxable amount, as a percentage of total income beginning at age 71 and allocated until age 95, so that the total amount is exhausted at that age.

The first and second pillars are well entrenched and successful in providing a basic survival amount to all Canadian citizens. When the CPP is insufficient it is augmented by the OAS and GIS.

The third pillar depends on companies to make reasonable contributions to a pension plan and in many cases the contributions by employees of a percentage of their annual earnings so that a pension fund can be sufficiently funded to provide the sums defined in the pension promise and commitment. These amounts are uninsured and are provided in accordance with federal and provincial legislation (PBSA/PBA), which are fully undermined by paramountcy of Federal Bankruptcy and Insolvency Legislation.

12.2 Pension Status

In a BIA environment, the amounts of pension due, which form part of the pensioner’s contract during his employment years, become unsecured debt and have a status below (after) all other of the bankrupt company's debtors. The BIA legislation currently in place was developed in concert with corporations, legal professionals, actuaries, and government officials, none of whom had retiree or pensioner status. While most other elements and national groups also participated in legislation development over time, including taxation personnel, cities and communities, fishermen, unemployed, there is little or no evidence of a request to or participation from actual retiree groups or individuals.

12.3 Restriction due to legislation

The counsel from all of the legislation recommendation participants, CCE/CIA/CAPSA/CPM, provided for distribution of assets to all other creditors, banks, lenders, hedge funds (protected by credit swaps) bond owners and even common shareholders. Retirees and pensioners are not recognized adequately as creditors even though countless thousands of citizens laboured for countless years throughout their working years on condition that as part of their wage they would receive a deferred payment as retirement income. Indeed, all of the current legislation recommender groups refuse to recognize the inequality of this legislation and advocate that it is "good public policy" to disenfranchise millions of elderly Canadian citizens (Mercer).

The legislation provides no ability for the various courts of the land, Supreme Court of Canada, appeals courts of Ontario, British Columbia Supreme Court, and Courts on both federal and provincial jurisdictions from fairly rendering judgments in cases in the BIA having an impact on pension agreements, contracts, commitments, and promises, even though in many instances, the pensioners contributed directly to these pension plans.

The contradictory nature of the legislation, in particular the requirements of the PBSA vs. the priority contradictions in the BIA and CCAA also result in extended legal confrontations, which are not in aid of the pensions, but create increasingly burdensome cost on the estates of the applicant and significant economic loss to all parties.

The current legislation is in contradiction to the Government's intention in the PBSA revisions 2009 and PBSR of 2010 to increase the pension security for senior citizens. In order to achieve: social justice, good public policy and honour, revisions to the BIA are required. The revisions would allow courts, the ultimate arbiters, in Canada, the ability to judge in any BIA case the extent to which retired senior citizen pensions should be allocated the portions of their pension funds held as assets by their sponsor in CCAA/ BIA.

APPENDIX 1

OECD, Working Paper on Insurance & Private Pension Benefit Protection #6, Fiona Stuart (2007)

Employee and Pension Claims During Company Insolvency. Dr. Janis Sara, June 2008

Bankruptcy and Employee Claims – Nortel Case. Diane Urquhart (2010)

IRPP Study, Funding Rules, Insolvency Law and Pension Insurance. Ronald B. Davis (March 2011)

The Future of DB. Malcolm Hamilton, Mercers (March 2011)

Examining the Insolvency Toolkit, Report of Public Meetings on the Canadian Commercial Insolvency Law Systems. Dr. Janis Sara (July 2012)

International Treatment of Pension and Wage Claims in Company Insolvency Procedures. Paul M. Secunda, (September 2013)