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• FREEDOM 55 LOST? THE RECENT TREATMENT OF PENSIONS IN INSOLVENCY PROCEEDINGS •

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“Whether lawyer, politician or executive, the American who knows what’s good for his career seeks an institutional rather than an individual identity. He becomes the man from NBC or IBM. The institutional imprint furnishes him with pension, meaning, proofs of existence. A man without a company name is a man without a country.”

—Lewis H. Lapham

“A corporation’s responsibility is to the shareholders, not its retirees and employees. Companies are doing everything they can to get rid of pension plans and they will succeed.”—Ben Stein

“People don’t place their trust in government or company pension plans; they have to be self-reliant.”—Scott Cook

I. INTRODUCTION

The “Great Recession” of 2008/2009, as it is sometimes referred to in the press, saw some of North America’s most venerable corporations come under court protection. Many of these institutions had attracted talent and grown on promises of generous, government-regulated pensions for their employees. Faced with insolvency, however, many of these employers came under significant pressure to do everything that they could to compromise those promises, along with others. It is not surprising, therefore, particularly as a large segment of the North American population approaches retirement age that, over the course of the Great Recession, the treatment of the pension obligations of insolvent corporations became a material issue for both the courts and for governments. So far, experience suggests that pension obligations may not be immune from the impact of insolvency in the context of our current legislative framework, but that governments

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are willing to take some steps to ensure that confidence in Canada's corporate pension plans is not lost, although the extent to which governments will go to buttress the legislative framework pertaining to pensions remains unclear. Our aim, through this paper, is to review recent developments in pension law relevant to Ontarians, in the context of the restructuring of insolvent corporations. We attempt to do this in three steps. In the first part of our paper, we provide an introduction to some of the basic principles governing the administration of pension plans in Ontario. The second part of our paper reviews a series of special topics that pertain to the administration of pensions in the context of insolvency and that have been the subject of recent jurisprudence and/or legislative and/or regulatory amendments. Finally, in the third part of our paper, we review various initiatives taken by governments in an attempt to blunt the impact of insolvency on pension beneficiaries, including various proposed amendments to insolvency laws.

II. ALMOST EVERYTHING YOU WANTED TO KNOW ABOUT THE PENSIONS BENEFITS ACT

Pensions provided to persons employed in Ontario are governed by the *Pension Benefits Act*¹ [*PBA*] and related regulations. The *PBA* was very recently amended by Bill 236, which received royal assent on May 18, 2010.² Some of the provisions of Bill 236 have already been proclaimed into force, others will come to force on specified dates in the future.³

The nature and purpose of the *PBA* was described as follows by the Supreme Court of Canada, quoting, with approval, the Court of Appeal for Ontario:

The purpose of the Act was well stated in *Gen-Corp Canada Inc. v. Ontario (Superintendent of Pensions)* (1998), 158 D.L.R. (4th) 497 (Ont. C.A.), at p. 503:

[T]he *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and "evinces a special solicitude for employees affected by plant closures". ...

On the one hand, the protection of the rights of vulnerable groups is a central and long-standing function of the courts. The protectionist aim of the legislation is especially evident in s. 70(6), which seeks to preserve the equal treatment and benefits between situations of partial wind-up and full wind-up. On the other hand, pension standards legislation is a complex administrative scheme, which seeks to strike a delicate balance between the interests of employers and employees, while advancing the public interest in a thriving private pension system.⁴

Among other things, the *PBA* and its related regulations provide for:

- the key participants in the administration of the pension plan;
- the dissemination of information relevant to a pension plan;
- the contributions that are required to be made to the pension plan;
- the investment of the funds of the pension plan;
- the transfer of assets out of the pension plan;
- the ability (or, rather, inability) of a beneficiary of a pension plan to commute or surrender their entitlements and successor liability;
- the winding up of the pension plan;
- security for payments due to the pension plan;
- the liability of persons that contravene the *PBA* and, where the person is a corporation, of its directors, officers, officials and agents; and
- the continuation of the Pension Benefit Guarantee Fund (the “PBGF”).

Some of these provisions are described, in a summary way, below. We have included commentary about some of the changes to the *PBA* that will be coming into force over the next two years, as a result of an overhaul of the *PBA* pursuant to Bill 236.

1. THE KEY PLAYERS IN A PENSION PLAN

The “administrator” of a registered pension plan⁵ is usually the corporate employer. The administrator is required to *ensure* that the plan is administered in

accordance with the *PBA*. In the private sector the administrator is often referred to as the plan sponsor. It is possible for several corporations to participate in a single pension plan, but only one corporation can act as the administrator. The quickest way to find out who is the administrator according to the records of the Ontario pension regulator (Financial Services Commission of Ontario, or “FSCO”) is to go the regulator’s website that provides key information about Ontario-registered plans. This website discloses whether an employer has fallen behind in its regulatory filings, who holds the assets of the plan, and how many members are in the plan.

The individual members of a pension plan, and their beneficiaries, are the beneficial owners of the assets of the plan. The legal owner of the assets of the pension plan is the fund-holder, or custodian. The fund-holder could be a trust company, an insurance company, or a committee of individuals. The fund-holder is the agent of the administrator of the plan.

If a plan sponsor has fallen behind in making required contributions to its pension plan, the fund-holder may be liable for failing to notify the pension regulator of this. The *PBA* requires the administrator of the plan to give the custodian of the plan an annual summary of the required pension contributions due for the year.⁶ The custodian must notify the regulator that a contribution was not paid when due, within 60 days after the day on which the contribution became due.⁷

Individuals entitled to pension plan benefits are entitled to establish an “advisory committee” to monitor and make recommendations to the administrator, and to promote awareness of the pension plan.⁸ These “advisory committees” have no real power. Bill 236 expands the rights of advisory committees to obtain information about the pension plan, but does not grant them any rights to administer the plan.

The Superintendent of Financial Service is authorized to issue orders under the *PBA* to require *any person* to take or refrain from taking any action in respect of a pension plan or pension fund.⁹ His or her first step will be to issue a Notice of Proposal to Make and Order (referred to as an “NOP”). He or she will serve it on the administrator of the plan and “on any other person to whom the Superintendent proposes to direct the order”.¹⁰ Persons on whom the NOP is served may require, as of right, a hearing before the Financial Services Tribunal, in respect of

the proposed order. The Tribunal will conduct a hearing and direct the Superintendent as to what he or she should or should not do. A decision of the Tribunal is subject to appeal to the Divisional Court.¹¹

Bill 236 gives the Superintendent authority he or she does not currently have, to approve of compromises under the *Bankruptcy and Insolvency Act* [BIA] and *Companies' Creditors Arrangement Act* [CCAA] with respect to pension funding contribution schedules.¹²

2. SUCCESSOR EMPLOYER LIABILITY

Labour relations legislation can impose collective agreement obligations on purchasers of businesses who fall within the successor employer rules.¹³ The successor employer provisions of Ontario pension legislation¹⁴ are far less serious.

Ontario pension legislation says that where there is a sale of business, and the transferring employees join the registered pension plan of the new (successor) employer, there are two key repercussions. First, the predecessor employer is not required to terminate its pension plan; it can maintain its plan in a suspended mode, until the point in time when the successor employer terminates its successor plan.¹⁵ Second, the successor employer must recognize the transferring employees' length of service in their prior employer's pension plan, solely for the purpose of determining whether they have satisfied the necessary waiting period to join the successor's plan, and met the vesting requirements. Pension legislation does not require a successor employer to establish a successor pension plan, nor does it require a successor employer to assume a pension plan of the prior employer. It is possible that such requirements arise with respect to unionized employees under the successor employer provisions of labour relations legislation.

3. WINDING-UP

The administrator of a pension plan can voluntarily choose to terminate it, or can be ordered by the Superintendent to terminate it.¹⁶ In either case, the procedures are the same. For a plan that provides defined benefits, the administrator is required to cause an actuarial valuation report (known as a "wind-up report") to be filed with the Superintendent for approval.¹⁷ The wind-up report will describe

whether there is a surplus or deficit as at the effective date of the wind-up, and will propose the amounts and method of distribution of assets from the pension fund. If there is a deficit, the employer will be entitled to make annual contributions to the pension fund over a period no longer than five years following the effective date of the wind-up, to pay it off.

It can take a year or longer, following the effective date of a wind-up, for the wind-up report to be filed with and approved by the regulator. It is generally considered to be prudent for the administrator to promptly change the investments of the pension fund, to reflect the fact that it is being terminated and no longer has a long-term horizon for investments. This is often referred to as "immunization of the portfolio".

What happens to the members of the wound-up pension plan? Their benefits cannot be paid out until the Superintendent has approved of the actuary's wind-up report. Once the wind-up report has been approved, the individuals are provided with a variety of transfer options. If they do not select a transfer option, their entitlement is "annuitized": the administrator transfers the obligation to pay the pension to an insurance company.

If the employer is unable or unwilling to carry out the wind-up of the pension plan it sponsors, the Superintendent may act as, or appoint, a new administrator to carry out the wind-up.

4. SECURITY PROVISIONS

The *PBA* establishes a statutory deemed trust with respect to:

- employee contributions to the pension plan which have been withheld from the employees' pay but not yet remitted to the pension fund;¹⁸
- employer contributions due and not paid into the pension fund;¹⁹ and
- employer contributions that have accrued up to the date of the termination (wind-up) of the pension plan, but have not yet become due.²⁰

The administrator of the pension plan has a lien and charge on the assets of the employer in an amount equal to these amounts that are deemed to be held in trust.²¹

5. DIRECTORS & OFFICERS — OFFENCES

It is rare, but possible, for directors and officers to be charged with the offence of breaching the PBA. In essence, they could be prosecuted and fined if they caused or acquiesced in a breach of the PBA, or failed to take “all reasonable care in the circumstances to prevent the corporation” from committing an offence.²² The failure to make contributions to a pension plan would be an offence. Errors in computing benefits, and imprudent investments, would also be offences.

This possibility of prosecution does not apply solely to directors and officers of the corporations who sponsor pension plans; it also applies to directors and officers of the investment management firms, actuarial consulting firms and other corporations who play a role in assisting plan sponsors with the administration of pension plans.

6. THE PENSION BENEFITS GUARANTEE FUND

The PBGF is an insurance fund that was established in 1980 by the Ontario government. Rules regarding the PBGF are set out entirely in the *PBA*.²³ It is unique in Canada. It is funded by mandatory contributions made by those employers who sponsor defined benefit pension plans. It is also funded on a periodic, *voluntary* basis, by the Ontario government.

The Superintendent of Financial Services administers the PBGF. He is authorized to declare, on a plan-by-plan basis, whether or not the PBGF will be applied to a particular pension plan with a deficit. The administrator of a plan that is going through a wind-up may apply for such a declaration after filing the wind-up report with the Superintendent.

If it is applied, the PBGF will not fully fund the benefits; there are certain types of benefits that are not subject to the so-called “guarantee”. More importantly, there is a \$1,000 cap on the amount of coverage that the PBGF will apply, to each individual.

Where money is paid out of the PBGF, the Superintendent will have a lien and charge on the assets of the employer associated with the pension plan to which the claims relate.²⁴

III. SPECIAL TOPICS IN PENSION ADMINISTRATION IN INSOLVENCY

We have seen, in recent years, material developments in the law pertaining to the treatment of pen-

sions in the context of insolvency and restructuring proceedings, in terms of both federal legislation and jurisprudence. We review these developments below, starting with the treatment of pension claims in insolvency proceedings, followed by the treatment of contributions accruing due during the restructuring process, and the treatment of payments out of the pension fund during the restructuring process. We next review recent amendments to the *CCAA* and *BIA* affecting the treatment of stays of proceedings, focusing on regulatory proceedings in the course of the restructuring process. Finally, we review the treatment of issues relating to third party liability; specifically, the directors and officers liability, and the liability of monitors and receivers.

1. THE TREATMENT OF PENSION CLAIMS IN INSOLVENCY AND RESTRUCTURING PROCEEDINGS

The persistent debate over the effect of the statutory liens and trusts created by the *PBA* in the context of insolvency proceedings continues. Those arguing against the effectiveness of the *PBA* provisions will take comfort in the recent decision of the Ontario Superior Court of Justice in the case of *Re Indalex*²⁵ (although leave to appeal that decision has recently been granted), and to various recent amendments to the *BIA* and the *CCAA* that grant security only for a very narrow subset of pension claims. Those on the other side of the argument will, conversely, note that the recent amendments to the *BIA* and *CCAA* serve to reinforce the argument that those statutes are not intended to affect legislative deemed trusts other than where those trusts are in favour of the Crown.

In *Re Indalex* the court considered a claim, made in the context of a *CCAA* proceeding by certain former executives of the debtor and by a union representing certain of the debtor’s employees, that part of the proceeds arising from the sale of the debtor’s assets were subject to a trust for the beneficiaries of the pension plans, which were in the process of being wound-up or subject to being wound-up. The executives and the union argued that the effect of ss. 57(3), (4) and 75 of the *PBA* was to deem the debtor to hold in trust for the beneficiaries of the pension plans, an amount equal to the employer contributions accrued to the date of the wind-up but not yet due under the plans or *PBA* regulations — effectively, the wind-up liability of the pension plans. Ultimately, the court dismissed the executive and union

claims on the basis that s. 57(4) of the *PBA* only applies to “an employer who is required to pay contributions to the pension fund” and the debtor in that case was current in its payment obligations.

[49] In this case I have concluded there is no conflict between the federal and provincial legislation. I find that as of the date of closing and transfer of assets there were no amounts that were “due” or “accruing due” on July 20, 2010. On that date, *Indalex* was not required under the *PBA* or the Regulations thereunder to pay any amount into the Plan. There was an annual payment that would have become payable as at December 31, 2009 but for the stay provided for in the Initial Order under the *CCAA*.

[50] Since as of July 20, 2009, there was no amount due or payable, no deemed trust arose in respect of the remaining deficiency arising as at the date of wind-up.²⁶

Leave to appeal from that decision was sought and has recently been granted. At this time, the appeal has yet to be perfected and a date has yet to be set for its hearing.

As a result of the basis upon which the *Indalex* case was decided, the court was not called upon to consider whether the relevant deemed trust provisions of the *PBA* were in conflict with the scheme of priorities established by the *BIA*. The court did refer, in passing, to two earlier cases suggesting that this was the case; namely, *Toronto Dominion Bank v. Usarco Ltd.*²⁷ and *Re Ivaco Inc.*²⁸ In each of these cases the court held that the deemed trust provisions created by the *BIA* were ineffective in the circumstances of the case. In *Ivaco*, the Court of Appeal for Ontario held that the scheme of priorities established by the *BIA* is relevant in the course of *CCAA* proceedings, notwithstanding that the debtor company is not and many never be bankrupt.²⁹

A thorough consideration of the effectiveness of the deemed trust provisions created by provincial legislation is beyond the scope of this paper. However, we do believe that the following two observations are appropriate in light of recent amendments to the *BIA* and *CCAA*.

*COMPREHENSIVE SCHEME OF DISTRIBUTION
ENHANCED BY BIA SS. 81.5 AND 81.6*

First, we think that it is appropriate to observe that the recent addition of ss. 81.5 and 81.6 to the *BIA*

tends to reinforce the argument that the *BIA* creates a comprehensive scheme of distribution of the debtor’s assets that leaves no room for the operation of deemed trusts that would benefit pension claimants.

The leading case standing for the proposition that property of a bankrupt that is subject to a deemed trust created by provincial legislation is nonetheless divisible amongst the bankrupt’s creditors is found in the majority decision of the Supreme Court of Canada in the case of *British Columbia v. Henfrey Samson Belair Ltd.*³⁰ In that case, the majority of the Supreme Court of Canada held:

[15] To interpret s. 47(a) as applying not only to trusts as defined by the general law, but to statutory trusts created by the provinces lacking the common law attributes of trusts, would be to permit the provinces to create their own priorities under the *Bankruptcy Act* and to invite a differential scheme of distribution on bankruptcy from province to province.

[16] Practical policy considerations also recommended this interpretation of the *Bankruptcy Act*. The difficulties of extending s. 47(a) to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt’s assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all the other property. Could the Crown’s general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the *Bankruptcy Act* of setting up a clear and orderly scheme for the distribution of the bankrupt’s assets.

[17] In summary, I am of the view that s. 47(a) should be confined to trusts arising under general principles of law, while s. 107(1)(j) should be confined to claims such as tax claims not established by general law but secured “by Her Majesty’s personal preference” through legislation. This conclusion, in

my opinion, is supported by the wording of the sections in question, by the jurisprudence of this court and by the policy considerations to which I have alluded.³¹

Sections 81.5 and 81.6 of the *BIA* tend to reinforce the reasoning in the *Henfrey Samson Belair* case. As we describe immediately below, these provisions provide security for certain pension claims and not others. One might argue that in doing so, they tend to suggest that Parliament has considered the extent of the priority that pension claims should be afforded in circumstances of insolvency and provided for that priority as part of a comprehensive scheme of distribution of the property of the debtor divisible among its creditors.

Sections 81.5 and 81.6 of the *BIA* were proclaimed into force in July 2008. The former provision applies in the context of a bankruptcy and the latter applies in the context of a receivership. In each instance, security is provided for the following amounts that, in respect of a prescribed pension plan, are unpaid on the date of bankruptcy or immediately before the first day on which there was a receiver, as the case may be:

- (a) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund;
- (b) an amount equal to the normal cost, within the meaning of s. 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, or, if the pension plan in question is not federally regulated, the amount that would be the normal cost within the meaning of s. 2.1 of the *Pension Benefits Standard Regulations, 1985* if the plan were federally regulated; and,
- (c) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of s. 2(1) of the *Pension Benefits Standards Act, 1985*, or, if the pension plan in question is not federally regulated, the amount that would be required to be paid under a defined contribution provision, within the meaning of s. 2(1) of the *Pension Benefits Standards Act, 1985*, if the plan were federally regulated.

The pension plans prescribed by the regulations to the *BIA* are described in s. 59.1 of the *General Rules* to the *BIA*. They consist of all pension plans regulated by an Act of Parliament or of the legislature of a province. In Ontario, the *PBA* applies, by operation of s. 3 of the *PBA* and the definition of pension plan found in s. 1 of the *PBA*, to every plan that is organized and administered to provide pensions for persons employed in Ontario, other than those that are specifically exempted within the definition of "pension plan" found in the *PBA*.

The security that is provided by ss. 81.5 and 81.6 of the *BIA* is on all of the assets of the bankrupt or of any person any of whose property is in the possession or under the control of a receiver, as the case may be. The term "assets" is not defined in the *BIA* and the term has yet to be judicially considered within the context of ss. 81.5 and 81.6. The *BIA* does define "current assets" to mean "cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets".³² It seems logical to conclude, on the basis of this definition that a reference to "assets" generally must include "current assets" and something more.

It is not clear, however, how "assets" relates to either: (a) the all encompassing definition of "property", which is defined in the *BIA* to mean "any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property";³³ or, (b) the concept of 'property divisible among creditors' which is defined in s. 67(1) of the *BIA*, and excludes trust property and other assets accepted to be essential to an individual debtor's livelihood.

LINGERING DOUBT OVER "THE PROPERTY OF A BANKRUPT DIVISIBLE AMONG HIS/HER CREDITORS"

Our second observation is that, notwithstanding the foregoing, our review of the cases that rely on the *Henfrey Samson Belair* decision suggests that the impact of s. 67(2), dealing with deemed trust provisions in federal and provincial legislation has not been considered at length, although the cases that do consider the proposition have concluded that it does

not change the general proposition that property subject to a “deemed trust” created by provincial legislation remains divisible among the creditors of a bankrupt.

Section 67(2) of the *BIA* provides as follows:

Deemed trusts

(2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.

It is notable that while s. 67(2) expressly invalidates legislation deeming property to be held in trust for the Crown, by omission it leaves intact legislation deeming property to be held in trust for persons other than the Crown, such as *PBA*, s. 57(4).

In the recent round of legislative amendments, s. 67(2) was left intact and, what is more, a similar provision was introduced to the *CCAA*, providing as follows:

37.(1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

Certainly, it would have been easy enough to expand the scope of the foregoing provisions to federal and provincial legislation deeming property to be held in trust for any person. Parliament did not do this, notwithstanding successive rounds of amendments. Applying various principles of statutory interpretation, the *BIA* and *CCAA* could be taken to endorse such deemed trusts.³⁴

The uncertainty created by s. 67(2) of the *BIA* and s. 37(1) of the *CCAA* is especially acute in light of the reasons of the Supreme Court of Canada in *Husky Oil Operations Ltd. v. Minister of National Revenue*.³⁵ In that case, although the majority of the Supreme Court of Canada accepted the proposition that “provinces cannot create priorities between creditors or change the scheme of distribution on bankruptcy under s. 136(1) of the *Bankruptcy Act*”,³⁶ they also went out of their way to emphasize that

clear conflict between federal and provincial law is required before paramountcy is triggered:

I underline that the “effect” which Roman and Sweatman speak of is the effect on bankruptcy priorities (Roman and Sweatman, at pp. 81-105). Consequently, clear conflict, that is an inconsistent or mutually exclusive result, which in this case entails a reordering of federal priorities, is necessary in order to declare a provincial law to be inapplicable in bankruptcy.³⁷

Indeed, this qualification is expressed in s. 72(1) of the *BIA*, which provides, in part, that “The Provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act ...”.

In the case of *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*,³⁸ the Court of Appeal for Ontario reversed the decision of the court at first instance which would have given effect to a deemed trust in favour of carriers. In doing so, the Court of Appeal rejected the argument that the law as stated in the *Henfrey Samson Belair* case was changed by the introduction of s. 67(2). However, the court’s reasoning is, with respect, very brief, and the issue has yet to be considered by the Supreme Court of Canada.

Furthermore, to the extent that the Supreme Court of Canada’s decision in the *Henfrey Samson Belair* case turned on policy concerns regarding the pot pourri of conflicting claims and other logistical challenges that arise when one tries to resolve priority issues created by deemed trust arrangements, it should not be lost on anyone that, notwithstanding the concerns expressed by the Supreme Court of Canada, the federal government subsequently went ahead and expressly enshrined the priority of such arrangements with respect to certain employee source deductions.³⁹ Although the inefficiencies and administrative challenges resulting from that legislative action are apparent to all those who practice in the area, those challenges, in and of themselves, are hardly insurmountable and cannot be said to have crippled credit markets.

Finally, we note that there is legislation pending before Parliament that could affect the treatment of pension claims. In particular, we refer to: (a) Bill C-9, the federal government’s omnibus budget bill, which contains amendments to the federal *Pension*

Benefits Standards Act, 1985;⁴⁰ and, (b) Bill C-501, a private member's Bill which would amend the *BIA* and *CCAA* to accord priority to pension plan deficits. This legislation is discussed in greater detail, below, in Part IV of this paper.

2. THE TREATMENT OF PENSION CONTRIBUTIONS ACCRUING DUE MID-RESTRUCTURING

Quite apart from the treatment of pension claims at the end of the restructuring proceedings is the matter of how one deals with pension contributions accruing due mid-restructuring. From the debtor's perspective the treatment of these payment obligations can have a material impact on cash-flow. Conversely, the beneficiaries of the pension plan are typically not interested in running the risk of incurring a larger claim at the end of the restructuring process. Thus far, the decided cases suggest that the treatment of the obligation will depend upon type of contribution at issue. Accordingly, we start, below, by describing the two basic kinds of pension contributions, and then we proceed to describe recent developments in the law in respect of each of them.

THE TYPES OF CONTRIBUTIONS

The *PBA* requires an employer to make a variety of different contributions to a registered pension plan, for the purpose of covering the cost of the plan that is not covered by employee contributions.⁴¹ There are two categories of contributions that an employer may be required to make.

First, there are the payments that are referred to in the *PBA* as "current service contributions". In federal legislation these are referred to as "normal cost payments". We use these two terms interchangeably going forward in this paper. If the pension plan is a defined contribution plan (*i.e.*, a plan in which the employer's pension obligation is limited to making fixed one-time contributions to the plan), the amount of the current service contribution will be established by the pension plan documents and any applicable collective agreement. If the pension plan is a defined benefit plan (*i.e.*, a plan that promises to pay the beneficiaries of the plan a specific monthly payment in retirement), the amount of the current service contribution is determined by actuarial estimation having regard to a variety of variables, such as the benefit to be provided, workforce demographics and

the anticipated growth of the pension plan's assets over time.

Second, if the pension plan is a defined benefit plan then the employer may be required to make additional contributions to the pension plan; in the *PBA* regulations these are referred to as "special payments". The obligation to make special payments arises where the original plan experience or investment performance differed from that assumed by the actuaries in order to provide the benefit promised to employees and the plan develops either a going concern unfunded liability or a solvency deficiency.

A going concern unfunded liability arises when it appears, based on a periodic actuarial assessment of the plan, that the plan is insufficiently funded to pay the benefits that are or will become due, assuming that the pension plan continues indefinitely. Once a going concern unfunded liability is identified, the employer is required to make monthly special payments to fund the deficiency within 15 years.⁴²

A solvency deficiency arises when it appears, based upon a periodic actuarial assessment of the plan, that the plan's current assets are insufficient to meet the obligations that would be due if the employer immediately discontinued its business and the plan were wound-up. In the case of a solvency deficiency, the employer is required to make special payments to fix the deficiency within a five to ten year time frame.⁴³

THE TREATMENT OF SPECIAL PAYMENTS

In a paper co-written last year by one of the authors,⁴⁴ it was observed that a trend had developed not to make special payments in the course of *CCAA* proceedings and that this trend had been sanctioned by the decision of the Ontario Superior Court of Justice in the case of *Re Collins & Aikman Automotive Canada Inc.*⁴⁵ In that case, the court dismissed the union's motion for, among other things, an order striking out the provision of the *CCAA* initial order declaring that the debtor was "not required" to make special payments to its pension plan and concluded that the debtor's obligation to make special payments could be stayed. The fact that the obligation to provide a pension formed part of a collective agreement was found not to matter. Although leave to appeal the *Collins & Aikman* decision had been granted to one of the interested unions, the dispute between the union, the employer and the auto-manufacturer that had funded the restructuring, was eventually settled

and, in accordance with the terms of the settlement, the appeal was abandoned.

Since that time, the decision in *Collins & Aikman* has been followed in at least two other cases, including the decision of the Quebec Superior Court in *Re AbitibiBowater Inc.*⁴⁶ and another decision of the Ontario Superior Court of Justice in *Re Fraser Papers*.⁴⁷

The *AbitibiBowater* case is particularly interesting in that, just a few days earlier in the same case,⁴⁸ the court declared that the steps taken by the debtor company to unilaterally suspend certain early retirement benefits were null and void. The court concluded that the impugned provisions effectively altered pension entitlements arising under a collective agreement, and, relying on earlier decisions of the Quebec Court of Appeal, held that it was not open to the court to do this. The court drew a distinction, however, between recognizing the validity of a right, and granting immediate enforcement of the right, pointing out that the latter would fall to be determined in a later hearing.

A few days later, the court held that special payments to a pension plan were in the nature of pre-filing obligations and that proceedings to enforce the payment of such obligations could (and in the circumstances of that case should) be stayed.⁴⁹

We do not propose to undertake, in this paper, a normative assessment of the propositions for which *Collins & Aikman*, *AbitibiBowater* and *Fraser Papers* stand. However, the issues that might bear further consideration on appeal include the following:⁵⁰

(a) In circumstances where the employer is required to provide the pension plan by the terms of a collective agreement, whether obligations arising under a collective agreement are subject to compromise at all. In this regard, recent authorities that the reader will want to consider include, among other things: the decision of the Superior Court of Justice and the Court of Appeal for Ontario in the case of *Nortel Networks Corp.*;⁵¹ the recent amendments to the *BIA* and *CCAA* providing that collective agreements are not subject to compromise;⁵² and, the decision of the Supreme Court of Canada holding that the right to bargain collectively is protected by s. 11(b) of the *Charter of Rights and Freedoms*, and any decisions interpreting that case.⁵³

(b) If obligations arising under collective agreements are subject to compromise, whether the court

has the jurisdiction to characterize the nature of the obligation to make special payments relative to the collective agreement, as the court purported to do in *Collins & Aikman* and *AbitibiBowater*, or whether that exercise is within the exclusive jurisdiction of a labour arbitrator and/or the Labour Relations Board. In this regard, the reader will want to consider, among other things, the impact of the limitations on the jurisdiction of the court imposed by the recent proclamation into force of amendments to the *BIA* and *CCAA* dealing with regulatory proceedings.⁵⁴ These amendments are described further below.

(c) Where courts do have jurisdiction to characterize the obligation to make special payments, whether they have done so correctly. In this regard, we note that additional support for the proposition that special payments need not be made in the course of restructuring, may be found in the recent proclamation into force of certain amendments to the *BIA* and the *CCAA*. These new provisions require that the court, prior to sanctioning a plan of compromise or arrangement or approving a sale of the debtor's assets, be satisfied that all normal cost payments accruing due in the course of the restructuring process will be paid.⁵⁵ Applying the usual principles of statutory interpretation referred to above,⁵⁶ one might argue that the specific requirement that normal cost payments be made implies that special payments need not be made over the course of the restructuring process. Against this is the argument that the approach taken by the courts to date is simply too technical and loses sight of the bigger picture; namely, the fact that an employer's obligation is to provide a future pension. One might argue that while the total monthly payment that must be made to the pension plan takes into account the inevitable inaccuracy of historical actuarial predictions, the employer's monthly payment obligation is legally fresh consideration provided for current service by current employees.

THE TREATMENT OF NORMAL COST PAYMENTS

In contrast to special payments, the authors are not aware of any cases in which a court has authorized an employer to cease making normal cost payments over the course of the restructuring process. A number of amendments to the *BIA* and *CCAA*, already referred to above, suggest that the employer should continue to make normal cost payments. We have already seen that, pursuant to ss. 81.5 and 81.6

of the *BIA*, normal cost payments, if not made, will form a first charge on the assets of the debtor in the event of bankruptcy or receivership. Also of note are the provisions that require that before sanctioning a plan of compromise or arrangement or approving a sale of assets, a court satisfy itself that any normal cost payments to the pension plan that are unpaid can and will be paid.

Notwithstanding the foregoing, it is not obvious why the reasoning adopted in *Collins & Aikman* and *AbitibiBowater*, if correct, could not apply equally to normal cost payments. In those cases, it was held that the enforcement of the obligation to make special payments could be stayed notwithstanding s. 11.3 of the *CCAA* (as it then was)⁵⁷ because it is not clear how the special payments relate to the value of the current services being provided by the active employees of the debtor. Arguably, however, normal cost payments suffer from the same problem. The normal cost payments may be completely disproportionate to the value of the services being provided by active employees.

At the same time, however, it would seem that if a union or employees bargained for and the employer agreed to provide deferred compensation in the form of a defined benefit pension, and the employer ceases to make the payments deemed by experts, in accordance with valid laws, to be necessary for the purpose of providing that benefit, then the employer is breaching its agreement with its union or its employees by paying something less than the full price for the services that it is receiving. This reasoning suggests that the relevant question is not whether the payment at issue is a normal cost payment or a special payment, but whether the employer is entitled to unilaterally breach or perhaps even repudiate its agreement to provide a pension.

3 TRANSFERS OUT OF THE PENSION PLAN DURING THE RESTRUCTURING

An issue that does not garner much public attention but which can be material if markets are volatile over the course of a long-term liquidating restructuring and which may be a source of potential directors and officers liability is the ratio at which departing employees are entitled to take funds out of the pension plan.

The *PBA* contemplates that when the employment of an employee who is entitled to a deferred pension

is terminated, they may elect to require the administrator of the pension plan to pay the commuted value of the pension plan into certain alternate pension structures such as a locked-in personal RRSP.⁵⁸ The common parlance among pension practitioners is “elect portability”. Where the last actuarial assessment of the plan indicates that the plan is underfunded, the employee who elects to transfer his or her entitlement out of the plan is only entitled to receive the proportion of the commuted value payment equal to the funded level of the pension plan, with the balance to be paid to them over time, as the pension plan is brought back to a funded status. Until recently, the *PBA* and the related regulations were not clear as to what should happen in circumstances where the funded level of the plan had dropped markedly since the time of the last actuarial assessment, as was the case in the ongoing Nortel restructuring.

In *Nortel Networks Corp.*,⁵⁹ the last actuarial assessment of the pension plans in question indicated that they were funded to the level of approximately 85-86%. However, due to recently-experienced marked declines in financial markets and low interest rates, more recent estimates suggested that the plans were actually funded only to the level of approximately 69%. Given the real risk that the pension plans in question would have to be wound-up in the near future, making commuted value payments in favour of departing employees at the standard rate of 85% risked over-paying departing employees to the prejudice of one or all of continuing employees of Nortel Networks, other beneficiaries of insolvent Ontario pension funds who were relying on the Pension Benefit Guarantee Fund to make their pensions whole, and Ontario taxpayers.

In these circumstances, and in the absence of a clear mechanism in the *PBA* and related regulations for the reduction of the amount payable to departing employees, the Ontario Superior Court of Justice exercised a jurisdiction to order Nortel to apply a reduced transfer ratio of 69% to future requests for payments out of the plan. From a timing perspective, the court held that all persons who had already been sent letters of election from Nortel indicating that they were entitled to be paid at the higher 85% ratio would be paid at that higher ratio, but that going forward the lower ratio would apply.⁶⁰

Following the *Nortel* decision, the *PBA* regulations were amended to provide that if the transfer

ratio of a pension plan is less than one and the administrator of the plan knows or ought to know that events have taken place that may result in the reduction of the transfer ratio by ten per cent, the administrator shall not undertake a transfer of any part of the commuted value without the prior approval of the Superintendent of Financial Services for Ontario.⁶¹

4. STAY OF PROCEEDINGS

As mentioned above, the amendments to the *CCAA* and *BIA* recently proclaimed into force provide a new regime relating to the stay of regulatory proceedings while the restructuring effort is ongoing.⁶² Ultimately, at a high level, the court supervising a restructuring proceeding retains considerable discretion. However, the amendments do provide a basic framework for the exercise of that discretion.

The applicable provision of the *CCAA*, s. 11.1, provides as follows:

11.1(1) In this section, “regulatory body” means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body’s investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court’s opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the

court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

The relevant provisions of the *BIA* are substantially the same, except that they refer to the statutory stay of proceedings that applies where a proposal or notice of an intention to make a proposal have been filed.

At this time, we are not aware of any judicial consideration of these new provisions. It is typically not productive to speculate on how it may be interpreted or applied in the absence of a specific factual matrix. However, we are inclined to make the following three general observations:

- First, “regulatory body” appears to us to be very widely defined. It includes persons undertaking not only enforcement activities, but activities in furtherance of the administration of federal or provincial legislation. Currently, the prescribed regulatory bodies consist only of stock exchanges, the Investment Industry Regulatory Organization of Canada and the Mutual Fund Dealers Association of Canada. Other bodies that would almost certainly qualify include the Financial Services Commission of Ontario, the Superintendent of Financial Services, and the Ontario Labour Relations Board. A grievance arbitrator might also qualify inasmuch as the role of the arbitrator in interpreting the collective agreement and resolving labour disputes is fundamental to the proper operation of the *Labour Relations Act, 1995*.
- Second, although the stay of proceedings ordered by the court in connection with the restructuring does not apply to proceedings by the regulatory body, the regulator cannot enforce the making of a payment.
- Third, the court may make an exception to the exclusion if the court is persuaded of two things: (a) that a “viable” compromise or arrangement could not otherwise be made; and, (b) that it is not contrary to the public interest that the regulatory proceeding in issue be stayed. The use of the word “viable” is curious. It may suggest that, if the debtor wishes to subject the regulatory body to the stay, the

debtor may have to give the court some sense of what its restructuring plan will look like in order that the court may assess its viability. It will also be interesting to see how the courts interpret the “public interest” and what evidence will be tendered to assist the court in that interpretation. In addition to matters of health, safety and the environment, this provision would seem to call for a consideration of matters of public finance (such as the impact of a proceeding on the Pension Benefits Guarantee Fund (“PBGF”)) and societal values, such as the impact of the proceeding on collective bargaining.

5. DIRECTORS AND OFFICERS LIABILITY

Although the directors and officers liability provisions of the *PBA* have not changed, recent years have seen a number of developments in the form of case law affecting directors and officers liability under the *PBA*, as well as amendments to the *CCAA* affecting directors and officers liability.

Two cases are worth mentioning: *Morneau Sobeco Ltd. v. Aon Consulting Inc.*⁶³ and *Re Slater Steel Inc.*⁶⁴ Both of these cases relate to claims arising out of the administration of the Slater Stainless Corp. (“Slater”) pensions plans, and serve to emphasize the care that must be taken when attempting to structure a settlement of these types of claims to be sure that all interested persons are parties to the settlement agreement.

MORNEAU SOBECO LTD. V. AON CONSULTING INC.

Slater had sponsored and administered two underfunded pension plans (the “Slater Plans”). Norton provided actuarial services as an employee of Aon Consulting Inc. (“Aon”). Slater was granted protection under the *CCAA*. The *CCAA* Initial Order imposed a charge of up to \$17.5 million upon Slater property, to indemnify the directors and officers for claims which might be brought against them.

In the course of the *CCAA* proceedings, the Superintendent filed a director and officer claim (“FSCO Claim”) which identified numerous regulatory and compliance issues in relation to the administration of the Slater Plans. It was alleged that the directors and officers of Slater committed offences under the *PBA* because they “caused, authorised, permitted, acquiesced or participated in” the contraventions and

failed to take reasonable steps to prevent the contraventions. The FSCO claim sought a \$100,000 fine against the directors and officers and an order directing that they must pay \$18 million plus interest into the Plans.

In September 2004, the Superintendent of Financial Services appointed Morneau Sobeco Limited Partnership (“Morneau”) as administrator of the Plans.

In December 2004, the Settlement Order for the FSCO claim was signed requiring the receiver for Slater to pay \$100,000 to FSCO and ordering Slater to pay the lesser of \$18.3 million or the deficiencies in the Slater Plans. The judgment was unsecured and Slater had no funds to distribute to unsecured creditors.

The *CCAA* proceedings were unsuccessful and a Termination Order granted, which included a release from liability for directors and officers of Slater. Approximately 14 months after the termination of the *CCAA* proceedings, Morneau brought an action against Norton and Aon for \$20 million, the amount of under-funding, alleging that by overstating the value of the Slater Plans in the actuarial reports, Norton breached his duties to the Plans’ beneficiaries and allowed Slater to avoid making the required contributions prior to insolvency.

Aon and Norton defended the action against them on the basis, among other things, that Slater did not rely on their advice. In addition, Aon and Norton sought to institute third party proceedings against the individuals including directors, officers, and employees who served on Slater’s Audit Committee (the “Slater Personnel”). Specifically, Aon and Norton alleged negligence, breach of statutory and fiduciary duties, inducing or committing breaches of fiduciary duty, placing themselves in a conflict of interest and engaging in wilful misconduct. They claimed that the Slater Personnel employed a deliberate strategy to minimize contributions. This included instructing Norton to use an asset “smoothing” method which adjusted the value attributed to the plans assets without disclosing to Norton that Slater was nearing insolvency. Further, they alleged that Norton was instructed by the Slater Personnel to delay the proceedings with FSCO to avoid making payments to the Plans.

The Slater Personnel objected to the claims on the grounds that: (a) the third party claims did not disclose a proper cause of action; and (b) the Settlement and subsequent Termination Order released them

from all claims and liabilities. On a motion by the Slater Personnel to strike the third party claim, the court found in favour of the Slater Personnel. Aon and Norton appealed. The Court of Appeal found that the chain of reasoning used by the motion judge was fundamentally defective and granted the appeal. The following two conclusions of the Court of Appeal are noteworthy:

First, the Court of Appeal held that the court below erred in concluding that, if Aon and Norton's defence to the main action failed and Slater was found to have reasonably relied on the advice given by Aon and Norton, it followed that the directors and officers could not be liable for contribution. The Court of Appeal reasoned that "The success of the Morneau claim is not dependent on establishing that Slater reasonably relied on the reports. It is dependent on establishing that the allegedly negligent reports played a role in enabling Slater to avoid making the required payments". Essentially, the Court of Appeal confirmed that an actuary can be held to owe a duty not only to the pension plan administrator, but to the beneficiaries of the plan, and that in the event that an action is brought against the actuary, it is open to the actuary to seek contribution and indemnity from the plan administrator and from the administrator's directors and officers.

Second, as part of its analysis of the directors and officer's argument that they had been released from liability by the terms of the Termination Order, the Court of Appeal observed that this was not necessarily so because "the Termination Order protects the directors and officers from claims arising from their service as directors and officers", and in "the Proposed Third Party Claims, the Slater Personnel are not being sued in their capacity as directors and officers of Slater. Rather, the claims are made against them as individuals, in their capacity as agents and employees of Slater qua administrator".⁶⁵

The court went out of its way to point out that while it was prepared to accept this distinction for the purposes of the pleadings motion, its reasons should not be taken as determinative: "These comments are not intended to be determinative of this issue. They are offered only to explain why I do not view the Proposed Third Party Claims as necessarily within the scope of para. 15 of the Termination Order".⁶⁶

If the distinction drawn above eventually proves to be correct, then further consideration needs to be

given to the effect of s. 5.1(1) of the *CCAA*. That section provides as follows:

5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

(2) A provision for the compromise of claims against directors may not include claims that

- (a) relate to contractual rights of one or more creditors; or
- (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

(3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

(4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

In light of the reasoning in the *Aon Consulting* case, one might argue that the effect of s. 5.1(1) of the *CCAA* is to preclude, as part of a plan of compromise and arrangement, the release of claims against directors of a debtor where the directors are liable not in their capacity as directors of the debtor, but in their capacity as agents or representatives of the administrator of the pension plan.

RE SLATER STEEL INC.

In the aftermath of the Court of Appeal's decision in the *Aon Consulting* case, the directors of Slater moved before the court supervising Slater's *CCAA* restructuring proceedings for a declaration that the FSCO was obligated, by the terms of its Settlement with the directors, officers and employees, to withdraw the claim by Morneau or provide the directors

with an indemnity in respect of Aon's third party claim. The motion was dismissed.

The Settlement contained a release from any claim or proceeding against "any person or corporation relating to the facts or issues released herein in which a claim for contribution or indemnity could be made by the person or corporation against the Releasees or any of them". The order stated that the terms applied to the resolution of the FSCO claim but did not affect the rights of any person not a party to the Minutes. The Minutes of Settlement did not include Morneau as a party. The directors claim that they would not have executed the Minutes if they were aware that Morneau could bring a claim against third parties which might result in a claim that was not covered by the Minutes.

As noted above, Morneau was appointed as the wind-up administrator of the Slater Plans and sued Aon and Norton who commenced third party claims against the directors. The directors wrote to FSCO to determine whether they planned to indemnify the directors or withdraw the Morneau claim. FSCO responded explaining that the indemnification provision in the settlement was inapplicable because this proceeding had not been brought by FSCO or the Superintendent nor did they act as a representative of the plaintiff Morneau. Further, FSCO was not in a position to withdraw to proceeding.

Morneau submitted an application to FSCO for an interim allocation from the PBGF to the Plans. FSCO allocated close to \$80 million. Once the Superintendent authorized payment out of the Fund, he became subrogated to the rights of the administrator. If the claims against Aon, Norton and/or the third party directors, officers and employees were successful, then any amount recovered in respect of contributions due under the Slater Plans would be paid first to the PBGF, and any amount recovered in excess of the PBGF liability would be applied for the members' benefit.

The court dismissed the directors' motion for two reasons. First, the court reasoned that even though the Superintendent can step into the shoes of Morneau, the claim continues to belong to Morneau. As such, the only defences allowed are those which may be asserted against Morneau. A release from FSCO is no defence to a claim by Morneau.

Second, the court found that a genuine issue for trial existed as to whether or not FSCO had asserted control over the claim. The court observed that the

PBA allocates different roles to the Superintendent and to the administrator of the Plans. Section 71 allows the Superintendent to act as or appoint an administrator, it does not amount to FSCO exercising a representative capacity on behalf of Morneau. As well, the language of the Appointment Agreement confirmed the separate roles of the two entities. FSCO denied that it was exercising control over the litigation. However, there was evidence that suggested that FSCO was in control of the litigation, including correspondence in which it was stated that "FSCO is coordinating with Morneau in their action against the actuary". This issue could not be resolved on a motion.

RELEVANT LEGISLATIVE AMENDMENTS

A number of legislative amendments are worth noting in connection with the topic of directors and officers liability arising in connection with the administration of a pension plan.

First, we direct the reader's attention to s. 11.1 of the *CCAA* and s. 69.6 of the *BIA*, already discussed above. These sections exempt regulatory proceedings from the stay of proceedings imposed in restructuring proceedings. We expect that, at first instance, proceedings undertaken by FSCO to prosecute an offence under the *PBA* would qualify as a regulatory proceeding.

Next, we refer the reader to s. 11.51 of the *CCAA* and s. 64.1 of the *BIA*. Those provisions permit the court, on application by a debtor company and on notice to the secured creditors who are likely to be affected, "make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act".⁶⁷ The charge may rank in priority to secured claims,⁶⁸ but before providing the charge the court must be satisfied that the company could not obtain adequate indemnification insurance for the director or officer at a reasonable cost.⁶⁹ The only cases of which we are aware in which the court has been called upon to apply these provisions are the two *CCAA* restructuring proceedings in respect of *Canwest*,⁷⁰ and the decisions of the Quebec Superior Court in the cases of *Dessert & Passion Inc. (Faillite) c. Banque Nation-*

*ale du Canada*⁷¹ and *Industries Show Canada Inc.*⁷² In the *Canwest* cases, the court granted a charge in favour of directors and officers on the basis of the usual reasoning, having been satisfied that the directors and officers insurance then in place would expire shortly and could not be replaced. In the *Dessert & Passion* case, the court refused to grant the directors charge because the director had deposed that he intended to remain in office come what may, and because there was no evidence that insurance was not otherwise available. In the *Industries Show* case, referring to both *Canwest* and *Dessert & Passion*, the court refused to grant a director's charge on the basis that the inability to obtain insurance related principally to the fact that the director, who was also the majority shareholder, insisted on remaining in control of the company; as well, as majority shareholder, the director was otherwise motivated to maintain his office and there was no evidence that he would resign.

Finally, the reader should also be alert to the fact that the *CCAA* now contains a provision barring the release, through a plan of compromise or arrangement of claims that are not dischargeable upon bankruptcy, unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement.⁷³ This exemption includes, among other things, any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence.⁷⁴ We are not aware of any cases which consider whether a fine or an order for payment of an amount not paid to a pension plan, made pursuant to s. 110 of the *PBA*, falls within the scope of this exception. Also excluded is "any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others".⁷⁵ Claims of the kind levied in *Slater Steel*, for example, might fall within the scope of this provision.

6. RECEIVER'S AND MONITOR'S LIABILITY FOR PENSION PLAN OBLIGATIONS

At least since the decision in the case of *St. Marys Paper Inc.*⁷⁶ and, more recently, the appellate decisions in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*,⁷⁷ the liability of receivers and, to a lesser extent, *CCAA* monitors for pension obli-

gations has been a point of material interest to the profession. The amendments to the *BIA* and the *CCAA* recently proclaimed into force attempt to address this issue.

First, s. 14.06 of the *BIA* now provides, in part, as follows:

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

- (a) an interim receiver;
- (b) a receiver within the meaning of subsection 243(2); and
- (c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

(1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

- (a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and
- (b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

The *CCAA* contains a similar provision in respect of monitors. Section 11.8 provides, in part, as follows:

11.8(1) Despite anything in federal or provincial law, if a monitor, in that position, carries on the business of a debtor company or continues the employment of a debtor company's employees, the monitor is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

- (a) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and

- (b) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

We are not aware of any court decisions interpreting the foregoing provisions. Anecdotally, we can advise that some professionals seem to be taking the view that this legislation finally puts an end to the issue of court officers' liability for pension arrears. Others are more circumspect, pointing out, for example, that the immunity is limited to actions taken by the monitor or trustee while acting "in that position". For some, this raises the distinction drawn by Ground J. at first instance in the *TCT* case, between a receiver acting qua receiver for the purpose of protecting or realizing on the assets of the debtor, and a receiver operating for another purpose. It is also noteworthy that the immunity from liability is only in respect of a liability "that exists before the [court officer] is appointed or that is calculated by reference to a period before the appointment". It is not clear that a wind-up liability necessarily falls within the scope of that wording.

IV. RECENT GOVERNMENT INITIATIVES

Perhaps in response to the hardship caused to beneficiaries of private pension plans by employer insolvency in the context of the current legislative framework, governments at both the federal and provincial level have undertaken a number of initiatives. These are described below.

1. NEW FEDERAL "WORKOUT SCHEME" RELIEF (BILL C-9)

The federal government has proposed several interesting changes to pension legislation that will affect certain companies in financial distress. They are part of this year's budget bill, which was introduced in the House of Commons on March 29, 2010. As at May 27, 2010, Bill C-9 has received second reading and has been reviewed by the Standing Committee on Finance. The coming-into-force regulations associated with the pension changes in Bill C-9 have not yet been released, so it is unclear when these changes will be effective.

These changes will apply only to registered pension plans governed by federal pension benefits legislation (the *Pension Benefits Standards Act, 1985*). Federally-regulated plans are for employees who are

subject to federal labour and employment legislation: employees in the airline, broadcasting, postal service, banking, telecommunications and inter-provincial transportation sectors. The regulator of federal pension benefits is the Office of the Superintendent of Financial Institutions. Federally-regulated pension plans represent only seven per cent of all private pension plans in Canada, and account for approximately 12 per cent of pension assets across the country.⁷⁸ As at March 31, 2008 there were 351 federally-regulated defined benefit registered pension plans in the private sector, with assets of \$109 billion.⁷⁹

Pension plans that are governed by Ontario pension benefits legislation will not be affected by the following "workout scheme" and deemed trust proposed changes that are part of Bill C-9.

"WORKOUT SCHEME"

The new "workout scheme" will be a voluntary process to allow employers to delay making deficit payments to their pension plans. The requirement to pay "normal cost" contributions, and to remit employee contributions, is not affected by this scheme. The deferred "special payments" will be subject to a deemed trust. The plan members and beneficiaries will have the right to object, and the entire arrangement will be subject to approval by the Minister of Finance. The following is a description of the scheme as set out in Bill C-9; further details will be in the regulations (not yet released).

Bill C-9 says that, subject to regulations, ... "an employer may elect to enter into a distressed pension plan workout scheme, unless the employer is in the process of being liquidated, has made an assignment or has become bankrupt ...". It will not be available to companies that are already in the process of being liquidated or are bankrupt, nor will it apply to pension plans that have already terminated. It will be available to employers who are the subject of proceedings under the *CCAA* or Part III of the *BIA*. It will also be available to employers who are not the subject of such proceedings, but anticipate that they will not be able to make the required deficit payments to their pension plans.

The temporary moratorium on pension contributions will automatically apply, once the employer files the necessary declaration as to its need for the relief. This election will be followed by a mandatory negotiation period. We do not yet know how long the finite negotiation period will be; the Bill says that it

will be set out in the regulations, and that it can be extended by no longer than three months at the discretion of the Minister of Finance. During the negotiation period the employer must attempt to reach a “workout agreement” with the representatives of the members and beneficiaries of the pension plan. The “workout agreement” will establish a funding schedule for deficit payments. The agreed-to funding schedule is subject to the approval of the Minister of Finance, who must consider prescribed criteria (not yet released).

There is a fairly detailed code in Bill C-9 regarding this scheme:

- Once it files the requisite declaration that allows it to cease making special (deficit) payments to the pension plan, the employer must “without delay” make a court application for the appointment of a representative of the non-unionized members of the plan (if any), and a representative of the beneficiaries of the plan. The relevant union will have authority to represent the unionized members of the plan.
- The negotiation period ends automatically upon the liquidation, assignment or bankruptcy of the employer.
- The federal pension regulator may not order the termination of the pension plan during the negotiation period.
- If the employer was not the subject of proceedings under the *CCAA* or Part III of the *BIA* at the commencement of this process, the deferred payments and interest thereon will become due immediately if and when the employer does become the subject of such proceedings.
- The non-union representatives of the members and beneficiaries may consent to a proposed workout agreement only if less than one third of the individuals they represent, object to it.
- The costs of going through this process, including the fees of the representatives, must be paid by the employer, not the pension fund.

CHANGES TO FEDERAL PENSION DEEMED TRUST

At present, federal pension benefits legislation imposes a deemed trust on payments that have accrued but have not yet been paid to the pension fund.⁸⁰ Bill C-9, not surprisingly, will add to the deemed trust all contribution payments that are deferred under the new workout scheme. Bill C-9 also creates a new deemed trust with respect to amounts payable by an employer if the issuer of a letter of credit held by the trustee of the pension plan fails to honour a demand for payment.

There is a surprise in Bill C-9, relating to the deemed trust provisions. As expected, the federal government has added a requirement that a pension plan be fully funded upon termination. This requirement currently exists in most other provincial pension benefits legislation. Bill C-9 does not set out the period over which a wind-up deficit must be funded; it is likely to be five years, as is the case for Ontario-registered pension plans. The surprise is that Bill C-9 expressly imposes a deemed trust on each instalment of the deficit payments that are owed to the pension fund following termination of the plan. In other words, the federal deemed trust will arise each time an instalment payment regarding the wind-up deficit is due and not paid. Bill C-9 says that once the employer is subject to liquidation, assignment or bankruptcy, the deemed trust will no longer arise, with respect to subsequent payments due and not paid.

Undoubtedly, insolvency practitioners who deal with federally-regulated pension plans will scrutinize the interplay between these new deemed trusts, and the priorities set out in the *BIA*. As indicated above, the leading cases currently hold that the pension deemed trusts with respect to an Ontario-registered pension plan fall away on bankruptcy.⁸¹ If Bill C-9 becomes law in its current form, secured creditors of employers with federally-regulated pension plans will have to take into account new deemed trusts, especially with respect to wind-up deficit contributions that are due and unpaid prior to bankruptcy. It will remain to be seen whether such an expression of Parliamentary intent will affect the interpretation or application of deemed trust provisions in provincial legislation.

2. NORTEL: THE QUEBEC RESPONSE

On January 15, 2009 the Quebec government made an innovative change to its pension benefits legislation.⁸² It created a new transfer option for members of terminated pension plans in a deficit position. No other pension jurisdiction in Canada has such an option. It applies only to pension plans that terminate during 2009, 2010 or 2011.

Individuals who are subject to Quebec pension legislation, whose pensions are reduced as a result of a deficit in their terminated pension plan, can elect to transfer their reduced pension assets out of their insolvent employer's pension plan to the Quebec pension regulator (the Regie des rentes du Quebec). The regulator will not top up the under-funded assets. Rather, the regulator will invest them prudently, in the hope that the value will increase over a period not to exceed five years. At the end of the five-year period, the Quebec pension regulator must use the assets to purchase an annuity from an insurance company.

This approach allows breathing room for investments to recover, and interest rates to increase, such that when the transferred assets are used to purchase a lifetime stream of income from an insurance company in future, a large monthly benefit will be provided to the individual. The alternative for the terminating member, which is the current situation in Ontario, is to have their reduced pension crystallized at the time of the plan termination, when assets and interest rates are at historic lows.

This Quebec innovation was put in place prior to the insolvency of Nortel. In October of 2009 the Quebec government announced that it would "safeguard" the "remaining" pensions of Nortel pension plan members in Quebec, by use of this transfer option. No new legislation is required to achieve this. The Nortel Network Limited pension plans are registered in Ontario, but have thousands of members in Quebec. The provinces, and the federal government, have operated under an agreement for many years, such that the pension regulator where a pension plan is registered will administer the relevant pension benefits legislation. The Quebec government's intention is to allow Quebec members of the Nortel pension plans to transfer their pension lump sums to the Quebec regulator, such that their pensions can be administered by the Quebec regulator for a period of up to five years. (The Nortel plans must terminate,

before this can happen. At present the Nortel pension plans are ongoing.)

Some have called this Quebec approach an "orphanage". Over the past few months there have been calls for the federal and provincial governments to set up a national orphanage, so that all members of the Nortel, Fraser Papers and Abitibi pension plans can avoid the immediate liquidation effect of terminating pension plans.⁸³

3. NORTEL: THE ONTARIO RESPONSE

An association of Nortel retirees and former employees has been doggedly lobbying the Ontario government, in particular, to establish a pension orphanage for Ontarians.⁸⁴ Commentators note that an important difference between Quebec and Ontario's pension regulatory scheme is the fact that Ontario has a guarantee fund, in the form of the PBGF, while Quebec does not. In that regard, it is noteworthy that, in connection with the 2010 Ontario budget, the Ontario government reported a \$500 million grant to the PBGF for 2009-10, as follows:

One of the issues raised by the Expert Commission was the continuing viability of the Pension Benefits Guarantee Fund ("PBGF"). The PBGF is the only fund of its kind in Canada. The Pension Benefit Guaranty Corporation in the United States and the Pension Protection Fund in the United Kingdom operate in similar pension systems. All three face considerable financial challenges.

While intended to be self-financing, the annual assessments paid by the employer sponsors of DB pension plans (which averaged \$48 million per year from 2005 to 2009) have been insufficient to meet the claims on the PBGF. The Province has provided a series of loans to the Fund that resulted in debts outstanding to the Province of \$275 million at March 31, 2009.

Stabilizing the PBGF

Responding to the increasing challenges faced by the PBGF, the government is providing a \$500 million grant to the Fund in 2009-10. This grant will help ensure the PBGF has sufficient assets to cover claims in the near term.

Actuarial Projection Study of the PBGF

Consistent with the Expert Commission's recommendations, the government commissioned the first independent actuarial projection study of PBGF pre-

miums and benefits in 2009. The results of this study, expected in the spring of 2010, will provide greater insight into the PBGF's financial health. The government will then determine the best steps for moving forward with reforms that address the future of the PBGF.⁸⁵

Also noteworthy is the settlement agreement entered into by the various constituents in the Nortel restructuring, early in 2010, pursuant to which Nortel agreed, among other things, to: maintain the administration of its pensions plans through September 2010, and continue making normal cost payments through September 2010 and special payments (as it had been doing from the outset of the restructuring proceedings) through March 2010. Nortel also agreed to ensure that certain information necessary to the wind-up of the pension plans would be gathered in Ontario within a certain timeframe for the purpose of ensuring an orderly transition of the pension plans to a wind-up administrator. In exchange the beneficiaries of the pension plans agreed, among other things, not to pursue deemed trust and lien claims otherwise expected to result from the wind-up of the pension plans. In the circumstances of that case, the Superintendent did not oppose the order sought from the court giving effect to this settlement. As a result, the wind-up of the pension plans is expected to proceed in as orderly a manner as possible.

4. FRASER PAPERS: THE NEW BRUNSWICK RESPONSE

In the Fraser Papers *CCAA* restructuring, an arrangement was reached between the debtor, the relevant union, representatives of the salaried employees and retirees, and the New Brunswick Superintendent to facilitate the sale of operations in New Brunswick. The arrangement contemplated, among other things:

- the grant of an eight-year extension for the final settlement of wind-up benefits, so as to permit underlying asset values to improve;
- a mechanism for allocating value to any notes and shares that the pension plans might receive as a result of the restructuring process for the purposes of calculating the benefits provided to retirees during the extended wind-up period;
- confirmation that the wind-up liability would not attach to the assets of the business being

sold or follow through to the purchaser of the assets; and,

- the creation of new defined contribution pension plans for the employees who were offered and accepted employment with the purchaser.

The arrangement was implemented through a combination of an agreement between the parties, an order of the court supervising the *CCAA* restructuring, and legislative amendments to New Brunswick's pension legislation.⁸⁶

The province of New Brunswick did not provide any guarantee regarding the ultimate value of the assets of the pension plans.

5. PENDING FEDERAL BILLS TARGETING THE TREATMENT OF PENSION LIABILITIES IN INSOLVENCY

On May 26, 2010 an NDP private member's Bill received second reading in the House of Commons and was referred to the Industry, Science and Technology Committee for review. Bill C-501, "*An Act to amend the Bankruptcy and Insolvency Act and other Acts (pension protection)*" is a revived version of an earlier NDP private member's bill.⁸⁷ It amends the *BIA* and the *CCAA* to create a super-priority charge over the assets of an insolvent employer, in respect of the entire pension plan deficit. This change would apply to all registered pension plans, regardless of their jurisdiction of registration, across the country.

It is unusual for private member's bills to become law. Fewer than half a dozen have passed in the last decade. The Liberal, Bloc and NDP members of Parliament support Bill C-501, possibly due to a real desire to pass the Bill, or a desire to needle the governing Conservatives, or a combination of both motives. Interestingly, the Bill was supported by 12 of the 123 Conservative MPs who voted at the second reading stage.

V. CONCLUSION

The treatment of pension plans in circumstances of insolvency is an area in which the distinction between law and public policy can become very blurred, requiring a careful consideration and balancing of many competing interests.

Thus far, although the law is not fully settled, courts have not, in striking this balance, accorded any kind of priority to pension claims or to the making of special payments, on the basis that such a priority would be inconsistent with the scheme of distribution that applies (or is expected to apply) in bankruptcy; perhaps in recognition that expectations regarding the ranking of creditors' claims are not to be tinkered with lightly.

If, however, the courts have found themselves unable to provide comfort to pension beneficiaries in the form of priority for their claims, neither have they rushed to relieve professionals who might be liable for a shortfall experienced by a pension plan from such liability. Nor, it must be said, are all corporate employers rushing to abandon these liabilities; perhaps in recognition that they play a material role in engendering loyalty in a workforce.

Most importantly, in these difficult economic times, legislatures appear to be willing to take action to blunt the harsh effects of insolvency, in the form of financing for guarantee funds, and, importantly, additional time for markets to improve.

On the whole, while it may not be as attractive as it once might have been for an employee to seek an institutional rather than an individual identity, as suggested by Mr. Lapham, the authors believe that it would be an overreaction on the part of Canadians not to place trust in government or company pension plans, as suggested by Mr. Cook.

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¹ R.S.O. 1990, c. P.8 [*PBA*].

² S.O. 2010, c. 9. Associated regulations have not been released, as of May 29, 2010.

³ Indeed, most of the Bill is not yet in force, with the exception of provisions regarding surplus sharing agreements.

⁴ *Monsanto Canada Inc. v. Ontario (Superintendent of Financial)*, [2004] S.C.J. No. 51, at paras. 13-14.

⁵ The term "administrator" is referenced in ss. 8, 19 and 22 of the *PBA*.

⁶ *PBA*, s. 56.1(1); the notice must be a completed "Form 7", pursuant to s. 49.1.2 of Regulation 909 under the *PBA*.

⁷ *PBA*, s. 561.(3).

⁸ *PBA*, s. 24.

⁹ *PBA*, ss. 87 and 88.

¹⁰ *PBA*, s. 89(2).

¹¹ *PBA*, s. 89.

¹² For the purposes of s. 6(7) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] and s. 60(1.6) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] the Superintendent will be authorized to approve of (not "enter") agreements respecting pension contributions, in connection with compromises, arrangements and proposals under those statutes.

¹³ *Labour Relations Act*, S.O. 1995, c.1, s. 69.

¹⁴ *PBA*, s. 80.

¹⁵ *Gencorp Canada Inc. v. Ontario Superintendent of Pensions*, [1995] O.J. No. 3768 (Div. Ct.), affirmed [1998] O.J. No. 961 (C.A.), leave to appeal to the S.C.C. refused, [1998] S.C.C.A. No. 206.

¹⁶ *PBA*, ss. 68 and 69.

¹⁷ *PBA*, s. 70(1).

¹⁸ *PBA*, ss. 57(1) and 57(2).

¹⁹ *PBA*, s. 57(3).

²⁰ *PBA*, s. 57(4).

²¹ *PBA*, s. 57(5).

²² *PBA*, s. 110(2).

²³ *PBA*, ss. 82 to 86.

²⁴ *PBA*, s. 86.

²⁵ [2010] O.J. No. 974 (S.C.J.).

²⁶ *Ibid.*

²⁷ [1991] O.J. No. 1314 (Gen. Div.).

²⁸ [2006] O.J. No. 4152 (C.A.) [*Ivaco*].

²⁹ In *Ivaco*, *ibid.*, the Court of Appeal for Ontario held as follows:

[63] For the Superintendent's position to be correct, there would have to be a gap between the end of the CCAA period and bankruptcy proceedings, in which the pension beneficiaries' rights under the deemed trusts crystallize before the rights of all other creditors, including their right to bring a bankruptcy petition. That position is illogical. All rights must crystallize simultaneously at the end of the CCAA period. There is simply no gap in the federal insolvency regime in which the provincial deemed trusts alone can operate. That is obviously so on the facts in this case because the Bank of Nova Scotia had already commenced a petition for bankruptcy, which was stayed by the initial order under the CCAA. Once the motions judge lifted the stay, the petition

was revived. In my view, however, the situation would be the same even if no bankruptcy petition was pending.

³⁰ [1989] S.C.J. No. 78 [*Henfrey Samson Belair*]. This case has been relied upon for this proposition in a number of other decisions. See, e.g., *Points of Call Holidays Ltd., Re*, [1991] B.C.J. No. 638 (S.C.); *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2005] O.J. No. 589 (C.A.); *Norame Inc., Re*, [2008] O.J. No. 1580 (C.A.).

³¹ *Ibid.*

³² *BIA*, s. 2.

³³ *Ibid.*

³⁴ For example, see R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed., (Markham: Lexis Nexis Canada Inc., 2008) at 205 (presumption of knowledge and competence), 210 (presumption against tautology), 223 (presumption of coherence) and 243 (implied exclusion).

³⁵ [1995] S.C.J. No. 77.

³⁶ *Ibid.*, at para. 32.

³⁷ *Ibid.*, at para. 36.

³⁸ *Supra*, note 30, at paras. 16 and 17.

³⁹ *BIA*, s. 67(3).

⁴⁰ R.S.C. 1985, c. 32.

⁴¹ R.R.O. 1990, Reg. 909, s. 4(2).

⁴² *Ibid.*, s. 5.

⁴³ *Ibid.*

⁴⁴ M. Starnino, J-C Killey and C.P. Prophet, *The Intersection of Labour and Restructuring Law in Ontario: A Survey of Current Law*, 2009, Ontario Bar Association, Continuing Legal Education.

⁴⁵ [2007] O.J. No. 4186 (S.C.J.) [*Collins & Aikman*].

⁴⁶ [2009] J.Q. no 4473 (S.C.).

⁴⁷ [2009] O.J. No. 3188 (S.C.J.).

⁴⁸ *Re AbitibiBowater Inc.*, [2009] J.Q. no 7160 (S.C.).

⁴⁹ *Re AbitibiBowater Inc.*, *supra*, note 46.

⁵⁰ The authors should not be taken to express a view in respect of any of these issues.

⁵¹ [2009] O.J. No. 2558 (S.C.J.), affirmed [2009] O.J. No. 4967 (C.A.).

⁵² *CCAA*, ss. 32, 33; *BIA*, ss. 65.11, 65.12.

⁵³ *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] S.C.J. No. 27.

⁵⁴ *CCAA*, s. 11.1, *BIA*, s. 69.6.

⁵⁵ See: *CCAA*, ss. 6(6)(a)(iii)(A), (7), and s. 36(7), and *BIA*, ss. 60(1.5)(a)(iii)(A), 65.13(8).

⁵⁶ See *supra*, note 34.

⁵⁷ The relevant section following the proclamation into force of the most recent round of amendments to the

CCAA is s. 11.01. The text of the provision has not changed from the earlier s. 11.3. It reads:

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

⁵⁸ *PBA*, s. 42. Some pension plans do not provide this transfer option to terminating employees who are age 55 or older; they are required to leave their entitlement in the plan and receive a monthly payment directly from the plan, rather than “cash out”.

⁵⁹ [2009] O.J. No. 2257 (C.A.).

⁶⁰ *Ibid.*

⁶¹ *Pension Benefits Act*, R.R.O. 1990, Reg. 909, s. 19(5), as amended by O. Reg. 239/09, s. 9.1.

⁶² See *CCAA*, s. 11.1; *BIA*, s. 69.6.

⁶³ [2008] O.J. No. 1022 (C.A.) [*Aon Consulting*].

⁶⁴ [2009] O.J. No. 2229 (S.C.J.).

⁶⁵ *Supra*, note 63, at para. 31.

⁶⁶ *Ibid.*, at para. 37.

⁶⁷ *CCAA*, s. 11.51(1); see also *BIA*, s. 64.1(1).

⁶⁸ *CCAA*, s. 11.51(2); see also *BIA*, s. 64.1(2).

⁶⁹ *CCAA*, s. 11.51(3); see also *BIA*, s. 64.1(3).

⁷⁰ *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (S.C.J.); *Canwest Publishing Inc., Re*, [2010] O.J. No. 188 (S.C.J.) [*Canwest cases*].

⁷¹ [2009] J.Q. no 11239 (S.C.) [*Dessert & Passion*].

⁷² *Industries Show Canada inc., Re*, [2009] J.Q. no 15713 (S.C.) [*Industries Show*].

⁷³ *CCAA*, s. 19(2).

⁷⁴ *CCAA*, s. 19(2)(a).

⁷⁵ *CCAA*, s. 19(2)(c).

⁷⁶ *St. Marys Paper Inc. (Re)*, [1993] O.J. No. 2286 (Gen. Div.), affirmed [1994] O.J. No. 1426 (C.A.).

⁷⁷ [2004] O.J. No. 1353 (C.A.), reversed [2006] S.C.J. No. 36 [*TCT*].

⁷⁸ Press release of the Office of the Minister of Finance, Department of Finance Canada, January 9, 2009.

⁷⁹ Financial Sector Division of the Department of Finance Consultation Paper entitled, “Strengthening the Legislative and Regulatory Framework for Private Pension Plans Subject to the “*Pension Benefits Standards Act, 1985*”, dated January 2009, p. 23.

⁸⁰ Section 8 of the *Pension Benefits Standards Act, 1985*.

⁸¹ *Ivaco Inc. (Re)*, [2005] O.J. No. 3337 (S.C.J.), affirmed [2006] O.J. No. 4125, 83 O.R. (3d) 108 (C.A.).

- ⁸² Bill 1, 2009, chapter 1: “An act to amend the Supplemental Pension Plans Act and other legislative provisions in order to reduce the effects of the financial crisis on plans covered by the Act”.
- ⁸³ “Union seeks fund for bankrupt companies”, The Globe and Mail, December 17, 2009.
- ⁸⁴ See the reports of lobbying efforts on the website of the “Nortel Retirees and former employees Protection Committee”: <<http://www.nortelpensioners.ca>>.
- ⁸⁵ *2010 Ontario Budget, Budget Papers* (Queens Printer for Ontario, 2010) at 172.

- ⁸⁶ Bill 51, *An Act to Amend the Pensions Benefit Act*. Royal assent received on March 26, 2010.
- ⁸⁷ Bill C-476, introduced by NDP Pension Critic Wayne Marston on November 3, 2009, was referred to as the “Nortel Bill”. Note that Liberal Senator Pierrette Ringuette introduced Bill S-245 in the Senate in the prior Session of Parliament; it also proposed to amend the BIA and CCAA to provide priority for pension deficits.

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