ACPM | ACARR
The Association of Canadian Pension Management
L'Association canadienne des administrateurs de régimes de retraite

February 7, 2023

Honourable Pamela Wallin, O.C, S.O.M.
Chair, Standing Committee on Banking,
Commerce and the Economy
Senate of Canada
Ottawa ON K1A 0A4

Honourable Colin Deacon
Deputy Chair, Standing Committee on
Banking, Commerce and the Economy
Senate of Canada
Ottawa ON K1A 0A4

Sent by email

Honourable Senator Wallin and Senator Deacon,

Re: Senate review of Bill C-228

ACPM is the leading advocacy organization for a balanced, effective and sustainable retirement income system in Canada and we are a politically neutral, non-profit national organization. Our retirement plan sponsor and administrator members manage retirement plans for millions of plan members, including active plan members and retirees. Our members represent some of the largest private and public sector defined benefit (DB) pension plan sponsors and administrators in Canada.

We are writing with respect to the Standing Committee on Banking, Commerce and the Economy's upcoming study of *Bill C-228: An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefits Standards Act, 1985* ("**Bill C-228**").

We understand that the purpose of Bill C-228 is to ensure, through the establishment of a super-priority in the event of the employer's insolvency, that retirees ultimately receive their promised pension benefits. While pension security is a laudable goal which ACPM fully supports, ACPM believes that this goal can be accomplished through other mechanisms that avoid a number of negative unintended consequences. We have previously articulated our views in this regard in our letter of October 17, 2023, to Peter Fonseca, Chair of the House of Commons Standing Committee on Finance, appended hereto as Appendix "C". In our letter we proposed practical, realistic alternatives to a super-priority that could benefit pensioners without the detrimental effects that a super-priority is likely to cause. In particular, the possibility of allowing pension plans to continue to operate after an employer insolvency until they are in a stronger funded position, should be closely examined as a useful tool in the pursuit of pension security, as has been demonstrated in numerous examples (e.g., Stelco, Air Canada, Québec's approach to pension wind-ups for insolvent employers, *etc.*).

We understand the Senate of Canada's important role of studying legislation with a view to uncover and suggest corrections where there are apparent technical flaws in said legislation. Our review has identified a number of serious technical, and perhaps even fatal, flaws with Bill C-228, including potential constitutional issues. This letter outlines our principal concerns.

Issue 1 – Constitutionality for provincially regulated employers is not clear.

Sections 91 to 95 of the *Constitution Act, 1867* divide legislative powers between the federal Parliament and provincial legislatures. Section 91 sets out the areas of jurisdiction exclusive to the federal Parliament, including bankruptcy under subsection 91(21); Section 92 sets out the areas of jurisdiction exclusive to the Provinces, the most expansive of which is Section 92(13), related to "property and civil rights in the province".[1] A law will be deemed *ultra vires* (or invalid) where the law was established outside of the powers granted to that specific legislative body.[2]

Provincial pension standards legislation, such as the Ontario PBA, is grounded in the power provided to provincial Legislatures under Section 92(13) of the *Constitution Act, 1867*. Generally, the pension obligations of employers are subject to provincial pension standards legislation based on the province in which the employee works.[3] The one notable exception to that is with respect to the pension obligations of a federal undertaking (such as a bank, railroad or telecommunications company), which are regulated by the federal *Pension Benefits Standards Act, 1985* ("**PBSA**").[4]

It is obvious that federal Parliament has the authority to prioritize the debt obligations of employers who are subject to a proceeding under the CCAA or BIA. However, less clear is its authority to create a pension debt and give it a priority. As discussed below under Issue 4, with respect to provincially regulated plans, Bill C-228 has the potential to do exactly that.

In determining the constitutional validity of a law, the courts will generally employ a two-step process which entails identifying the "pith and substance" of the law[5] and then determining whether the law falls under federal or provincial authority.[6] Under the first stage of the test, courts will consider a legislation's preamble as well as Hansard and minutes of parliamentary committees.[7] A review of Hansard leaves little doubt that a purpose of Bill C-228 is to ensure plans are and remain fully funded on an annual basis. For example, Mr. Chris Lewis (Essex, CPC), in support of Bill C-228, stated the following:

> Bill C-228 answers the problem of pension insolvency in three main areas. First, it would require that an annual report on the solvency of pension funds be tabled here in the House of Commons for greater transparency and oversight. This is exactly the kind of issue that needs more transparency and oversight from the government. Second, it would provide a mechanism to transfer funds into a pension fund to restore it to solvency, to ensure the insolvent portion until the fund can be restored. <u>These first two points will make sure there is scrutiny to ensure that pension funds are solvent, that they remain solvent or that they are fixed if they are starting to slip.</u>[8]

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1 Ibid, at § 21.
2 P. W. Hogg and W. K. Wright, *Constitutional Law of Canada* (5th ed. Supp.) ("**Hogg**"), at § 15:5.
3 Ibid, at para 10 and 11.
4 *CAW-Canada, Locals 112 & 673 v. Ontario (Superintendent of Financial Services)* 2007 ONFST 2, at para 8.
5 Re Anti-Inflation Act, 1976 2 S.C.R. 373, at para 450
6 Hogg, at § 15:4
7 *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para 51.
8 Lewis, Chris. House of Commons Debates. Volume 151, No. 015, First Session, at para 1425.

If Bill C-228, in pith and substance, attempts to ensure that pension funds of solvent provincially regulated employers remain fully funded at all times, in stark opposition to the deliberate policy choice made by the provincial legislatures that have lowered their legislated solvency funding requirements, it is arguably *ultra vires* for the federal government to enact such legislation.

Moreover, Section 94A of the *Constitution Act, 1867*, prohibits the federal government from enacting legislation that affects the operation of a provincial law relating to old age pensions. Section 94A implies that, while federal Parliament may make laws regarding pension plans generally, such laws will be inoperative to the extent they affect the operation of provincial laws relating to the regulation of pension plans. Insofar as Bill C-228 attempts to supplant the funding regime of a province, it is arguably offside Section 94A. Case law in the context of inconsistencies between the *Income Tax Act* treatment of disability pensions and provincial pension legislation supports this view.[9]

In addition, Bill C-228 effectively renders the Ontario Pension Benefits Guarantee Fund (the "**PBGF**") superfluous. The PBGF is an insurance regime in Ontario, which exists to protect members in the event of an employer insolvency. Subject to certain exceptions set out under the Ontario *Pension Benefits Act* ("**Ontario PBA"**), employers are required to remit annual premiums to the PBGF. In the event of an employer insolvency and subject to certain exceptions, the PBGF assures that the first $1,500 of a member's monthly pension will be paid at 100% and the balance at the plan's funded ratio. Bill C-228 makes no accommodation whatsoever for the PBGF. Insofar as the provisions of Bill C-228 affect the operation of the PBGF, the application of Section 94A could render the offending sections of Bill C-228 inoperable.

Finally, employers in certain provincial jurisdictions have secured unique funding regimes and exemptions from their applicable provincial legislatures for the plans sponsored by them. For example, Algoma Steel Inc. and Stelco Inc. have each secured exemptions from certain aspects of the funding regime and deemed trust provisions from the Ontario legislature under the Ontario PBA after having gained the buy-in of their unions and retirees. Insofar as Bill C-228 would attempt to apply a priority to amounts owing as if the plans of those entities were federally regulated, and effectively reverse the exemption from the application of the deemed trust provisions under the Ontario statute, Bill C-228 is arguably unconstitutional.

The constitutionality of Bill C-228 is essential to its purpose and will no doubt be litigated. We urge the Committee to study this issue further and to make appropriate changes to Bill C-228.

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9 *Brien v. Saint John (City) Pension Board*, 3 CPPB 183. In considering this issue, the court noted at paragraph 11:

> The second step to determine is whether the relevant provisions affect the operation of a provincial law in relation to old age pensions and supplementary benefits and, if so, whether the two pieces of legislation conflict. If they are not found to so affect provincial legislation, then the federal legislation is valid. However, if it is determined that the provisions affect provincial law in relation to old age pensions and supplementary benefits, then the provincial and federal legislation are in conflict and the federal legislation is invalid as s.94A provides for provincial paramountcy in the event that federal legislation affects the operation of provincial law.

Issue 2 – The circumstances in which priority applies is overly-broad.

Currently, the only circumstance in which retirees do not receive all promised benefits under a prescribed pension plan is where all four of the following occur at the same time: (i) the plan is wound-up, (ii) the plan is underfunded on a wind-up basis, (iii) the employer is insolvent and (iv) the plan's recovery as an unsecured creditor in the insolvency is insufficient to cover the wind-up deficit. In Ontario, a fifth circumstance also applies: the PBGF does not apply or does not cover all promised benefits.

By contrast, the only relevant criterion necessary for the priority created by Bill C-228 to apply is (iii) – employer insolvency. The overly broad application of Bill C-228 could lead to absurd results. For example, it is often the case that a pension plan is bargained into a collective agreement of an insolvent employer. In a liquidating CCAA process where a purchaser buys the assets of the business, the plan could be transferred to the purchaser, resulting in no wind-up and no loss of pension benefits to any member of the plan. In such a case, the plan will continue to be funded under the regulatory regime by the purchaser and every pensioner will continue to receive every dollar of pension. However, prior to the sale, there may be outstanding special payments owing to the plan by the insolvent employer or there may exist a solvency deficiency or an unfunded liability. Because the wording of the Bill is not sufficiently precise, it could be interpreted so as to create a priority for the unpaid special payments and any other unfunded liability and solvency deficiency despite the purchaser's assumption of the liability to fund the plan, thus potentially giving rise to a priority amount on the bankruptcy of the former employer and notwithstanding that pensioners are not losing any pension. This cannot be the intent.

The issue is even more glaring in a CCAA proceeding where the employer has a viable business that could be restructured and continue to operate. The backdrop of the BIA priority in that circumstance could inhibit or cause the restructuring to fail if so-called debtor-in-possession lenders refuse to lend or refuse to make further advances due to having a lesser priority than the pension deficit. In that case, there could be job losses and ripple effects amongst creditors, such as suppliers, who may, in turn, need to declare insolvency themselves, cease operating due to their bills being unpaid, and result in a wind-up of the pension plan that crystallizes a deficit.

For the above reasons, the priority created for Bill C-228 should, at most, only apply where a plan is already wound-up at the relevant date or will be wound up in connection with a proceeding. By contrast, where a plan continues with the restructured entity or where a plan continues with a purchaser, there should be no loss, no claim, and no priority.

Issue 3 – For federal plans, the amount over which the priority is created is wrong.

The federal PBSA applies to federally regulated pension plans. Ongoing federally regulated pension plans are funded on two bases: going concern and solvency.

Going concern funding levels assume the plan will continue indefinitely, i.e., that members will earn future service and retire, that salaries will increase and that assets will earn a going concern rate of interest. Under the federal PBSA, if assets are less than 100% of the going concern liabilities determined for the plan, there is an *unfunded liability* for which a schedule of special payments is established.

In contrast, solvency funding levels assume that the plan is terminated on the valuation date. No salary increases are assumed, and liabilities are valued based on the cost of buying an annuity from an insurance company for retirees. If assets are insufficient on a solvency basis, there is a *solvency deficiency*. Under the federal PBSA, an employer must make special payments to fund up to 100% of the three-year average solvency deficiency amortized over 5 years. By contrast, again under the federal PBSA, a wound-up plan is funded on a wind-up basis. While very similar to a solvency basis, it is not based on a three-year average, but at a point in time: the wind-up date.

Bill C-228 creates a priority for the employer's special payment funding obligations. Specifically, the priority would apply to all special payments, be they going concern or solvency special payments. It also creates a priority for "any other unfunded liability or solvency deficiency", whether the plan is terminated or not, and notwithstanding that the amount may not be owing to the plan under the funding schedule established under the PBSA. Special payments can also include an element of interest and investment return, which would be difficult to apply if special payments were accelerated and paid all at once. All of these aspects miss the mark.

Under the PBSA, an ongoing pension plan may be fully funded on a wind-up basis, meaning that there are sufficient assets within the plan to pay all promised benefits in the event of a plan wind-up, but special payments may nevertheless be owing. In addition, there may still be an unfunded liability or a solvency deficiency based on the three-year average solvency funding regime even though the plan has become fully funded on the valuation date. Regardless, the fact remains that unless a plan is terminated with a wind-up deficit, there will be no loss to retirees.

Simply put, an employer's statutory funding obligation to an ongoing plan is not a good measure of the amount that may be needed to prevent a cut in pension benefits on the wind-up of the plan in an insolvency scenario and creates uncertainty for creditors trying to evaluate the risk of lending to that employer. If a priority is to be created, the amount of the priority should, as best as possible, approximate that amount needed to prevent a loss in pension benefits. Any priority should therefore only apply to wound-up plans (per the above) and only to the amount of the wind-up deficit, if any, as of the relevant date. For federally regulated plans, this would be the amount the employer is required to fund under subsection 29(6) of the PBSA.

Issue 4 – The application of Bill C-228 to provincially regulated plans is unclear.

In addition to the foregoing issue with respect to the mismatch between going concern and solvency funding on the one hand and wind-up funding on the other, Bill C-228 is further flawed, and perhaps fatally so, as it relates to provincially regulated plans.[10]

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[10] Both the BIA and CCAA use the term "prescribed pension plan" to define the types of pension plans to which the priority created by Bill C-228 apply. Sections 60(1.5)(a)(ii); 81.5(1)(b); and 81.6(1)(b) of the BIA and Section 6(6)(a)(ii) of the CCAA each apply to "prescribed pension plans that are subject to an Act of Parliament" (i.e. federally regulated pension plans). Sections 60(1.5)(a)(iii); 81.5(1)(c); and 81.6(1)(c) of the BIA and Section 6(6)(b)(ii) of the CCAA each apply to "any other prescribed pension plan" (i.e. provincially regulated pension plans). Sections 2(1), 3(1), 4(1) and 5(1) of Bill C-228 would amend the BIA and CCAA with respect to federally regulated pension plans; whereas Sections 2(2), 3(2), 4(2); and 5(2) apply to provincially regulated plans.

First, the amount of the priority is simply not clear. On a plain read of the Bill, it seems that the priority amount created by Bill C-228 with respect to a provincially regulated plan requires the plan: a) to be effectively reimagined as a federally regulated plan; b) to determine the special payments that would have been owing by the employer had it been so regulated and; c) to then apply a priority to that amount. It is not at all clear how one would go about that exercise. It cannot be that an employer who files for CCAA protection is required to revalue its provincially regulated plan as if it had been federally regulated and create a fictitious schedule of payments that would have been owing had it been so. If that is the expectation, Bill C-228 would effectively create a priority over an amount that was not in fact owing by the employer under provincial legislation: it would create a debt and then apply a priority to it.

This issue would be particularly acute for plans, such as those in Québec, where the deliberate policy decision was made to provide for no solvency funding and which does not require employers to fund on a wind-up basis. This would also be an issue in Ontario, Nova Scotia and New Brunswick which provides for an 85% solvency funding standard.[11]

By contrast, the PBSA provides for a 100% solvency funding standard based on the three-year average solvency deficit.

Consider the following example, which is also illustrated at Appendix “A”: an Ontario-based employer sponsors an Ontario registered pension plan that is 85% funded on a solvency basis, and the plan is up to date on all payments to that plan under the Ontario PBA. Given the higher solvency funding standard under the PBSA, if the plan were federally regulated, special payments would be owing to the plan.

On filing for creditor protection under the CCAA, subsection 5(2) of Bill C-228 could be interpreted to require that the plan be valued as of the filing date (i) as if the federal funding rules applied to it to establish the amount described in proposed new clause 6(6)(a)(iii)(A.1) of the CCAA, and (ii) under the Ontario PBA to determine if there is “any other unfunded liability or solvency deficiency” to establish the amount described in proposed new clause 6(6)(a)(iii)(A.2).

Notwithstanding that neither amount would have been owing by the employer prior to filing, and that neither amount actually represents a loss to pensioners, no plan of arrangement or sale of assets could be approved by the court without the court being satisfied that the above amounts can and will be paid. Moreover, under Ontario solvency funding rules, employers are entitled to exclude certain benefits from the determination of the solvency deficiency, such as indexation for pensioners and plant closure benefits. On a wind-up, those benefits must be funded. It is not clear whether or how the proposed new priority would apply to the liability associated with those benefits. Moreover, Ontario members would have the protection of the PBGF, and it is not clear how that protection would interact with the priority created by Bill C-228.

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[11] Section 1.3.2 of Ontario Regulation 909 to the PBA.

Similarly, it is unclear how Bill C-228 would treat plan types that are not contemplated under the PBSA, such as target benefit plans ("**TBP**")[12] or jointly-sponsored pension plans ("**JSPP**")[13], since the funding obligations and any resulting solvency deficiency or unfunded liability in respect of such plans are treated differently than a traditional defined benefit pension plan and these types of plans are not contemplated under the PBSA.

In Ontario, British Columbia, Alberta, New Brunswick, Nova Scotia and Québec, multi-employer pension plans (MEPPs), TBP's and JSPP's are generally exempt from solvency funding and, most importantly, there is no obligation under legislation for employers participating in such plans to contribute amounts beyond their monthly contribution requirements and on wind-up of such plans, members can only look to the assets in the fund to provide benefits – in other words, by design and legislation, there is no employer guarantee standing behind such plans. This is completely different from traditional single employer plans (like Nortel or Sears) wherein the employer is obliged on plan wind-up to cover any remaining deficiency.

Under such plan designs, employer contribution obligations are determined by the plan text, applicable collective bargaining agreements, or the plan's funding policy – consistent with legislative requirements. It cannot be the intention of the drafters of Bill C-228 to create payment obligations to a pension plan where none exist, and for the reasons noted above, we question whether federal Parliament has the capacity to do so. Accordingly, if it is the will of the Senate to pass legislation that creates a a priority over employer assets in the event of insolvency, Bill C-228 should be amended to clarify that it only applies where the funding obligation exists in the first place.

Potential Amendments

If a pension priority is to be established under the CCAA and BIA for pension amounts, it should:

- only apply to wound-up plans;
- be for a clear, discernable, and quantifiable amount (similar to unpaid wages which are subject to a maximum per employee);
- be for an amount no greater than the amount deemed to be held in trust under the pension standards legislation to which the plan is subject;
- contain exceptions for employers that have already secured exemptions under provincial legislation to funding or deemed trust provisions, for employers whose unions have agreed to an

[12] Target benefit plans are currently offered in Alberta, British Columbia, Ontario, New Brunswick, Nova Scotia and Quebec. Other provinces are also considering establishing a target benefit plan framework. A target benefit plan allows for fixed contributions by sponsors and a target "pension benefit" that can be adjusted based on the funding level of the pension plan.

[13] A jointly-sponsored pension plans allows for governance responsibilities/obligations to be shared between sponsors and members and also requires cost-sharing between members and sponsors. Jointly-sponsored pension plans also typically have different funding requirements than traditional defined benefit pension plans and are often exempt from solvency funding payments.

exemption, and for different plan types with different wind-up funding regimes, such as JSPPs and TBPs; and

- apply only after the application of the Pension Benefits Guarantee Fund in Ontario.

Provincial pension standards legislation authorizes regulators to wind-up plans in most insolvency scenarios. The CCAA could also be amended to explicitly entitle the relevant pension regulator to wind-up a plan as of the order date in the case of a sale of all or substantially all of the assets of the debtor where the pension plan is not assumed by the purchaser (i.e., a liquidating CCAA).

Bill C-228 raises serious policy concerns affecting complex bankruptcy and pension legislation spanning federal and provincial jurisdictions. It is significant that only one other OECD country (South Korea) includes a super-priority approach to securing pensions. We urge the Senate to seriously study the bill and its potential implications, and to do the necessary industry and stakeholder consultations.

Thank you for the opportunity to make submissions on this very important topic to Canadians. We would be glad to provide further information or testimony as the Committee determines appropriate.

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CC:
Members of the Senate Standing Committee on Banking, Commerce and the Economy
Honourable Chrystia Freeland, M.P., Minister of Finance, Deputy Prime Minister
Honourable François-Philippe Champagne, M.P., Minister of Innovation, Science and Industry

- Appendix A (attached) – Example of an Ontario-based private sector company offering a defined benefit pension plan
- Appendix B (attached) – Bill C-228 Media Scan
- Appendix C (attached) – October 17, 2022 letter from ACPM to Honourable Peter Fonseca, M.P. Standing Committee on Finance

APPENDIX "A"

To assist the Senate of Canada in understanding the jurisdictional issues and impact, the following example reflects an Ontario based private sector company offering a defined benefit pension plan. Ontario is the largest pension regulator in Canada by number of plans and volume of assets.

Company X in Ontario, Solvency discount rate = 4%, Going-concern discount rate = 5.75%, etc.

	Going-concern	Solvency	Wind-up	Wind-up after PBGF coverage
Assets	$850 million	$850 million	$850-1,200 million	$950 million ($100 million of PBGF coverage)
Liabilities	$850 million	$1 billion	$1.2 billion	$1.2 billion
Surplus (deficit)	$0	($150 million)	($350 million)	($250 million)
Funded Ratio	100%	85%	71%	n/a

Under Ontario legislation no special payments would be required to the pension fund as there is no going-concern deficit and the solvency funded position is at least 85%. However, Bill C-228 creates a pension priority for:

- "an amount equal to the sum of all special payments that *would have been required* to be paid by the employer …to liquidate an unfunded liability or a solvency deficiency *if* the prescribed plan were regulated by an Act of Parliament"; and
- any amount required to liquidate any other unfunded liability or solvency deficiency of the fund

What is the amount of the priority?

Does Bill C-228 require the employer to revalue the plan as if it had federally regulated schedules of special payments owing? How far back?

The legislation should clarify that the amount owing is the wind-up deficit applicable under the relevant pension jurisdiction (after estimated PBGF support) which, in this simplified example, should be $250M (rather than some imagined deficit as though it were federally regulated and without PBGF coverage).

In an Ontario regulated plan, the wind-up deficit is characterized as neither a "solvency deficiency or an unfunded liability". Is the amount of the wind-up deficit (in excess of these two) subject to a priority?

Does the application of the PBGF get made before the priority is determined or after? If before, information may not be timely, if after, the PBGF is effectively moot.

IMMEDIATELY – Creditors will assess $350 million as a potential claim ahead of them and presumably reduce the credit available to the company or charge a higher rate of interest due to higher risk. As well, solvency funding is volatile so the bankers may cut back credit even more to allow for a safety margin, potentially accelerating an insolvency or make operating a business incompatible with offering lifetime pensions to the workforce. It is not unreasonable to assume such a company will take action to mitigate the consequences including assessing whether to continue to offer a defined benefit pension plan.

APPENDIX "B"

Bill C-228: ACPM Submissions and Media Scan | Projet de loi C-228 : Soumissions de l'ACARR et balayage médiatique

I) ACPM Submissions to Parliament on Bill C-228 | Mémoires de l'ACARR au Parlement sur le projet de loi C-228

September 21, 2022: FINA review of Bill C-228, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the PBSA, 1985

21 septembre 2022 : Examen par le FINA du projet de loi C-228, Loi modifiant la Loi sur la faillite et l'insolvabilité, la Loi sur les arrangements avec les créanciers des compagnies et la Loi de 1985 sur les normes de prestation de pension

October 17, 2022: FINA review of Bill C-228, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the PBSA, 1985

17 octobre 2022 : Réponse de l'ACARR - Examen par le Comité permanent des finances (FINA) du projet de loi C-228, Loi modifiant la Loi sur la faillite et l'insolvabilité (« LFI »), la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») et la Loi de 1985 sur les normes de prestation de pension (« LNPP »)

November 23, 2022: OPEN LETTER - Bill C-228, An Act to amend the Bankruptcy and Insolvency Act, ("BIA") the Companies' Creditors Arrangement Act ("CCAA") and the Pension Benefits Standards Act, 1985 ("PBSA")

23 novembre 2022 : Projet de loi C-228, Loi modifiant la Loi sur la faillite et l'insolvabilité (LFI), la Loi sur les arrangements avec les créanciers des compagnies (LACC) et la Loi de 1985 sur les normes de prestation de pension (LNPP)

II) ACPM News Releases on Bill **C-228 | Les Communiqués de presse de l'ACARR sur le projet de loi C-228**

October 18, 2022: ACPM submits comments to FINA during their review of Bill C-228
https://www.globenewswire.com/en/news-release/2022/10/18/2536839/0/en/ACPM-submits-comments-to-FINA-during-their-review-of-Bill-C-228-an-Act-to-amend-the-Bankruptcy-and-Insolvency-Act-BIA-the-Companies-Creditors-Arrangement-Act-CCAA-and-the-Pension-B.html

18 octobre 2022 : L'ACARR soumet ces commentaires au Comite Permanent des Finances de la Chambre des Communes dans le cadre de son examen du Projet de loi C-228L'ACARR soumet ces commentaires au Comite Permanent des (globenewswire.com)

November 25, 2022: ACPM submits open letter to Members of the House of Commons and the Senate regarding Bill C-228
https://www.globenewswire.com/en/news-release/2022/11/25/2562667/0/en/ACPM-submits-open-letter-to-Members-of-the-House-of-Commons-and-the-Senate-regarding-Bill-C-228-An-Act-to-amend-the-Bankruptcy-and-Insolvency-Act-BIA-the-Companies-Creditors-Arrang.html

25 novembre 2022 : L'ACARR soumet une letter ouverte aux Membre de la Chambre des Communes
L'ACARR soumet une lettre ouverte aux Membres de la Chambre (globenewswire.com)

III) Bill C-228 Media Coverage | Projet de loi C-228 - Couverture médiatique

Please note: *This selection of articles has been provided as information on the media coverage of Bill C-228 in Canadian news sources and is not intended to indicate ACPM's agreement or disagreement with any of the positions taken by the authors.*

Veuillez noter : *La sélection d'articles qui suit est fournie à titre d'information sur la couverture médiatique du projet de loi C-228 dans les sources d'information canadiennes et ne vise pas à indiquer l'accord ou le désaccord de l'ACARR avec les positions prises par les auteurs.*

Benefits Canada: Amendments to insolvency legislation would secure DB pensions, say retiree organizations
October 14, 2022
Amendments to insolvency legislation would secure DB pensions, say retiree organizations | Benefits Canada.com

Benefits and Pensions Monitor: ACPM Wants Bankruptcy Bill Abandoned
October 19, 2022
https://www.bpmmagazine.com/news-2022-oct-13-19

Benefits Canada: ACPM warns of 'unintended consequences' of pension super-priority bill
October 20, 2022
https://www.benefitscanada.com/pensions/governance-law/acpm-warns-of-unintended-consequences-of-pension-super-priority-bill/

Actuarial Solutions - Prioritizing Pensions
October 24, 2022
Prioritizing Pensions - Actuarial Solutions Inc

Benefits and Pensions Monitor: PIAC Disagrees with Super-Priority
October 24, 2022
https://www.bpmmagazine.com/news-2022-oct-20-26

Avantages : L'ACARR s'oppose à la super priorité en cas de faillite. Elle pourrait mettre en danger la pérennité des régimes PD.
24 octobre 2022
https://www.avantages.ca/retraite/legislation-gouvernance/lacarr-soppose-a-la-super-priorite-en-cas-de-faillite/

Canadian Bar Association National Magazine: Prioritizing the workers - Company pension plans will soon get super-priority in bankruptcy and insolvency matters. But the new rules could impact the lending environment in Canada, critics say.
November 4, 2022
https://www.nationalmagazine.ca/en-ca/articles/law/business-corporate/2022/prioritizing-the-workers

McCarthy Tetrault: Bill C-228: Pension Protection Legislation Advances Further
November 10, 2022
https://www.mccarthy.ca/en/insights/blogs/restructuring-roundup/bill-c-228-pension-protection-legislation-advances-further

The Globe and Mail: MPs advance bill giving pension plan members priority in corporate bankruptcies
November 23, 2022
https://www.theglobeandmail.com/business/article-mps-advance-bill-giving-pension-plan-members-priority-in-corporate/

Canadian Association of University Teachers: University and college teachers urge Liberal government to protect universities from insolvency law
November 25, 2022
https://www.caut.ca/node/12245

Benefits Canada: Pension super-priority bill passes in House of Commons
November 28, 2022
By: Lauren Bailey
https://www.benefitscanada.com/pensions/governance-law/pension-super-priority-bill-passes-in-house-of-commons/

Gowling WLG (blog): Bill C-228: A Problem For Defined Benefit Pension Plans
December 2, 2022
by Christopher Alam and Ovo Efemini
https://gowlingwlg.com/en/insights-resources/articles/2022/bill-c-228-problem-defined-benefit-pension-plan/

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https://www.benefitscanada.com/news/cir-news-news/pension-super-priority-bill-real-return-bond-cancellation-top-priorities-for-piac-in-2023-new-chair

APPENDIX "C" - ACPM-response-to-Bill-C-228-Oct17-2022-Final.pdf

October 17, 2022

Honourable Peter Fonseca, M.P.
Standing Committee on Finance
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada
Sent via email to FINA@parl.gc.ca

Re: FINA review of Bill C-228, An Act to amend the Bankruptcy and Insolvency Act, ("BIA") the Companies' Creditors Arrangement Act ("CCAA") and the Pension Benefits Standards Act, 1985 ("PBSA")

Dear Mr. Fonseca:

ACPM is the leading advocacy organization for a balanced, effective and sustainable retirement income system in Canada. Our private and public sector retirement plan sponsors and administrators manage retirement plans for millions of plan members, including both active plan members and retirees. Among our members are some of the largest private sector defined benefit (DB) pension plan sponsors in Canada. We are a politically neutral, non-profit national organization.

Our membership is comprised of plan sponsors, administrators and service providers ***who work in the retirement income industry on a daily basis*** and many have been doing so for several decades. Collectively, their priority is to ensure the best possible outcome that will provide their plan members with the pension and retirement security that they expect. ACPM understands the financial challenges for plan members who find themselves facing a sponsor's insolvency, and we also would like to arrive at a solution that improves pension security for defined benefit plan members.

ACPM believes that a successful retirement income system balances coverage and security. In Canada, there is a finely calibrated and balanced retirement income system that scores better than many of our peers in international indices.[1]

The goal of Bill C-228, that of securing retiree pensions in the event of an employer insolvency, is laudable; however, the proposed means to accomplish that goal are flawed and will have serious and undesirable unintended consequences - including to the stakeholders that Parliamentarians are intending to help.

[1] Mercer CFA Institute Global Pension Index 2022

Under the proposed super-priority approach, in the event of plan insolvency, any unfunded obligations in respect of member benefits would rank ahead of secured and unsecured creditors; other approaches to achieve the same or similar goal are available to Parliamentarians. We outline below three alternative approaches and none of them have the same potential to harm the retirement income system as does the current formulation in Bill C-228 - we urge the Committee to adopt one of these alternative approaches to secure retiree pensions. However, we would first like to highlight the implications of proposed Bill C-228 in its current iteration.

UNINTENDED CONSEQUENCES

1) **Ordinary course borrowing will become more difficult, expensive, or impossible for some Defined Benefit (DB) plan sponsors.**

Canada has much to be proud of when it comes to the soundness of our financial system, which is grounded in each financial institution playing a role that ensures systemic stability. This is predicated on the basis of creditors accurately assessing risk profiles and maintaining their own prudential regulatory requirements to prevent lending losses.

DB pension deficits, by their nature, fluctuate in value and, because of this variability, the priority for pension deficits created by Bill C-228 would fundamentally alter the risk profile that is assessed by creditors, who, in turn, would need to adjust their own approaches. Should this legislation come into effect as is, we expect creditors to respond by undertaking some or all of the following measures to adjust for the increased risk that a loan would not be repaid:

- Refusing to lend to non-investment grade companies with DB pension plans;
- Requiring borrowers to agree not to assume any new DB pension plan over the course of a loan, even those DB pension plans that are well-managed, invested and funded (and thus depriving employees of the opportunity for DB pension plan coverage);
- Requiring more and/or different sources of collateral and other credit enhancements from companies that receive loans;
- Applying higher interest rates on loans, or applying larger reserves, which increases the debt servicing costs for companies;
- Negotiating events of default that are triggered when pension deficits arise, even without a corresponding plan termination, so that a loan may be called prior to the expiry of its term. This would, in turn, likely impede the employer's ability to amortize and liquidate those pension deficits, creating a "vicious circle";
- Restricting a company's ability to further draw down credit facilities should that company's pension plan go into deficit – thus adding to the cost of, and access to, borrowing and possibly restricting letters of credit that would help to secure plan deficits;
- Causing a potential negative impact on the credit ratings of companies with DB plans.

All of these measures would impede the ability of businesses to access credit, not only to grow and contribute to the economy through employment and taxes, but to remain viable during short-term economic crises, including recessions.

Even healthy companies with healthy DB pension plans may see the cost of capital increase due to the cost and complexity of the loan itself.

There would be a need to impose more onerous reporting requirements on companies with DB pension plans to ensure their solvency is continually monitored. The more onerous reporting requirements stem from difficulties that creditors will face in determining their exposure to pension deficiencies, since they are based on the availability of actuarial valuations which represent a snapshot in time and are based on actuarial assumptions (which change based on economic conditions). Given these transparency limitations, more rigorous reporting requirements would be imposed and that would add cost and complexity to the loan itself.

A super-priority approach would make it even more difficult for Canada to attract business investment, already an issue of existing concern and this approach to an insolvency issue in Canada requires more caution simply because we have not seen the benefits of a super-priority approach in real world situations. Additionally, since the United States does not use a super-priority approach, a U.S company with a Canadian subsidiary would be inclined to issue debt out of the U.S. or would invest the absolute minimum into Canadian operations. While some G7 countries compensate plan members in an insolvency situation, none of them use a super-priority approach and this is true for the overwhelming majority of retirement plans in the world.

2) DB Pensions will be terminated.

Canada's retirement income system is grounded in the "three pillars" of retirement income security (government pensions, employment pensions, and personal savings). If Bill C-228 is passed, given the increased cost and burden of borrowing likely to be faced by DB plan sponsors, it is a near certainty that many of the remaining DB plan sponsors in Canada will wind-up their plans and that the liabilities will be annuitized or otherwise off-loaded from the corporate balance sheet, thus gutting the second pillar. The annuity market in Canada has few participants and is already facing record demands that cannot be absorbed in the short term.[2]

Pension plan sponsors need credit, loans, and financing for all sorts of reasons (equipment, research, acquisitions etc.) and are unlikely to take the risk of having access to credit or financing that is limited, eliminated or too expensive. Many of them compete against employers without DB plans and some compete in a global market where competitors are not subject to Canadian insolvency laws. Bill C-228 is likely to eliminate many of the existing single employer DB pension plans from the Canadian retirement income landscape.

In place of the DB plan, employers may offer a Defined Contribution (DC) plan or, less likely due to limited availability, a Target Benefit plan, or they adopt a non-pension retirement savings plan that is perceived to be less regulatorily complex, such as a group RRSP.

[2] An additional implication is that federal legislation does not provide for an absolute discharge of liability for the plan sponsor upon the purchase of an annuity. Therefore, even if a company were to annuitize pension obligations, it may still face adverse effects from Bill C-228 in terms of an assessment of residual liability against their credit rating. ACPM has long advocated for federal legislation to address this deficiency but it has not been forthcoming to date.

Studies have shown that the projected outcomes in a DC pension plan or group RRSP are far poorer for employees than they are in an employer-sponsored DB plan.[3] A recent study showed that $1 contributed to an employer sponsored DC plan produced between $1.94 and $2.58 in retirement income, whereas the same $1 contributed to a large employer sponsored DB pension plan produced $4.19 of retirement income.[4] We urge the Committee to study what the loss of such an efficient retirement savings vehicle would do to the Canadian retirement income landscape, and to future generations of retirees in Canada who will have to make do with half the income they might otherwise have had.

In respect to collectively bargained pension plans, Bill C-228 could create a necessity to renegotiate existing collective agreements which could ultimately affect currently negotiated contribution rates and pension benefits. These collective agreements vary widely in terms of their time periods and it may be years before compromise solutions are agreed upon, adding an additional roadblock for the economic security of a company and its employees and potentially ending DB plan availability for these unionized employees.

Longer-term, the accelerated erosion of private sector pension plans will increase governmental and public scrutiny on public sector DB plans which are the norm in the federal and provincial public sectors. If private sector DB pension plans are further eroded while there is widespread DB pension plan availability in the public sector (which is currently the case), this conspicuous social inequity would need to be addressed, possibly in ways that would negatively affect public sector DB pension plans.

It has been observed that there are fewer and fewer corporate single employer DB pension plans and some may feel that the loss of these plans can be tolerated if it enhances pension security for retirees. In other words, it may be acceptable for DB plan terminations to occur for some plan members in order to improve pension security for non-terminated plan members. To those of that view, we note that the vast majority of DB plans pay 100% of their promised benefit to 100% of their members, and that **focusing on benefit security for current retirees in a way that results in the further erosion of DB coverage could virtually eliminate DB plans for active private sector employees who still accrue a DB pension**.

This outcome would deny current DB plan members of their preferred retirement option and create intergenerational inequity - a contradiction to the spirit, if not the intent, of this proposed legislation. It may also increase reliance on government retirement income support funded from general tax revenues.

Whether shared-risk (New Brunswick legislation) or target benefit (British Columbia legislation) plan sponsors would be affected is not clear as Bill C-228 makes reference to pension funding rules under similar statutes in the Pension Benefits Standards Act (1985) (PBSA), and there are no provisions in the PBSA for shared-risk plans or target benefit plans.

[3] The Value of a Good Pension: How to improve the efficiency of retirement savings in Canada

[4] Supra, page 25

3) Insolvent companies may not be able to restructure.

Many restructurings rely on debtor-in-possession (DIP) financing in order to proceed. Currently, the CCAA allows for an Order to be made that prioritizes the repayment of a DIP loan ahead of repaying other pre-filing creditors. Bill C-228 would give priority to the payment of a pension deficit ahead of any DIP loan. Where the pension deficit is sufficiently large relative to the liquidation value of the company, DIP financing may be unobtainable or only obtainable under very restrictive or expensive terms.

If DIP financing is unobtainable, a company that could have otherwise restructured and continued as a viable operating entity and as a community employer may instead be forced to liquidate, terminate employees and shutter the doors. It is likely that the successful restructurings of Canadian icons such as Air Canada, Stelco, Algoma, Resolute and others may not have been possible if Bill C-228 had been the law at the time.

Canada has also implemented the UNCITRAL Model Law on Cross-Border Insolvency (1997) in domestic law, and Canadian Courts are frequently asked to recognize foreign insolvency proceedings and to cooperate with foreign Courts in international insolvency matters. In this regard, Bill C-228 introduces a risk that could restrict Canada's ability to effectively cooperate with foreign jurisdictions. This, in and of itself, requires further investigation.

4) Changes to the Canadian economy

Given the reordering of the disbursement of assets, unsecured creditors such as suppliers, including small businesses, would be faced with a reduced likelihood of recovering any amounts that are due. These businesses frequently operate with small profit margins so this type of situation would put pressure on their own finances, particularly during periods of economic uncertainty.

It is possible that some DB pension plan sponsors will choose to keep their DB pension plans open; however, we expect that changes will be made that could have a systemic impact on the Canadian economy, such as:

- In the case of DB pension plans that remain active, we expect a lowering of the investment risk profile to minimize the likelihood of deficits. This would mean moving pension assets to fixed income and/or investing plan assets in buy-in annuities to "de-risk" their liabilities. This will result in less investment in Canadian public equities, an issue that has been highlighted recently by Letko, Brosseau & Associates Inc.[5].;
- Corporate issues of debt may decrease at a time when demand from pension funds will increase, further exacerbating market dislocations;
- The annuitization of pension assets entails a liquidation of equities by the pension plan purchasing the annuity, and a redeployment of that capital in favour of fixed income by the insurance companies from which the annuities are purchased. This shift in capital will be massive

[5] Pension System's Divestment of Canadian Equities. The Policy Implications for Canada; Les caisses de retraite se départissent des actions canadiennes. Répercussions sur la politique canadienne

and the implications should be understood by the Committee.

POLICY APPROACHES TO SECURING PENSIONS

Our members understand the need for pension security and the certainty it provides for workers and retirees. For financially distressed companies capable of restructuring, our preferred approach is the current one of working with existing stakeholders, including retirees, to enable restructuring of financial arrangements that will allow the debtor to maintain its operations and protect jobs and pensions. Air Canada, Resolute, Stelco and Algoma are all examples of successful restructurings where the risk of loss on all sides motivated parties on all sides to restructure the corporate entity, maintain the pension arrangements through the collective bargaining process, keep jobs, and continue to operate in the communities in which they are situated. These are success stories that would have been highly unlikely had Bill C-228 been the law at the time.

However, if insolvency is inevitable, our members agree that the insolvency regime should provide employees and retirees with a high degree of certainty of receiving as much of their pension promise as possible. We think it can be accomplished without the collateral damage outlined above and by utilizing alternative approaches, ***any of which could be implemented by the federal government***.

1) **Allow pension plans to continue to operate despite the insolvency or bankruptcy of the sponsoring employer.**

Reductions to pension benefits are the result of the forced crystallization of deficits at a wind-up date triggered by the employer sponsor's insolvency. Eliminating this crystallization event and allowing the plan to continue operating in some form rather than winding it up will, in many cases, allow for funding to recover over time and reductions to be eliminated or minimized.

This has been demonstrated in recent years whereby the majority of plans in Ontario are now fully funded and/or in surplus on a solvency basis despite not making special payments to fund deficits[6]. These improvements have been the result of a combination of factors over recent years, such as strong capital markets and rising interest rates, which have allowed these pension funds to naturally strengthen. In essence, time and good management have allowed the plans to achieve fully funded status without additional employer funding.

Building on that experience, we suggest that the Committee study the feasibility of amending the CCAA and BIA to allow pension plans that do not continue on with the restructured entity to continue under the supervision of a special insolvency trustee that would be appointed to wind-down the pension plan(s) of an insolvent employer(s). This trustee would be empowered to make decisions with respect to the pension fund that would maximize the available dollars.

For large pension plans, it may be beneficial to maintain the pension plan for several years after the

[6] FSRA/ARSF - Quarterly Update on Estimated Solvency Funded Status of Defined Benefit Plans in Ontario; Mise à jour trimestrielle sur le niveau estimé de capitalisation de la solvabilité des régimes à prestations déterminées en Ontario

employer's insolvency in order to maximize the dollars available in the fund. This is especially the case where the plan has a strong going concern funded ratio but a lesser solvency or wind-up ratio.

The intention would be to improve the plan's funded position before benefits are settled. An example of great success achieved through a similar framework is that of the legacy Stelco pension plans. In June 2022, seven years after the Ontario Pension Benefits Act was modified to accommodate the longer wind-up period for the Stelco plans, pension liabilities were annuitized - thus securing pensions at 100%.

For smaller pension funds, it may be beneficial to merge the plan with another plan to achieve the scale necessary to maintain the plan as a going concern. The pension insolvency trustee could also be empowered to merge the insolvent company plan where the trustee determines it to be most appropriate. Large multi-employer plans for similar or complementary industries or jointly sponsored plans are good candidates for such mergers.

We believe that the Committee should carefully consider the success of the Stelco example and the availability of alternatives to a traditional wind-up as the potential solution for a funding problem - the benefit of time and good management resulted in securing the pension promise. We believe this approach is repeatable because given a reasonable time period, a diversified investment program with a moderate amount of investment risk is highly likely to achieve a rate of return that exceeds that of high-quality fixed income investments which mirror insurance company portfolios that support life annuity promises.

2) Leverage the federal government's recent innovations.

The federal government has recently made great innovative strides in pension "decumulation" to enable defined contribution savings to be converted into a Variable Payment Life Annuity (VPLA). Advanced Life Deferred Annuities (ALDAs) are also available so that retirees have retirement income security in later life when most needed, but at a lower cost than a traditional annuity. The *Income Tax Act* could be amended to allow retirees of insolvent company pension plans to take advantage of these innovations to maximize the retirement dollars available to them.

Retirees of insolvent company pension plans could be empowered to change the form of their pension from a traditional DB life pension to a lump-sum payment in order to purchase, on a tax deferred basis, a VPLA or ALDA.

The pension insolvency trustee (referred to in Alternative 1) should also be empowered to negotiate bulk VPLA arrangements and communicate these preferred settlement options to retirees and beneficiaries entitled to deferred pensions. A direct transfer for bulk VPLA arrangements should be possible without triggering taxation due to the maximum transfer limits under section 8517 of the Income Tax Regulations.

Outcomes with a VPLA have the potential to substantially, if not fully, replicate the member's DB pension. We urge the Committee to build on this excellent made-in-Canada innovation to assist in solving this important problem.

3) Asset Pooling and Investment Management

A third alternative, either in addition to or as a stand-alone option, could be to leverage the professional, highly capable asset management services available within the existing federal public pension regimes to utilize, not only their economies of scale in investment fund management but, to add to their mandate, the investment of insolvent company pension funds. While we think this initiative could be part of establishing a best-in-class federal pension asset manager, it could also provide for a low-cost, high quality alternative investment manager to enable insolvent company pension plans to be managed in order to deliver on the pension promise. Such a federal manager could also manage the assets of a VPLA or the asset manager for the special trustee referred to in Alternative 1.

An example of pooled management by a third party/ trustee exists in Québec. For over 10 years, Québec legislation has allowed Retraite Québec (formerly Régie des Rentes du Québec) to administer retirees' assets after the wind-up of their pension plan following the bankruptcy of their former employer. The track record has been that most retirees end up with a higher pension than they would have received otherwise. This kind of solution, at a national level, would help a great deal, particularly in combination with all the proposed solutions we are providing.

PROPOSED MODIFICATIONS TO BILL C-228

Should the Committee nevertheless determine that a "super-priority" is appropriate, ACPM urges the Committee to consider making the following changes to Bill C-228:

- Employers with DB pension plans established these plans with a certain legislative frame of reference. While minimum standards and tax rules have shifted over time, the changes have been incremental. Bill C-228 proposes a massive shift in the nature of the obligation that is a DB pension plan. Out of sheer fairness, we urge the Committee to apply the "super-priority" to pension plans established after the effective date of the legislation.
- In the alternative, we urge the committee to give employers a long runway to adjust to the new reality of DB pension plan sponsorship. If the DB pension plan needs to be terminated in order to allow the employer to obtain financing and continue to operate, termination may not be possible in a 3 to 5 year time period. The employer may need several years to fund any deficit, renegotiate any collective agreement, and then purchase annuities (which itself can be an 18 to 24 month process). We suggest the Committee consider a 7 to 10 year implementation time frame. A lengthier time frame will also allow the annuities market in Canada to absorb the demand from the mass wind-up and exiting by corporate Canada of remaining DB pension plans.
- In order to make the super-priority assessable from a lending risk perspective, we urge the Committee to consider a per-member cap on the amount of the super-priority, similar in design and magnitude to that for unpaid wages ($2,000)[7].
- Employees could receive a one-time payment of an amount equivalent to 7 times the maximum

[7] Section 81.3 (1) - Bankruptcy and Insolvency Act; Loi sur la faillite et l'insolvabilité

weekly insurable earnings under the Employment Insurance Act ($8,117.34 for 2022).[8]

- We also suggest that the super-priority not apply to plans that are fully funded in accordance with the applicable minimum standard regime's target funding. For example, the Ontario legislature has determined that 85% funding on a solvency basis is sufficient for an on-going pension plan; that employer capital above 85% funding can be better deployed elsewhere in the business. For the federal government to impose a super-priority to ensure 100% funding would undermine the deliberate policy decision made by Ontario. Therefore, the super-priority for an Ontario registered pension plan should apply only to the 85% solvency funding threshold.

TECHNICAL ISSUES WITH BILL C-228

We do not believe that Bill C-228 should proceed as the proposed legislative changes within Bill C-228 make it unworkable and impossible to implement in the context of existing pension and insolvency legislative frameworks. If Bill C-228 is adopted as is, precious dollars in an insolvency proceeding will be wasted on litigating the precise effects of the changes brought about by Bill C-228. We note the following technical issues with Bill C-228 that make it difficult or impossible to interpret and apply:

Amendments to the BIA and CCAA

- The amount being given a priority under the BIA is not clear nor does it meet the objective of the bill as we understand it. If the goal is to ensure that pensions are paid in full, the amount to be given a super-priority should be the amount of any shortfall existing in a wound-up plan, to cover the shortfall between what the annuity provider charges to annuitize the plan and the funds available within the plan, after any lump sums are transferred out by those members who elect them. Any other amount could be too much or too little and would be based on a point-in-time actuarial valuation that would become out-of-date as the plan wind-up process occurs.

- It is not clear whether and how amounts payable from Ontario's Pension Benefits Guarantee Fund (PBGF) are factored into the amount to be given a super-priority.

- The type of plan that is subject to super-priority is not clear. The PBSA contemplates DB, DC and negotiated contribution plans (NCP). In Canada, there are also multi-employer plans that may not fit the definition of an NCP as well as target benefit and shared risk plans. It is not clear how those plans are affected by Bill C-228 or why DC, NCP, target benefit or shared risk plans would be included in such legislation given that they do not guarantee any specific pension outcome.

- Many jurisdictions in Canada do not require employers to fund on a wind-up basis (e.g.: Québec) or do not require 100% solvency funding (e.g.: Ontario, Nova Scotia, New Brunswick). For plans subject to those jurisdictions, it is not clear what amount would be subject to a super-priority.

[8] Wage Earner Protection Program; Programme de protection des salariés pour un employé

Amendments to the PBSA

- We do not understand the reference to "insurance". Currently, employers with available credit are entitled to contribute a letter of credit with a face amount equal to contributions owing, up to a certain limit. If the intent is to also allow for surety bonds issued by an insurance company to be substituted for a letter of credit, then we are generally supportive of this measure, but we suggest that it be clear in its intent and include similar regulatory parameters to the letter of credit provisions currently in the regulations under the PBSA regarding the issuer and terms of the surety bond. If some other outcome is intended, we suggest it be made clearer.

- The PBSA permits the Superintendent of Financial Institutions to consent to plan amendments that reduce accrued benefits. It is not clear how this regulatory power is intended to interact with Bill C-228. If the Superintendent were to agree to such a reduction as part of a restructuring of pension plan liabilities, Bill C-228 could have the unintended consequence of imposing a super-priority over an amount no longer required to be paid. Also, the PBSA Regulations also provide for a distressed plan workout scheme that Bill C-228 would arguably render moot.

CONCLUSION

As mentioned earlier, our membership is comprised of individuals who actually work in the retirement income industry and support plan members on a daily basis. ACPM regularly provides expertise to federal and provincial governments and their regulatory agencies and we are cognizant of the entire range of issues that are encountered by retirement plan sponsors, administrators and members/retirees in Canada.

Our membership is committed to fulfilling the pension promise for millions of plan members who are enrolled in the retirement plans that they manage. The implications and many aspects of Bill C-228 that we identify are not imaginary outcomes – we have seen the dramatic decline in private sector DB plan availability over the last decade due to accounting changes and the impact of volatile solvency funding and we believe that proposed Bill C-228 will exacerbate this decline to critical levels and make the recovery of private sector DB plans in Canada nearly impossible.

It is striking that no other OECD country has adopted a "super-priority" approach for pension deficits[9], largely because of the issues that we have identified - this fact alone should give the Committee pause.

If passed, ACPM believes that Bill C-228 would result in a net harm to Canadian DB plan members. Our submission merely scratches the surface of the potentially far-reaching implications of Bill C-228. If retirement income security is indeed a priority for the Standing Committee on Finance and for all Parliamentarians, ACPM urges that Bill C-228 in its current form be abandoned in favour of pursuing responsive, innovative policy that does not have the potential for collateral damage to the retirement system and the economy.

[9] Secunda, Paul M., "An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States" (2014). Faculty Publications. 651.

Changes to pension and bankruptcy legislation is technical and complex - it can have significant implications for business competitiveness and has broad-reaching effects for current and future retirees in Canada. Retirement income security is too important, and pensions and bankruptcy legislation is far too technical to do anything other than take a comprehensive, consolidated approach to solutions for pension security. As a representative of the retirement income industry, ACPM can provide the expertise required to develop pension security solutions that do not disrupt existing and future pension plans, provide a foundation for greater pension availability and align with the vast majority of financial regimes that are currently in place.

Thank you for your consideration and we would be pleased to provide further assistance.

Todd Saulnier
President, Board of Directors
ACPM
Association of Canadian Pension Management

Ric Marrero
Chief Executive Officer
ACPM
Association of Canadian Pension Management

CC:
Members of the House of Commons Standing Committee on Finance
Honourable Chrystia Freeland, M.P., Minister of Finance, Deputy Prime Minister
Honourable François-Philippe Champagne, M.P., Minister of Innovation, Science and Industry

Appendix 1 (attached) – Resource list

APPENDIX 1 – Resource List

1) ACPM Information

- Board of Directors
- Advocacy submissions and Publications
- Federal Council
- Leadership Supporters

2) References mentioned in this ACPM submission to the Standing Committee on Finance

- Mercer CFA Institute Global Pension Index 2022
- The Value of a Good Pension: How to improve the efficiency of retirement savings in Canada
- Pension System's Divestment of Canadian Equities. The Policy Implications for Canada; Les caisses de retraite se départissent des actions canadiennes. Répercussions sur la politique canadienne
- FSRA/ARSF - Quarterly Update on Estimated Solvency Funded Status of Defined Benefit Plans in Ontario; Mise à jour trimestrielle sur le niveau estimé de capitalisation de la solvabilité des régimes à prestations déterminées en Ontario
- Section 81.3 (1) - Bankruptcy and Insolvency Act; Loi sur la faillite et l'insolvabilité
- Wage Earner Protection Program; Programme de protection des salariés pour un employé
- Secunda, Paul M., "An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States" (2014). Faculty Publications. 651.

3) Canadian Association of Pension Supervisory Authorities; Association canadienne des organismes de contrôle des régimes de retraite

4) Sun Life Designed for Savings 2021; Sun Life - Objectif épargne 2021

5) OECD - Pensions at a Glance 2021; Panorama des pensions 2021