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Bill C-228: Pension Protection Act

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On April 18, 2023, Canada's Senate passed Bill C-228, the *Pension Protection Act*.¹ Should it become law (which is expected to occur later in 2023), Bill C-228 will impact the order of payments to creditors in the event an employer becomes bankrupt or insolvent, such that certain liabilities arising from a defined-benefit pension plan will be paid ahead of other creditors.

This change could have a significant impact on any employer that offers a defined-benefit pension plan, as insolvent employers would first need to fund special payment amounts for past, present, and future pension plan liabilities, prior to restructuring or paying the debts held by other creditors. These changes will not apply until the fourth anniversary of the day on which the bill comes into force.

Bill C-228 is a private member's bill sponsored by a Conservative Member of Parliament and has received broad multi-party support. The passage of this bill comes on the heels of reports which indicate that, in 2022, Canadian pension plans posted their lowest returns since the 2008 financial crisis.

General Overview of Pension Plans

In Canada, an employer-sponsored retirement plan most often takes one of two forms: a defined-benefit plan or a defined-contribution plan.

A defined-**benefit** plan provides a specific payment amount in retirement, usually based on a formula that factors in salary, years of service and age. Contributions to the defined-benefit plan are either made entirely by the employer or split between the employer and employee.

In a defined-**contribution** plan, there is no guaranteed payment amount in retirement. Instead, an employee will contribute to the plan (and often have a portion or all of those contributions matched by

¹ C-228, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefits Standards Act, 1985*, 1st Sess, 44th Parl.

the employer) and invest in securities to save for retirement. The final benefit amount of the pension is unknown because it is based on contributions and returns.

Due to the guaranteed nature of a defined-benefit plan, an employer's potential liability is greater than under a defined-contribution plan where the employer has no obligation to the plan's performance or the amount the employee ultimately receives from it.

Current Scope of Super-Priority

When an entity becomes insolvent, legislation governs which creditors have priority in recovering any outstanding debt. Certain priority status is known as "super-priority", and in 2009, legislation gave certain unfunded pension liabilities super-priority (regardless of the type of pension plan). This includes:

- Amounts deducted from an employee's pay for payment to the pension fund
- Unpaid normal costs and defined contributions required to be paid by the employer to the pension fund
- Amounts payable to the administrator of a pooled registered pension plan.

Expanded Super-Priority under Bill C-228

If passed into law, Bill C-228 will expand the scope of the super-priority to include:

- Special payments under section 9 of the *Pension Benefits Standards Regulations, 1985*, which are payments an employer must make over and above current service costs in order to amortize an existing unfunded liability or solvency deficit
- Any amount required to liquidate any other unfunded liability or solvency deficiency of the fund.

This is a significant expansion of priority because it will include funding the plan both as a going concern and on an insolvency basis, before other creditors are able to collect their debts.

Stakeholder Concerns

While the bill's intention to protect pensioners is laudable, the potential collateral consequences are not all positive and may encourage employers in Canada to discontinue defined-benefit pension plans. For example:

- Borrowing may become more difficult, expensive, or impossible for a defined-benefit pension plan sponsor (employer), which ironically could increase the risk of bankruptcy for these sponsors
- Insolvent employers may not be able to restructure due to not being able to obtain debtor-in-possession financing
- A defined-benefit plan sponsor may choose to wind-up its plan in favour of some other form of retirement savings for its employees
- The pool of funds available to creditors during a bankruptcy or restructuring is likely to be reduced greatly, in some cases to zero.

Next Steps for Employers that Sponsor a Defined-Benefit Pension Plan

As of the date of this briefing note, Bill C-228 has not yet received royal assent, following which there is a further four-year period before the changes come into effect. This delay will give employers time to consider how (if at all) to structure a defined-benefit pension plan going forward. To learn more and for assistance, contact Keith Burkhardt at Sherrard Kuzz LLP.

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