



Legislative Summary

BILL C-228: AN ACT TO AMEND THE BANKRUPTCY AND INSOLVENCY ACT, THE COMPANIES' CREDITORS ARRANGEMENT ACT AND THE PENSION BENEFITS STANDARDS ACT, 1985

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For clarity of exposition, the legislative proposals set out in the bill described in this legislative summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the Senate and House of Commons and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent and come into force.

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(Legislative Summary)

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CONTENTS

1	BACKGROUND	1
1.1	Insolvency Legislation in Canada.....	2
1.2	Regulation of Pension Plans in Canada.....	3
1.2.1	Treatment of Pension Obligations in Bankruptcy	4
1.2.2	Treatment of Pension Obligations in Proposals and Restructuring Proceedings	5
2	DESCRIPTION AND ANALYSIS.....	5
2.1	Short title (Clause 1)	5
2.2	Amendments to the <i>Bankruptcy and Insolvency Act</i> (Clauses 2 to 4).....	5
2.3	Amendments to the <i>Companies' Creditors Arrangement Act</i> (Clause 5)	6
2.4	Amendments to the <i>Pension Benefits Standards Act, 1985</i> (Clause 6)	6
2.5	Transitional Provisions (Clause 7)	7



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1 BACKGROUND

On 3 February 2022, Marilyn Gladu (Sarnia—Lambton) introduced Bill C-228, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefits Standards Act, 1985, in the House of Commons.¹

The bill amends the *Bankruptcy and Insolvency Act* (BIA)² and the *Companies' Creditors Arrangement Act* (CCAA)³ to ensure that claims in relation to shortfalls in defined-benefit pension plans are paid in priority in the event that an employer becomes insolvent. It also amends the *Pension Benefits Standards Act, 1985* (PBSA)⁴ to provide for the tabling of an annual report regarding the solvency of pension plans regulated under that statute.

The bill passed second reading on 22 June 2022 and was referred to the House of Commons Standing Committee on Finance (FINA) for study.

On 3 November 2022, FINA presented its report on the bill with four amendments.⁵ The first amendment added a paragraph to section 136(1) of the BIA to include severance pay as a preferred claim under the statute; however, the Speaker of the House ruled the amendment to be beyond the scope of the bill.⁶ The second amendment removed the proposal to amend section 9 of the PBSA, which would have allowed an employer to purchase insurance for any contributions required to be made to a pension plan. The third amendment removed the proposal to amend section 29 of the PBSA, which would have permitted the transfer of assets or liabilities from one pension plan to another upon the insolvency of an employer. The last amendment shortened the application date for various provisions of the bill. The House of Commons adopted FINA's report on the bill with three amendments on 18 November 2022, and the bill passed third reading on 23 November 2022.

Bill C-228 was introduced in the Senate on 24 November 2022. On 14 December 2022, the bill passed second reading and was referred to the Standing Senate Committee on Banking, Commerce and the Economy for study. The committee tabled its report on 7 March 2023 without amendment. The bill passed third reading in the Senate on 18 April 2023 and received Royal Assent on 27 April 2023.

1.1 INSOLVENCY LEGISLATION IN CANADA

The two main federal statutes that govern bankruptcy and insolvency are the BIA and the CCAA. The Office of the Superintendent of Bankruptcy Canada is the federal regulator responsible for supervising BIA and CCAA proceedings and ensuring compliance with those Acts. It also regulates licensed insolvency trustees and maintains a public registry of BIA and CCAA filings.⁷

The BIA applies to personal and corporate bankruptcies. With respect to corporate bankruptcies, various sections of the BIA dictate how a bankrupt company's assets are to be distributed among different classes of creditors; this is often referred to as the order of priority. Table 1 sets out the order of priority for claims under the BIA.

Table 1 – Priority of Claims in a Bankruptcy Under the *Bankruptcy and Insolvency Act*

Type of Claim	Description
1. Deemed trust (section 67(3))	Amount of unremitted source deductions in relation to: <ul style="list-style-type: none"> ▪ the Canada and Quebec pension plans; ▪ federal and provincial/territorial income taxes payable; and ▪ the Employment Insurance program. These amounts are deemed to be held in trust for the benefit of the Crown and are not part of the bankrupt company's assets.
2. Unpaid supplier (section 81.1)	Rights of suppliers to repossess unpaid goods delivered 30 days prior to the bankruptcy.
3. Super-priority <ul style="list-style-type: none"> ▪ Agricultural products (section 81.2) ▪ Salaries (sections 81.3 and 81.4) ▪ Pension fund contributions (sections 81.5 and 81.6) ▪ Restoration of contaminated land (section 14.06(7)) 	Value of unpaid agricultural and aquaculture products delivered 15 days prior to the bankruptcy. Value of unpaid salaries and allowances to a maximum of \$2,000 per employee. Value of deducted salary contributions and employer contributions to a registered pension plan. Costs incurred by a government to decontaminate land included in the bankrupt's assets.
4. Secured claim	Claims guaranteed by the bankrupt's assets that cover the value of this asset.

Type of Claim	Description
5. Preferred claim (section 136(1))	Unsecured claims that must be paid before regular unsecured claims in the order specified in section 136(1).
6. Unsecured claim	All other claims, which are paid by prorating their value according to the total value of all other unsecured claims.

Note: Regarding deemed trusts, it should be noted that property held in trust is not part of the bankrupt's assets and cannot be distributed among creditors. This feature of trusts has allowed the enactment of legislation ensuring that insolvent individuals and companies pay governments before any other creditors, as a portion of an insolvent individual's or company's assets is deemed to be held in trust for governments' benefit. Under the *Bankruptcy and Insolvency Act*, only deemed trusts created for employers' unremitted income tax deductions and contributions to the Employment Insurance program and to the Canada and Quebec pension plans are recognized. Of note, under the *Companies' Creditors Arrangement Act*, the court has the discretion to rank deemed trusts lower in priority. See [Canada v. Canada North Group Inc.](#), 2021 SCC 30.

Source: Table prepared by the Library of Parliament using information obtained from [Bankruptcy and Insolvency Act](#), R.S.C. 1985, c. B-3.

Rather than filing for bankruptcy, the BIA also allows individuals and corporations to submit proposals to their creditors. A proposal is an offer put forth by a debtor to their creditors to pay the creditors a percentage of the debt owed or to extend the time to pay the debt. A proposal must be approved by the court.

The CCAA applies to insolvent corporations or affiliated corporations with liabilities of more than \$5 million; however, it does not apply to all types of corporations, the main exclusion being financial institutions. The purpose of the CCAA is to allow corporations to restructure their business with the approval of the various classes of creditors and under the supervision of the court. The terms “compromise” or “arrangement” are often used to describe the plan put forth by a company to pay creditors and reorganize the affairs of the business. There is no order of priority under the CCAA, but certain claims must be addressed in the compromise in order for the compromise to be approved by the court.

1.2 REGULATION OF PENSION PLANS IN CANADA

In Canada, pension plans are regulated either federally or provincially. The PBSA regulates pension plans sponsored by businesses that fall under the legislative authority of Parliament, while pension plans sponsored by other businesses are regulated by provincial statutes, such as Ontario's *Pension Benefits Act*.⁸

In general, an employer that is sponsoring a pension plan must make the following contributions:

- the employer's contributions, which are the regular contributions that an employer must make under the terms of the plan, called “normal costs”;⁹

- the employees’ contributions, if applicable, which are deducted from the employees’ remuneration and deposited directly into the pension plan fund by the employer; and
- in the case of defined-benefit pension plans, “special payments” that the employer may be required to make to address any shortfall in the value of the assets of the pension plan; under the PBSA, this sort of shortfall is referred to as an “unfunded liability” or “solvency deficiency,” depending on the type of actuarial valuation.

1.2.1 Treatment of Pension Obligations in Bankruptcy

The BIA’s treatment of a bankrupt employer’s obligations with respect to a pension plan is shown in Table 2. While super-priority status is granted for claims relating to employee and employer contributions to the pension plan, special payments are unsecured claims which are paid out after all other types of claims. Therefore, the amounts owed to pension plan members, including retirees, will likely be reduced.

Table 2 – Treatment of Pension Obligations in Bankruptcy

Type of Pension Obligation	Treatment in Bankruptcy
Contributions already paid into the pension plan fund	Pension plan funds are held in trust by the administrator of the plan; the funds are not included in the assets that are to be divided among the creditors (section 67(1)(a) of the <i>Bankruptcy and Insolvency Act</i> (BIA)).
Employee contributions deducted at source but not remitted to the pension plan fund on the date of the bankruptcy	These are super-priority claims that are paid before secured claims but after the rights of unpaid suppliers, special rights for farmers, fishers and aquaculturists, and unpaid wages (section 81.5 of the BIA).
Employer contributions owed but not remitted to the pension plan fund on the date of the bankruptcy	These are super-priority claims that are paid before secured claims but after the rights of unpaid suppliers, special rights for farmers, fishers and aquaculturists, and unpaid wages (section 81.5 of the BIA).
Special payments by employer for unfunded pension liabilities that are accrued and owed to the pension plan fund on the date of the bankruptcy	These are unsecured claims that are paid after secured claims, claims with super-priority status and preferred claims.

Source: Table prepared by the Library of Parliament using information obtained from [Bankruptcy and Insolvency Act](#), R.S.C. 1985, c. B-3.

1.2.2 Treatment of Pension Obligations in Proposals and Restructuring Proceedings

The BIA and CCAA provide for similar treatment of pension obligations in relation to an insolvent employer undertaking proposal or restructuring proceedings. Under these statutes, the court is prohibited from approving a BIA proposal or a CCAA plan of arrangement unless the proposal or the plan of arrangement provides for the payment of:

- employee contributions deducted at source but not remitted to the pension plan fund;¹⁰ and
- employer contributions owed but not remitted to the pension plan fund.¹¹

However, the court may approve a BIA proposal or a CCAA plan of arrangement that does not require the payment of these contributions if it is satisfied that the parties involved have entered into an agreement, approved by the relevant pension regulator, respecting the payment.

Under both the BIA and the CCAA, obligations for special payments are treated as unsecured claims. Therefore, amounts owed to pension plan members, including retirees, will likely be reduced under a BIA proposal or a CCAA plan of arrangement.

2 DESCRIPTION AND ANALYSIS

At first reading, Bill C-228 consisted of nine clauses. As explained above, two clauses were deleted at the report stage in the House of Commons. The Royal Assent version of the bill has seven clauses and proposes amendments to the BIA, the CCAA and the PBSA.

2.1 SHORT TITLE (CLAUSE 1)

Clause 1 provides the short title of the bill: the Pension Protection Act.

2.2 AMENDMENTS TO THE *BANKRUPTCY AND INSOLVENCY ACT* (CLAUSES 2 TO 4)

Clause 2 adds sections 60(1.5)(a)(ii)(A.1) and 60(1.5)(a)(ii)(A.2) and sections 60(1.5)(a)(iii)(A.1) and 60(1.5)(a)(iii)(A.2) to the BIA to introduce new requirements for proposals by employers that participate in federally or provincially regulated pension plans. These new sections prohibit a court from approving an employer's proposal unless it includes a commitment to make special payments and pay other amounts required to address any unfunded liability or solvency

deficiency in the pension plan that are calculated at the time of the filing of the notice of intention or of the filing of the proposal.

Clause 3 amends section 81.5 of the BIA, which establishes a super-priority claim on all assets of an employer for certain unpaid amounts owed by the employer to a federally or provincially regulated pension plan in the event of bankruptcy. Clause 3 adds sections 81.5(1)(b)(i.1) and 81.5(1)(b)(i.2) and sections 81.5(1)(c)(i.1) and 81.5(1)(c)(i.2) to include special payments and other amounts required to liquidate any unfunded liability or solvency deficiency in the pension plan to the super-priority claim.

In a similar manner, clause 4 amends section 81.6 of the BIA which establishes a super-priority claim on all assets of an employer for certain unpaid amounts owed by that employer to a pension plan in the event of receivership. Clause 4 adds sections 81.6(1)(b)(i.1) and 81.6(1)(b)(i.2) and sections 81.6(1)(c)(i.1) and 81.6(1)(c)(i.2) to the BIA to include in the super-priority claim special payments and other amounts required to liquidate any unfunded liability or solvency deficiency in the pension plan.

2.3 AMENDMENTS TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT* (CLAUSE 5)

Clause 5 adds sections 6(6)(a)(ii)(A.1) and 6(6)(a)(ii)(A.2) and sections 6(6)(a)(iii)(A.1) and 6(6)(a)(iii)(A.2) to the CCAA – which sets out the requirements for a court-approved compromise for federally and provincially regulated pension plans – to include special payments and other amounts required to liquidate any unfunded liability or solvency deficiency in the pension plan as determined on the day on which proceedings commence under the CCAA.

2.4 AMENDMENTS TO THE *PENSION BENEFITS STANDARDS ACT, 1985* (CLAUSE 6)

Clause 6 amends section 40 of the PBSA to introduce new requirements with respect to the annual report of the Superintendent of Financial Institutions to the Minister of Finance and to Parliament. In addition to proposing technical amendments to update section 40, clause 6 states that the superintendent must:

- consult with the Chief Actuary of the Office of the Superintendent of Financial Institutions before submitting the annual report to the Minister of Finance;
- include information in the report on the success of pension plans in meeting funding requirements and corrective measures taken by the superintendent against any pension plans not meeting funding requirements; and

- transmit the report to the relevant provincial ministers responsible for finance and provincial securities commissions after it has been tabled in Parliament.

2.5 TRANSITIONAL PROVISIONS (CLAUSE 7)

Clause 7(1) provides that clauses 2 to 4, which are the proposed amendments to the BIA, do not apply to employers with existing defined-benefit pension plans for employees until four years after the bill comes into force.

Clause 7(2) states that clauses 5(1) and 5(2), which are the proposed amendments to the CCAA, do not apply to companies with existing defined-benefit pension plans for employees until four years after the bill comes into force.

NOTES

1. [Bill C-228, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefits Standards Act, 1985](#), 44th Parliament, 1st Session (S.C. 2023, c. 6).
2. [Bankruptcy and Insolvency Act](#), R.S.C. 1985, c. B-3.
3. [Companies' Creditors Arrangement Act](#), R.S.C. 1985, c. C-36.
4. [Pension Benefits Standards Act, 1985](#), R.S.C. 1985, c. 32 (2nd Supp.).
5. House of Commons, Standing Committee on Finance, [Bill C-228, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Pension Benefits Standards Act, 1985](#), Seventh report, 3 November 2022.
6. House of Commons, [Debates](#), 16 November 2022, 1655 (Hon. Anthony Rota).
7. Government of Canada, [Office of the Superintendent of Bankruptcy](#).
8. Ontario, [Pension Benefits Act](#), R.S.O. 1990, c. P.8.
9. For example, see [Pension Benefits Standards Regulations, 1985](#), SOR/87-19, s. 2(1), definition of "normal cost."
10. [Bankruptcy and Insolvency Act](#), R.S.C. 1985, c. B-3, s. 60(1.5); and [Companies' Creditors Arrangement Act](#), R.S.C. 1985, c. C-36, s. 6(6).
11. Ibid.