

November 26, 2019

Via E-mail

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Government of Ontario
Ministry of Government and Consumer Services
56 Wellesley St. W, 6th Floor
Toronto, ON M7A 1C1

Dear Sir or Madam:

Re: Public Consultation Re: Business Law Modernization and Burden Reduction Council (the "Council")

Recommendations to Amend Ontario's Business Law Statutes, Proposal Number:19-MGCS014

Submission of the Canadian Federation of Pensioners – Preservation of s. 30(7) PPSA priority for pension plan beneficiaries

We represent the Canadian Federation of Pensioners ("**CFP**"), an organization that advocates for pensioners of defined benefit pension plans. A copy of CFP's homepage at www.pensioners.ca is attached. On behalf of CFP, we are providing our comments with respect to the above-noted Public Consultation, specifically Proposal No. 6.

As we understand, Proposal No. 6 deals with enabling a security interest in cash collateral to be perfected by "control" in financial accounts (e.g. bank account funds) to provide for a priority security interest, while also calling for the existing priority for pension plan beneficiaries created by the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("**PBA**") deemed trust (as well as under the *Employment Standards Act*, 2000 and the *Pooled Registered Pension Plans Act*, 2015) currently in ss. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("**PPSA**") to be preserved. CFP is concerned with and supports the preservation of the priority for pension plan beneficiaries in s. 30(7) of the PPSA in the strongest possible terms.

For ease of reference, ss. 30(7) of the PPSA states:

Deemed trusts

(7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act*, 2000, the *Pension Benefits Act* or the *Pooled Registered Pension Plans Act*, 2015.

It appears to us that Proposal No. 6 contains two concepts:

- a) A proposal for a new rule to allow for a security interest in cash collateral to be perfected by "control"; and
- b) Despite such a security interest being established, there would be no impact on the existing priority for pension plan beneficiaries in ss. 30(7) of the PPSA with respect to amounts owing to a pension plan by an employer.

With respect to the first concept (creation of a security interest in cash collateral through "control"), CFP takes no position.

With respect to the second concept that the existing pension deemed trust priority in ss. 30(7) of the PPSA be preserved, CFP strongly supports such a preservation.

Indeed, CFP supports an *expansion* of the priority for pension plan beneficiaries and even clearer statutory language confirming the priority to prevent challenges in court by other creditors in insolvency cases.

CFP understands that the Council also supports the preservation of the ss. 30(7) PPSA priority for pension plan beneficiaries.

Underfunded pension plans are a significant social problem in Ontario (and the rest of Canada), and statutory priority protections for pensioners are vital

The importance of a statutory pension priority cannot be understated for retirees who rely on their monthly pension benefits for their livelihood, particularly on the insolvency or bankruptcy of their employer.

Once an insolvency arises for an employer who owes contributions to an underfunded pension plan, elderly retirees are thrust into an insolvency proceeding competing for the limited assets of their former employer against other creditors who advocate against the retirees' interests and recoveries.

In Canada, the provinces regulate pension plans and the federal Parliament has jurisdiction over bankruptcy and insolvency. This can lead to jurisdictional conflicts in insolvency cases when a company that sponsors a pension plan becomes bankrupt or insolvent and has not paid amounts it owes to an underfunded pension plan, leaving the plan incapable of paying the full monthly amount of the pension benefits to retirees that they earned and now rely on.

As a result of the PBA deemed trust and the priority in s. 30(7) of the PPSA, pension plan beneficiaries have obtained better results in the insolvency proceedings of their employers than they would have without the priority in cases including:

- *Indalex;*
- *Hollinger Canadian Publishing Holdings;*

- *Timminco* (CCAA);
- *Catalyst Paper* (British Columbia)
- *Wabush Mines* (Newfoundland and Quebec);
- *Stelco*; and
- *Sears Canada Inc.*

It is therefore important for the laws that protect pension plan beneficiaries to remain in place and to be clear and enforceable. The Supreme Court in the landmark *Indalex*¹ case confirmed that the PBA deemed trust and the priority in s. 30(7) of the PPSA are valid in CCAA proceedings (subject only to paramountcy).

The wind up of an underfunded pension plan in an insolvency proceeding crystallizes the unpaid wind-up deficit which becomes payable by the employer immediately. Unless material distributions are obtained from the estate of the employer (or negotiated in a CCAA Plan of Compromise) toward the wind up deficit, retirees will suffer reductions to their monthly pension benefits, which leads to financial hardships in their elderly years. These losses have occurred for the retirees of many Ontario companies, large and small, over the past several years.

To protect pension plan members, all provinces have introduced deemed trusts in their pension regulatory statutes in favour of pension plan beneficiaries for the amount owing by an employer to a pension plan that it has not paid (both for unpaid on-going contributions and the wind-up deficit amount). In Ontario, and recently in Saskatchewan², the provincial legislatures took the further step of reflecting the beneficiaries priority of that deemed trust in their respective PPSA statutes. The collateral referenced in ss. 30(7) of the PPSA reflects a carefully calibrated scheme as it provides for the deemed trust priority to apply over specific assets of a debtor: "accounts or inventory and its proceeds". The legislature has thereby not included other assets of a debtor.

The statutory scheme in ss. 57(4) of the PBA and ss. 30(7) has been recognized as valid by the Supreme Court of Canada in the federal case of *Indalex*.

¹ *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271

² *Personal Property Security Act, 1993, S.S. 1993, c. P-6.2*. Ss. 35(12) and 35(13) state:

35(12) A security interest, other than a purchase-money security interest, is subordinate to the interest of a person who is a beneficiary of a sum deemed to be held in trust pursuant to section 43 of The Pension Benefits Act, 1992.

35(13) Sums deemed to be held in trust pursuant to section 43 of The Pension Benefits Act, 1992 are an obligation of the employer secured by a security interest, other than a purchase-money security interest, in the personal property of the employer that is perfected without registration.

The pension priority regime in s.57 of the PBA and s. 30(7) of the PPSA

It is instructive to summarize the pension priority regime in the PBA and PPSA, to demonstrate why this priority is so important for pension plan members caught in insolvency proceedings of their employer and an underfunded pension plan.

There are two main employer insolvency scenarios that can involve pension plans: proceedings under the BIA and proceedings under the CCAA. The two insolvency regimes are distinct and have different legislative purposes, however, where a company is liquidating and not restructuring, the wind-up processes for the pension plan under both statutes are very similar.

A wind up involves the cessation of further pension benefit accruals by pension plan members and the distribution of all assets of the pension fund. Those assets are typically used to purchase annuities from an insurance company to take over the payment of the pension benefits of plan members. If the plan is underfunded on wind up, the amount of monthly pension benefits will be reduced as there are insufficient assets to purchase annuities to pay for full benefits.

For a wound up pension plan, the PBA deemed trust in section 57(4) applies to deem the amount owing by the employer to the plan to be held in trust for the pension plan beneficiaries.

The PBA deemed trust and the PPSA priority over "accounts or inventory, and its proceeds"

Section 57(3) of the PBA creates a deemed trust for pension plan beneficiaries over “an amount of money equal to the employer contributions due and not paid into the pension fund”. The deemed trust in Section 57(3) does not require a wind up of the pension plan in order to be effective. The Supreme Court in *Indalex* recognized “[Section] 57(3)...provides that the deemed trust protecting employer contributions exists while a plan is ongoing.

Second, the deemed trust in s. 57(4) of the PBA creates a deemed trust in favour of pension plan beneficiaries over all amounts owing to a pension plan on wind up. The Supreme Court in *Indalex* confirmed that the section 57(4) deemed trust applies to the entire amount owing by an employer to the pension plan on wind up. The most important deemed trust for the protection of pension plan beneficiaries is the wind-up deficit deemed trust. Section 57(4) states:

57(4). Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

The concept of a trust operates in insolvency such that property that is held in trust by a debtor does not form part of the debtor’s property, cannot be distributed to creditors, and must be paid to the beneficiary of the trust. Section 57 of the PBA, under the heading “Trust Property” contains protections for pension plan members (the beneficiaries of the trust) that apply where an employer owes contributions to a pension plan that it has not paid, causing the plan to be unable to pay the full amount of pension benefits that retirees earned.

Below, we respond to certain questions on p. 14 of Proposal No. 6 of the Roundtable Discussions PowerPoint dated November, 2019:

- **Question #3:** *Could parties have the flexibility to choose the laws of another jurisdiction to govern some of the rules that create a security interest in a financial account (i.e., a bank account), including the priority rules (and therefore be able to contract out of some of the rules of the PPSA, such as the conflict of laws provisions)?*

Answer: No party should not be permitted nor incentivized to "forum shop" the laws of another jurisdiction in order to select rules of another jurisdiction that create a security interest in a financial account, including the foreign jurisdiction's priority rules, in an effort to circumvent the Ontario PPSA and contract out of the priority of ss. 30(7). Such foreign shopping would enable and indeed encourage parties to select the PPSA rules of other jurisdictions for their advantage and then circle back to Ontario and undermine the priority of ss. 30(7). This should operate as an indirect undermining of the priority rule in ss. 30(7).

- **Question #4:** *What are the key considerations for the rules regarding priority of conflicting security interests from the proceeds of a financial account (i.e. bank accounts)?*

Answer: The key consideration regarding the priority of conflicting security interest from the proceeds of a financial account, such as a bank account, should focus on the party that the legislature has identified as warranting a priority recovery over certain collateral ahead of other secured creditors: namely, the pension plan beneficiaries. As noted above, ss. 30(7) has been drafted carefully to create priority for pension plan members over specific (but not all) collateral. It is clear that the legislature: a) identified pension plan members as a party that warrants specific priority protection; and, b) assigned certain collateral of the debtor, but not all of its assets, as collateral to which the beneficiaries' deemed trust priority attaches. The purpose and intention of ss. 30(7) should therefore be the guiding consideration for the rules regarding the priority of conflicting security interest. Despite any such conflict, the rules should be that the party identified by the legislation – pension plan members – should have the priority. The CFP takes no position with respect to how priorities that rank below the ss. 30(7) beneficiaries' priority should be addressed.

Priority contests involving the PBA deemed trust/PPSA priority should be determined at the time there is a conflict with another creditor over a distribution

Creditor priorities continue to evolve during CCAA proceedings, as they would under normal company operations. In relation to priority contests between the beneficiaries of the PBA/PPSA deemed trust and another creditor who challenges the priority, the relevant time for deciding that contest will be at the time of the distribution of assets during the CCAA proceeding. Prior to that point in time, the CCAA contemplates that creditors' priority rights can continue to evolve during the course of the CCAA proceeding. This approach to the timing for the determination of priority contests is supported for at least four reasons:

- a) In *Indalex*, the Supreme Court analyzed the priority dispute of the competing creditors as of the date of sale approval/distribution motion (i.e., not as of the date of the CCAA filing);
- b) The Court has held that priority contests between competing secured creditors “must be resolved as of the time when their respective security interests came into conflict” (i.e., not as of the date of the filing of the insolvency proceeding);
- c) The current Ontario Superior Court of Justice Commercial List Model Initial CCAA Order contemplates that priorities can evolve and improve for creditors during the CCAA proceeding prior to a distribution by providing, for example, that nothing in the Order shall “prevent the filing of any registration to preserve or perfect a security interest”; and
- d) The terms of the Ontario Superior Court of Justice (Commercial List) Model Approval and Vesting Order provide that sale proceeds are to stand in the stead of the property sold, i.e., the fact that assets are sold has no bearing on the priority ranking of a creditor claiming against the sale proceeds realized from sale.

The Supreme Court has confirmed that provincial personal property statutes such as the PPSA “provide the dominant legal framework for secured lending in Canada”. The express mention in section 30(7) of certain assets of a debtor to which the PBA deemed trusts attach – but not all the debtor's assets - is the legislative choice to give priority recovery to pension plan members over only those specific assets to pension creditors ahead of secured creditors.

This legislative approach also leaves flexibility for a potential lender to structure its loan terms over collateral *other than* “accounts, inventory, and its proceeds”. Accordingly, given the Supreme Court’s decision in *Indalex* interpreting the clear language of section 30(7), the law is clear that secured creditors in a CCAA (except for those who have a CCAA-ordered super-priority, such as a DIP lender, based on the doctrine of paramountcy), will rank behind the beneficiaries of the PBA deemed trust over “an account, inventory, and its proceeds”.

- **Question #5:** *Does obtaining the security interest in the financial account (i.e. bank account) by "control", should the financial institution (i.e. a bank) be required to disclose/provide notice of the security interest to:*
 - *the account holder/debtor;*
 - *other creditors?*
 - *If so, what information should be provided?*

Answer: Yes. Before obtaining the security interest in the financial account by control, a party, whether a bank or other lender, should be required to disclose/provide notice of the security interest to the pension plan members. This can be accomplished by providing notice to a union reporting employee/retirees, and/or to a pension committee established under the PBA or another retiree organization.

Additional submissions to restrict dividends and executive bonuses for companies with underfunded pension plans

CFP also strongly supports changes to the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16 that would restrict the ability of a company to pay dividends and executive bonuses where the company has an underfunded pension plan and has elected to contribute less to the plan by taking advantage of statutory solvency funding relief measures. This problem was recently reported in the media in the attached article (which references a research study). Such a restriction on dividends and bonuses was invoked for Air Canada several years ago, with ultimate success for both pension plan members and the company.

CFP would be pleased to discuss this proposal further.

Yours truly,

KOSKIE MINSKY LLP



Andrew J. Hatnay
AJH:vdl/encl.

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Latest News

Ontario Election 2018 Information

June 4, 2018

At our last CFP Board Meeting, the Directors approved new communication initiatives for reaching individual members. The documents we produced set out our political position in two current advocacy areas: federal BIA changes, and the Ontario election platforms on Pension Guarantees. ... [\[more\]](#)

Welcome

At the Canadian Federation of Pensioners (CFP), our mission is to advocate on behalf on defined benefit pension plans and issues from a pensioner's point of view. We do this by bringing Retiree Groups together to share expertise and experience and explore how to work to improve security for Defined Benefit Pension Plans and their members.

Founded in 2005, the Canadian Federation of Pensioners is currently focusing on the country wide need to improve the long term security of single employer defined benefit pension plans (DB plans) by:

- Advocating with Governments, Political Parties and Regulatory bodies to bring into focus issues with current pension and retirement legislation
- Participating in government, industry and other related forums that have been formally established to review issues and challenges with DB plans; and
- Speaking on pensioner issues with respect to current Canadian legislation when an employer's business is sold or merged, declared insolvent, bankrupt or is forced to wind-up, and the pension plan is underfunded.

Please feel free to browse our site to gain a greater insight into the issues with Pensions in Canada today, and please feel free to [contact us](#) directly for more information.

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Shareholders benefit as pensions go underfunded

\$66 billion paid out in dividends by firms that underfunded plans by \$12 billion, study shows

JOSH RUBIN
BUSINESS REPORTER

We've all got that friend who says they can't pay you back for dinner, but when you show up at their house you discover they just bought a brand new big-screen TV.

Now imagine that dinner cost you \$12 billion, and that new TV was worth \$66 billion. You might be a little frustrated.

A new study released Thursday suggests that's exactly what's going on with a major chunk of private-industry pensions across Canada.

The study, by the Canadian Centre for Policy Alternatives, found that of the 90 companies listed on the TSX Composite Index that have defined-benefit pension plans, just a handful completely funded their workers' pension funds in 2017.

At the same time, they were busy paying out billions of dollars in dividends to shareholders.

"I'm not against companies paying dividends. But if they can afford to pay the shareholders, they can afford to fund the pensions," said report co-author David McDonald, senior economist at the CCPA.

The study found that in 2017, the 90 defined pensions were collectively underfunded by roughly \$12 billion. The companies responsible for those pensions, meanwhile, paid out \$66 billion in dividends to shareholders — more than five times the amount it would have cost to fund the pensions.

Those shareholders usually include the very senior executives and board members who decide how free cash is used

Pension regulations too lax, critics say

PENSIONS from A1

The biggest single reason pension-funding deficits aren't been cleaned up, argues McDonald, is that the companies don't have to. Pension regulations dictate that funds must have at least 85 per cent of the money required to meet all their obligations, in the event that the plan is wound up. Regulators don't look at whether the company's been paying out dividends or hefty executive bonuses.

"All they need to do is look at whether they meet the statutory minimum. That needs to change. It's pretty clear that without regulatory changes, those deficits are going to be there forever," McDonald said. "Shareholders are supposed to take on the firm's risk. Instead, that risk is being shouldered by workers whose retirement security is compromised by outstanding pension deficits."

Retired Sears employee Ken Eady, who worked at the now-bankrupt retail powerhouse for three decades, agreed that regulators should be able to take a broader approach.

"I think (the regulators) should be looking at the financial health of the company. The

dividends. Executive bonuses. Those are all things that should matter," said Eady, who's now a vice-president of Sears Canada Retirees Group, an association of company pensioners.

Sears pensioners sued after their pensions were cut, saying that the company shouldn't have paid a \$509-million dividend to shareholders in 2013. At the time that dividend was paid, the pension fund at Sears Canada was short by \$133 million.

"From time to time, the investments are going to perform badly. As long as the company's in good financial shape, that's what matters more."

MALCOLM HAMILTON
PENSION EXPERT

While Eady says he and his wife have been able to survive on a pension that only pays about 80 per cent of what it was supposed to, other former colleagues haven't been so fortunate. "For me and my wife, we're OK. For some people, particularly outside of Ontario, it's been really tough. It's not the ability to take vacations to Flor-

ida. It's the difference between being able to stay in your own apartment or having to move in with your kids," Eady said.

But pension expert Malcolm Hamilton says occasional underfunding is a side effect of the way defined benefit pensions usually work — contributions from workers and companies which are then put into investments like stocks and bonds. When markets take a tumble, as they did after the global financial crisis in 2008, pensions will look underfunded. But that's only a problem, says Hamilton, if the company itself is actually in financial trouble. Otherwise, the company and its workers will keep paying in, and there will be plenty of money for pensioners to collect.

"From time to time, the investments are going to perform badly," said Hamilton, a pension industry consultant and former actuary at human resources consulting giant Mercer. "As long as the company's in good financial shape, that's what matters more. I'd rather have something that's 85 per cent funded by a strong, financially healthy company than something that's at 102 per cent, but is with a company that's in trouble."