Myths and Facts on Bill C-228

Canadian Labour Congress

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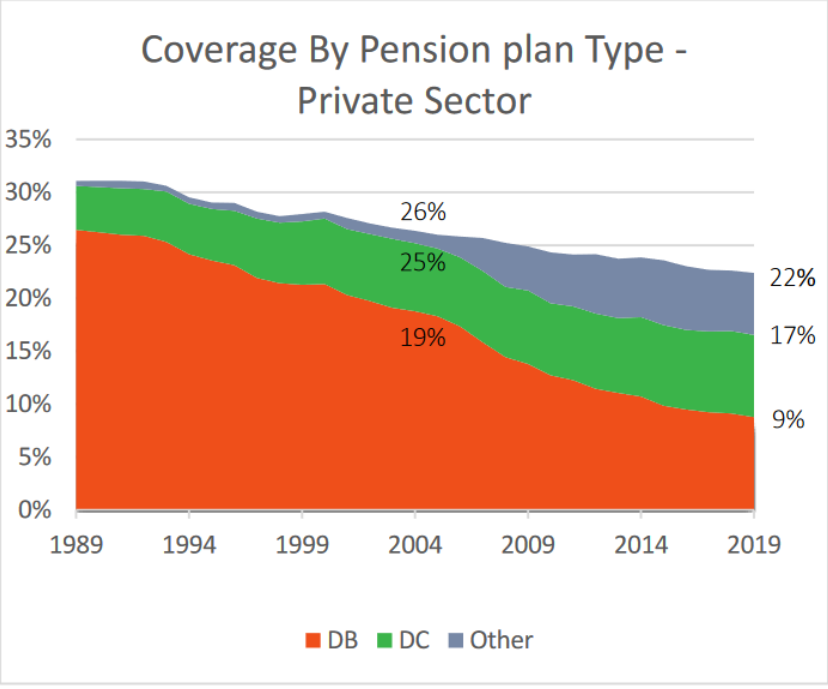
Bill C-228 (Pension Protection Act) amends the *Companies Creditors Arrangements Act* (CCAA) and *Bankruptcy and Insolvency Act* (BIA) to give the unfunded solvency liability in a defined-benefit (DB) pension plan super-priority status ahead of secured creditors in the priority of claims.

1. Won't super-priority status cause DB plan sponsors to wind up their plans?

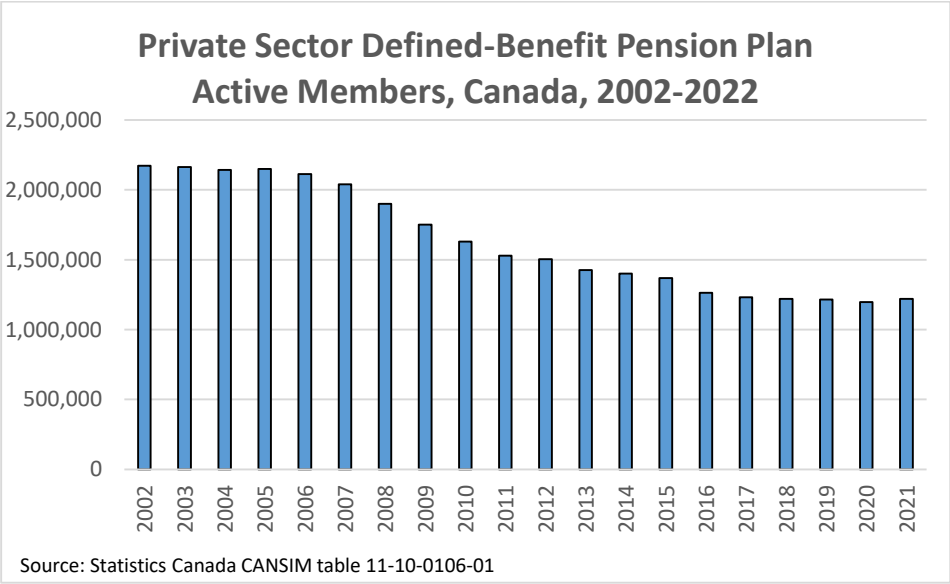
Currently, Canada does not grant super-priority status to the DB pension deficiency, and in the last decade, there has been no prospect of granting super-priority status to the unfunded liability.

Despite this, private-sector plan sponsors in Canada have been steadily closing their DB plans, freezing enrolment and accruals, and winding up their DB pension arrangements. While pension coverage generally has been falling in the private sector, DB plan coverage has been falling even faster as companies have sought to convert DB plans to defined-contribution (DC) or target benefit arrangements.



Source: Office of the Chief Actuary

The Canadian economy has added over 2 million net new private-sector jobs since 2002; despite this, the number of private-sector workers with a DB plan has nearly fallen in half over the past twenty years.



There are several complex, long-standing and interrelated reasons why companies are abandoning DB plans, none of which have to do with super-priority for the pension deficiency in insolvency. Interest rates fell sharply following the bursting of the dot-com bubble in 2000, and again after 2008 following the global financial crisis and Great Recession, remaining relatively low until very recently. This raised the cost of funding DB pension liabilities on a going-concern basis, but especially a solvency basis.

Financial market volatility and uncertain investment returns have also contributed to sponsors' contribution volatility, and growing longevity has raised the cost of DB plans. Changes in international accounting rules have also required sponsors to immediately recognize pension gains and losses on the income statement, exposing companies' balance sheets to pension liability volatility. For all of these reasons, companies have viewed DB employee pension plans as a source of growing cost and risk.

Unions believe DB plans are an excellent way to attract and retain employees, and are determined to retain and improve these plans. There are many steps the federal government could take to incentivize companies to offer DB pension benefits. But giving up benefit security for pensioners will not prevent companies from continuing to terminate their plans, nor is this an acceptable way to incentivize sponsors to retain their DB plans.

2. Won't super-priority status for the unfunded pension liability make it more difficult, expensive, or impossible for some DB plan sponsors to access loans?

To date, critics of Bill C-228 have presented little evidence that lending will be cut off or that it will become suddenly more expensive as a result of the Bill.

Commercial lenders decide whether to lend, and on what terms, according to a range of different factors, including default risk and the financial health of the firm, the expected rate of return on the loan, the opportunity cost of lending to a particular firm, and other factors. The ability of pensioners and plan members to demand the full value of their pension benefits in insolvency is only one factor considered by lenders, and not necessarily the deciding factor. Lenders continue to compete with one another to extend credit to viable, profitable companies. This will not change.

Commercial creditors like banks and financial institutions can take steps to protect their investments against the risk of default. They can expect companies to fully-fund their pension benefit plans, and limit their overall debt exposure. They can securitize their loans, transferring risk to investors. They can require increased disclosure about the funded status of their pension plans. These are not bad things. However, pensioners are unable to protect their pension benefits against the risk of default, despite being 'involuntary creditors' of the company.

3. Won't lenders impose costly reporting and disclosure obligations on DB plan sponsors, in order to ensure their loans can be serviced and repaid?

In itself, greater pension transparency and disclosure are good things. DB plan administrators already produce audited financial statements and detailed actuarial valuation reports which they file with pension regulators every one to three years. Relative to growing reporting requirements imposed by governments and investors in relation to greenhouse gas emissions and carbon exposure, additional or more frequent pension reporting is reasonable and manageable.

4. Won't Bill C-228 undermine the ability of insolvent companies to restructure and emerge from CCAA creditor-protection as a going concern, incentivizing liquidations instead?

Without super-priority status for the pension plan, pensioners and plan members are put in a very difficult and unfair situation (as they were placed in most recently at Laurentian University). In order to avoid plan wind-up and truly catastrophic cuts to pensions and benefits in a liquidation, plan members are pressured to 'voluntarily' agree to draconian cuts to pensions and benefits in CCAA proceedings. Typically, workers and plan members are pressured early in the proceedings to agree to massive cuts, with the threat of even more devastating cuts if they resist.

Since they currently have no protections in the event of bankruptcy and liquidation, they are threatened with losing everything, unless they agree to devastating pension and benefit reductions so that the company can remain a going concern. Opponents of Bill C-228 want to preserve the ability of companies to restructure on the backs of workers and pensioners. This is wrong and unfair.

With strengthened protections, plan members will be able to negotiate from a stronger position, instead of being at the mercy of insolvency lawyers. Protecting pensions through super-priority would force companies to restructure by renegotiating terms with secured creditors and others who are better able to adjust. Workers and pensioners may be prepared to negotiate from this stronger position in the interests of the company and its workforce. But without protections, pensioners have no real bargaining position at all.

5. Would capping the super-priority pension charge at $2,000 per plan member be an acceptable compromise increasing pensioners' protections?

Capping the amount subject to a super-priority claim only limits the risk-transfer from plan sponsors and lenders to pensioners and plan members. It would also do little to limit the demands from companies and secured creditors for benefit reductions in CCAA hearings.

6. Isn't this a provincial problem, created by the relaxation of solvency funding requirements in provincial jurisdiction?

Canada's insolvency framework is a federal responsibility, and federal statutes in this area are typically paramount over provincial legislation. However, the federal government has done relatively little to address pension losses in insolvency. They have shown no interested in exploring Canada-wide mandatory pension insurance; nor have they seriously tried to research the impact of changes to the priority of claims in the BIA. They also haven't been interested in cracking down on share buybacks, special dividends and other shareholder payouts when companies register a DB pension solvency deficiency.

In response to the Sears Canada liquidation, the federal government had an opening to make significant changes to the federal insolvency regime. Instead, it legislated modest changes in Bill C-97 that would have done nothing to prevent another Sears Canada debacle.

7. The government has already taken steps through Bill C-97 to make insolvency proceedings fairer, more transparent and more accessible for pensioners and workers.

The legislative amendments enacted in 2019 by Bill C-97 were very modest. They would not have prevented another Sears Canada (which they were a response to), nor did they prevent the subsequent gutting of the pension plan at Laurentian University. They were not intended to change the fundamentals of the CCAA and BIA process; they amounted to tinkering around the edges.

Bill C-97 amended the CCAA, BIA and the *Canada Business Corporations Act*. It incorporated a duty of parties in an insolvency proceeding to act in good faith. It added registered disability savings plans (RDSPs) to the list of exempted property that cannot be seized and distributed among creditors in a bankruptcy.

It also changed the BIA to allow a court to determine whether a company was insolvent or made insolvent by bonuses and termination payments to managers and executives made in the year preceding bankruptcy. If so, the court can authorize recovering these amounts.

Bill C-97 also required greater corporate disclosure regarding diversity, and allowed (but not required) directors and officers of a corporation to consider the interests of employees, retirees and pensioners in exercising their powers and discharging their duties.

8. Isn't Bill C-228 unnecessary, since outstanding pension contributions are already at the front of the line in insolvency proceedings?

Since 2008, outstanding normal-cost contributions owed to a pension plan have had a super-priority claim over a debtor's assets in bankruptcies and receiverships. However, this priority does not apply to special payments needed to liquidate an unfunded liability and to claims related to such an unfunded liability. It is the far larger unfunded pension deficiency, not the unremitted normal-cost contributions, that is the major issue for pensioners and plan members and the focus of Bill C-228.

9. Bill C-228 would rank 'golden parachute' severance packages for senior executives ahead of other claims?

Proposed amendments to Bill C-228 will prevent executive severance packages from being accorded super-priority status along with pensions and other employee benefits.

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