CAIRP
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Submission of the
Canadian Association of Insolvency and Restructuring Professionals[1]

Review of Bills C-476, C-487, C-501, S-214 and S-216 (40th Parliament)

June 25, 2010

Introduction

This paper is submitted by the Canadian Association of Insolvency and Restructuring Professionals ("**CAIRP**") and provides its comments with respect to the proposed changes to Canadian insolvency legislation and related acts, which have been set out in various bills, specifically Bills C-476, C-487, C-501, S-214, and S-216 that are currently on the agenda of the 40th Parliament (collectively the "**Bills**").

The proposed revisions set out in the Bills deal with quite technical changes to a number of statutes but, in summary, all aim to enhance the priority (from an unsecured creditor's perspective) of amounts owing to employees, former employees and pension and disability plan beneficiaries of organizations that commence formal insolvency proceedings.

The proposed revisions in the Bills[2] can be grouped into the following five areas:

1. Changes to the *Bankruptcy and Insolvency Act* (the "**BIA**") and the *Companies Creditors' Arrangement Act* (the "**CCAA**") to provide super-priority status for unremitted pension amounts (the "**Pension Proposal**" in this paper);

2. Changes to the *Wage Earner Protection Program Act* ("**WEPPA**") (the "**WEPPA Proposal**" in this paper);

3. Changes to the *Canada Business Corporations Act* ("**CBCA**") in respect of actions against directors (the "**Directors' Proposal**" in this paper);

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[1] The Canadian Association of Insolvency and Restructuring Professionals is the national professional organization representing 879 general members acting as trustees in bankruptcy, receivers, agents, monitors and consultants in insolvency and restructuring matters. Almost all practising trustees, licensed under the *Bankruptcy and Insolvency Act* belong to CAIRP. The Association is a non-profit corporation, established in 1979 to "advance the practice of insolvency administration and the public interest related to it".

[2] Bill S-214 and Bill C-476 also contain provisions that address changes to the *Employment Insurance Act*. These changes are not commented upon in this position paper. Bill C-501 does not contain the provisions that would seek to modify the *Wage Earner Protection Program Act* – these proposed changes are found only in Bill C-476 and Bill S-214, however in view of their importance, from CAIRP's perspective, these proposed changes are commented upon in this position paper.

4. Changes to the BIA to give super-priority status to employees' severance and termination pay (the "**Severance and Termination Pay Proposal**" in this paper); and

5. Changes to the BIA and CCAA to provide an enhanced status to certain long term disability benefits provided by an employer, in the event of a restructuring proceeding or in the event of a bankruptcy or receivership (the "**Disability Plan Proposal**" in this paper).

The Pension Proposal, WEPPA Proposal, Directors' Proposal and Severance and Termination Pay Proposal are addressed by Bills C-476, C-501 and S-214[3], while the Disability Plan Proposal is addressed by Bills C-487 and S-216.

Summary of Comments

Set out below is an executive summary of our comments on each of the proposed revisions (as set out above) – full comments are provided in the appendices to this paper.

1. The Pension Proposal

The Pension Proposal contemplates changes to the CCAA and BIA that would expand the super-priority treatment for unremitted employee deductions and "normal cost" pension contributions in insolvency proceedings, to encompass "special payments" ordered by a pension regulator to fund a solvency deficit in the plan to the extent such payments have come due and have not been remitted prior to commencement of a formal proceeding under the BIA or CCAA.

CAIRP notes that the priority of pension payments in BIA and CCAA proceedings has already been addressed by parliament by virtue of the recent revisions to the BIA and CCAA, which provide a measure of protection for pension amounts due at the date of the initial filing. As such, CAIRP is of the view that expanding the statutory super priority to all amounts that were required to be paid and are in arrears (i.e. only past due amounts, and not amounts required to be paid in the future on account of special payments) could be accommodated with reasonable efficiency within the existing framework for Canadian insolvency and restructuring proceedings and would not have a substantial negative impact on such proceedings.

CAIRP notes that certain statements have been made in connection with the Pension Proposal that would imply that super-priority status could be extended to the entire solvency deficit related to a defined benefit pension plan (i.e. not just the past due special funding payments). If the legislation were amended to provide for super-priority status for the entire solvency deficit[4], then CAIRP has numerous concerns which can be summarized as follows:

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[3] See note 2 above.

[4] Bill C-9 (40th Parliament, 3rd session), contains provisions that could be interpreted as effecting such a change, by causing an acceleration of certain amounts relating to pension deficits to become immediately due and owing in case of insolvency. See for instance section 1816(5) of Bill C-9, modifying section 29(6.4) of the *Pension Benefits Standards Act, 1985*.

a) The Pension Proposal assumes that the solvency deficit in a defined benefit pension plan can be accurately determined on a timely basis at the commencement of the filing. The Pension Proposal also assumes the solvency deficit within the pension plan, once calculated, is a fixed amount that will not fluctuate. These assumptions are both flawed, as until the plan is wound up, the solvency deficit will only be an estimate and will fluctuate each time the calculation is performed. In CAIRP's view, these two uncertainties will have significant negative impact on restructurings, potentially including:

   i. Lengthier restructuring filings, as stakeholders wait for calculations, or take time to assess the likelihood of understatement of the liability;

   ii. Reduced values, due to the aforementioned delays, increased restructuring costs or stakeholders discounting asset values to account for the increased risks/future uncertainty; and

   iii. Employers seeking to commence an immediate wind-up of the pension plans in order to crystallize the pension plan deficit and avoid future uncertainty/fluctuations. This would appear to be counter-productive to the intent of trying to protect pension plan benefits while promoting the restructuring of insolvent debtors.

b) Super-priority status for pension plan deficits could result in a severe contraction of credit for all borrowers with defined benefit pension plans, potentially triggering: loan defaults and insolvencies that might not otherwise occur; and/or impairing their ability to make further funding contributions to such pension plans even if the changes do not create loan defaults. In other words, companies that are otherwise "surviving" notwithstanding a pension plan deficit could be forced to commence insolvency proceedings as a result of the introduction of the Bills and the resulting contraction of credit. Because of the uncertainty in determining the existence or quantum of a deficit and the time lag in obtaining updated actuarial valuations, it is possible that borrowers with solvent defined benefit pension plans might also unnecessarily experience contraction of credit as secured lenders use more conservative assumptions in the interim, and this contraction could be material in value.

c) By creating a statutory super-priority without a marshalling scheme, the Bills compound the problem that presently exists with statutory super-priority security provisions in the legislation (for example, in connection with employee claims, pension plans and certain claims of the Crown for payroll source withholdings).

d) The Pension Proposal could result in an unfair re-allocation of value from other creditors to the pension plan beneficiaries. Ultimately, a restructuring or liquidation is about distributing value amongst the various stakeholders of the insolvent debtor. Pursuant to the Pension Proposal, the pension plan deficit would be funded from assets or resources that would otherwise be available to the other stakeholders of the insolvent plan sponsor, whether they be secured lenders, trade creditors, tax authorities or employees (e.g. severance and termination).

Although CAIRP is of the view that protection of pensions is a laudable public policy objective, CAIRP questions whether it is equitable that one creditor group benefit so significantly at the

expense of all other stakeholders in order to achieve that objective, and notes that this change could precipitate additional insolvencies among companies that would otherwise not occur. CAIRP further notes that in other countries, such as Australia, where significant amendments were made to pension legislation, the focus of such legislation was on increasing the quantum of funding contributions by all pension plans, rather than "clawing back" amounts from other creditors of insolvent plan sponsors to compensate for deficiencies in their plans.

2. The WEPPA Proposal[5]

Currently, WEPPA provides a measure of protection to employees who have unpaid remuneration or termination and severance pay owing as a result of a loss of their employment due to the bankruptcy or receivership of their employer. Pursuant to WEPPA, the federal government funds payments to such employees for amounts owing in respect of outstanding wages earned in the 6 months before the bankruptcy or receivership, and severance and termination pay relating to an employment that terminated in the 6 months before the bankruptcy or receivership, to a maximum aggregate amount, currently $3,323.08 for 2010.

The Bills contemplate changes to the WEPPA that would increase the measure of protection to employees, by making the program apply not only in the event of bankruptcy or receivership, but also in the event of a loss of employment where the employer has filed a proposal under the BIA or a plan of arrangement under the CCAA.

CAIRP agrees with the concept underlying the WEPPA Proposal, as it corrects a number of inequities that became apparent after the WEPPA was implemented, particularly given the number of insolvencies of large employers carried out under the CCAA. CAIRP notes however that a number of changes would have to be made to the WEPPA legislation as a result of the WEPPA Proposal, and these are not addressed in the Bills. CAIRP would welcome the opportunity to work with the government to create solutions to deal with these issues.

3. The Directors' Proposal

The CBCA and the provincial legislation addressing corporations provide a measure of protection for employees by making directors personally responsible for unpaid amounts, in certain circumstances. For example, section 119 of the CBCA, essentially, provides that directors are jointly and severally responsible for all amounts due to employees for services rendered to the corporation (including vacation pay, but excluding severance pay), to a maximum amount equivalent to 6 months' wages, if the corporation becomes bankrupt or is liquidated, or is sued for the debt and execution has been returned unsatisfied.

The Directors' Proposal contemplates changes to the CBCA that increase the measure of protection by creating a new adjudication process, whereby the claims under Section 119 of the CBCA of current and former employees against directors would be adjudicated on an expedited basis by an adjudicator. The ability of directors to subsequently litigate the claims and/or appeal/stay an order of the adjudicator would be eliminated by the Directors' Proposal.

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[5] See note 2 above.

CAIRP's principal comments on the Directors' Proposal are the following:

a) The Directors' Proposal would only benefit employees of corporations that are bankrupt, and would not protect employees who are owed monies by corporations that have filed under the CCAA or are attempting to restructure through a proposal under the BIA.

b) CAIRP questions the necessity to streamline the process to make a claim against directors, in view of the protection already afforded employees under WEPPA (which has as its main objective protecting employees against loss of their remuneration in the event of the bankruptcy or receivership of their employer).

c) There is a potential for the Directors' Proposal to compromise the leadership of companies in financial difficulty as directors may resign as a company starts to get into financial difficulty, or otherwise enters the "zone of insolvency", rather than face the adjudication process that directors would consider biased. In addition, this may also hinder the ability of insolvent companies to attract replacement directors at a time when talented individuals are most required.

d) The Directors' Proposal may result in an increase in the cost of directors' and officers' insurance, or make it difficult/impossible to renew such insurance when a company gets into financial difficulty.

e) The Directors' Proposal contemplates the information being provided to the adjudicator within 30 days of a complaint being filed, which would likely be during the early days of the bankruptcy. In these circumstances, the Directors' Proposal has the potential to further complicate the trustees' role in the already difficult period at the outset of bankruptcy proceedings, and may negatively affect asset realizations, as the trustees' attention is diverted away from the asset realization process to deal with the Directors' Proposal's information requirements.

f) The Directors' Proposal will reduce potential recoveries for all other creditors, as there will be an inevitable increase in the costs of administration, as a result of the costs of gathering the required information to be provided to the adjudicator and subsequent follow-up questions. It is not stated who would bear these costs, but it would appear to be unfair for the non-employee creditors to have to bear these costs.

g) The Directors' Proposal would not benefit employees of provincially-incorporated companies, as it is only effective in connection with corporations incorporated under the CBCA. It may also lead to companies incorporating under provincial legislation to avoid being subject to the Directors' Proposal.

4. The Severance and Termination Pay Proposal

The BIA provides a measure of protection for employees in the event of the bankruptcy or receivership of their employer, by creating a super priority secured status for the wage claims of these employees (Sections 81.3(1) and 81.4(1) of the BIA) up to a maximum of $2,000 earned in the six months preceding the date of initial bankruptcy event or receivership.

The Bills contemplate changes to the BIA that would substantially increase the measure of protection, to provide a super priority charge for all severance or termination pay that is due to an employee as a result of the termination of employment from a person subject to bankruptcy or receivership and would operate independently of sections 81.3(1) and 81.4(1) (i.e. would not be subject to the maximum of $2,000 provided for in those sections).

CAIRP's principal comments on the Severance and Termination Pay Proposal are the following:

a) The Severance and Termination Pay Proposal would likely result in a significant contraction of available credit, as secured lenders reduce the amount of available credit by the severance and termination pay owing. A similar effect occurred following the introduction of the wage protections provided in sections 81.3 and 81.4 of the BIA, the distinction being that the quantum of these wage protections was significantly smaller and could be more readily calculated. This contraction of credit may result in companies that are otherwise "healthy" getting into financial difficulty and, dependent on the degree of financial health prior to the credit contraction, being forced to commence insolvency proceedings, possibly resulting in the termination of employees.

b) By creating a statutory super-priority without a marshalling scheme, the Bills compound the problem that presently exists with statutory super-priority security provisions in the legislation (for example, in connection with employee claims, pension plans and certain claims of the Crown for payroll source withholdings).

c) Quantification of the amounts owing for severance and termination is complicated and subjective, as the amount of severance and termination pay entitlement can vary widely, depending on the province of employment, common law and other factors. Not only would quantification of this amount increase the costs of bankruptcy proceedings, but it could also compound the impact of the credit contraction noted in (a) above, as secured lenders would use conservative assumptions in their calculations to deal with the subjective factors inherent in the calculation. The implementation of a standardized national methodology/approach to calculate severance and termination pay owing for purposes of the Severance and Termination Pay Proposal would mitigate some of the complexity and uncertainty.

d) The lack of a statutory cap for severance and termination pay in the Severance and Termination Pay Proposal is inconsistent with the $2,000 cap imposed in the recently enacted amendments (presumably after considerable government deliberation) to the BIA in respect of wage arrears (section 81.3(1) and 81.4(1)). CAIRP notes that making the proposed super-priority for severance and termination pay subject to a maximum dollar value would also reduce the complexity and credit contraction effects described in (a) and (b) above.

e) The Severance and Termination Pay Proposal may provide a false sense of security to employees, as the quantum of super-priority charges against the employers' current assets could exceed the realizable value of the employers' current assets. This deficit could arise because the Severance and Termination Pay Proposal would result in a further super-priority claim against the current assets of the employer (i.e. an additional super-priority claim in addition to the super priority amounts due under sections 81.1 and 81.2 of the BIA, deemed

trusts for unremitted employee source deductions, and the wage protections provided by sections 81.3 and 81.4 of the BIA). CAIRP notes that for large established employers, the amount of severance and termination pay arising upon bankruptcy or receivership could be very significant. If there was insufficient value in the current assets to discharge all of these super-priority amounts, the balance of these super-priority amounts and any other "junior" super-priority amounts owing (e.g. amounts owing in respect of pension claims under sections 81.5 and 81.6 of the BIA as well as the super priority charge for pension deficits proposed by the Pension Proposal) could still end up as unsecured claims.

f) The Severance and Termination Pay Proposal does not address the relative ranking of rights of employees for their wage claims as compared to their severance and termination amounts, in the event realizations from the current assets are insufficient to pay the entirety of these claims (i.e. after taking into consideration the super priority amounts due under sections 81.1 and 81.2 of the BIA and the deemed trust amounts for unremitted employee source deductions). In the event that the current asset realizations are insufficient, the legislation should provide for the relative ranking of the various types of claims. In CAIRP's view, amounts owing for unpaid wages and vacation pay should have priority.

g) As noted in our comments on the Pension Proposal, a restructuring or liquidation is about distributing value amongst the various stakeholders of the insolvent debtor. Pursuant to the Severance and Termination Pay Proposal, the amount of severance and termination pay owing would be funded from assets or resources that would otherwise be available to other stakeholders of the insolvent employer, whether they be the "junior" super-priority amounts noted in (d) above (such as pension plan beneficiaries), secured lenders, trade creditors or tax authorities. CAIRP is concerned that the multiplication of priority charges may be counter-productive to one of the principal objectives of insolvency and restructuring legislation, which is the fair distribution of value among the various stakeholders.

h) The Severance and Termination Pay Proposal could have other negative effects for employees, such as discrimination against older workers (with higher severance entitlements) and increased contracting out, both with the intent of reducing the liability associated with the Severance and Termination Pay Proposal.

5. The Disability Plan Proposal

The Disability Plan Proposal contemplates changes to the BIA and CCAA that would implement a measure of protection for workers that lose various long term disability and health benefits that they were receiving (collectively, the "**Benefits**")[6] prior to the commencement of the restructuring proceedings, the bankruptcy or the receivership. While Bills S-216 and C-487 use different language and concepts and, in certain respects are vague, they essentially provide that:

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[6] For purposes of both Bill C-487 and Bill S-216, the Benefits would consist of long term disability benefits and health related benefits payable to long term disability beneficiaries until the age of 65. For purposes of Bill C-487, the Benefits would also include health related benefits for all employees for a period of 5 years, with the same terms of coverage and level of benefits as were being provided to the employees prior to the inception of the restructuring proceedings.

- In the event of a restructuring proceeding (pursuant to the BIA or CCAA), the proposal or plan of arrangement must provide for the continuation of the Benefits or the payment to a fund of the unfunded portion of the liabilities relating to the Benefits ("**Benefit Liabilities**")[7], and the court must be satisfied that the employer can and will make these payments.

- In the event of a bankruptcy or receivership, the Benefits must be continued by making payments to the benefit plan, or by the trustee or receiver creating a fund sufficient to pay the unfunded portion of the Benefit Liabilities until the Benefits terminate.

To enforce these requirements, Bills C-487 and S-216 use different mechanisms:

- pursuant to Bill C-487, a super-priority statutory charge is created over all of the employer's assets for all payments required to be made; and

- pursuant to Bill S-216, trustees and receivers would be compelled to transfers assets to a fund (sufficient to pay the benefits to the beneficiaries until age 65).

CAIRP's principal comments on the Disability Plan Proposal are the following:

a) The calculation of the amount of the fund or the amount of the super priority secured claim will depend upon an actuarial valuation that will attempt to estimate the present value of future benefit costs. The present value of future benefits can only be estimated through a process of making assumptions about all the variables that affect the beneficiaries, such as the life expectancy of beneficiaries, possible changes in conditions of the disability, changes in the cost of benefits and health related costs over time, and yield of the investments set aside as a fund to cover future benefits. This process is inherently imperfect.

b) The Disability Plan Proposal contemplates the creation of a fund or a statutory super priority secured claim in the event of a bankruptcy or receivership, but does not address the administrative difficulties inherent to the creation of such a fund or statutory security. The Disability Plan Proposal as drafted would lead to a situation where the administration of estates in bankruptcy or receivership could not be wound down (as a result of a potential a deficiency or surplus during the tenure or on completion of the wind down), resulting in a long and costly administration of estates, and long delays in providing a recovery to ordinary unsecured creditors on account of their claims. The Disability Plan Proposal could also lead to an imbalance in the treatment of some of the long term disability beneficiaries as compared to others.

c) The Disability Plan Proposal could have an impact on attempts to restructure organizations with self-insured disability benefit plans. CAIRP is concerned that the time required to

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[7] Both Bill C-487 and Bill S-216 suggest a calculation based on an actuarial method. As such, the unfunded portion of the Benefit Liabilities would be the difference between the assets available in the benefit plan (if any) and the present value of future obligations relating to the Benefits, as determined by an actuary (similar to the calculation performed by an actuary of a deficit/surplus in a defined benefit pension plan).

quantify the long term disability obligation and the additional costs required to do so would be counterproductive to a restructuring process.

d) The uncertainty created by super-priority for long term disability benefits could result in a severe contraction of credit for the employers who self-insure. Banks making secured loans lend up to the net collateral values of the borrower's assets. The additional encumbrance on the assets in the event of insolvency would increase risk for lenders which in turn would translate into higher interest rates for borrowers, increased transaction costs and/or lower credit availability.

e) By creating a statutory super-priority without a marshalling scheme, the Bills compound the problem that presently exists with statutory super-priority security provisions in the legislation (for example, in connection with employee claims, pension plans and certain claims of the Crown for payroll source withholdings all competing for priority over the same assets).

f) By creating uncertainty and risk, the Disability Plan Proposal may adversely affect employees, former employees and people that are unable to work due to a long term disability. CAIRP is concerned that a reduction in credit availability may well result in companies that are otherwise "healthy" and able to fund the disability benefit costs on a continuing basis becoming financially distressed or insolvent.

g) The Disability Plan Proposal may also result in companies with large Benefit Liabilities being unable to make a viable plan/proposal due to the quantum of the Benefit Liabilities that must be paid – these employers would then be forced to liquidate.

h) CAIRP believes that implementing a protection in connection with all health related benefits of all employees for a period of 5 years (as is contemplated in Bill C-487) may constitute a duplication of a claim that is already addressed by the termination provisions of employment law, and does not know of any compelling reason to extend the protection to all employees for that length of time.

i) The Disability Plan Proposal could result in an unfair re-allocation of value from other creditors to the long term disability beneficiaries, as payments in respect of long term disability obligations would be funded from assets or resources that would otherwise be available to the other stakeholders of the insolvent employer, whether they be secured lenders, trade creditors, tax authorities or employees (e.g. severance and termination).

j) CAIRP believes that a policy objective of protecting employees who are beneficiaries of long term disability plans is laudable, however CAIRP believes this objective would be better achieved by creating incentives for employers to provide these benefits through an insurance plan, rather than a self-insured plan. Insurance companies, as specialized entities in this area, are well suited to administer these types of benefit plans and are subject to strict regulations.

Conclusion

CAIRP considers there could be a significant number of financial, legal and practical issues with the Bills that, if implemented, could have significant adverse impacts on the success, complexity and cost of restructuring and bankruptcy proceedings, and may also have further detrimental effects on solvent companies and the Canadian economy generally.

CAIRP would be pleased to meet with the committee to explain any of the issues it has identified and to answer any questions the committee may have.

Respectfully submitted,

CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS (CAIRP)

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The proposed expansion of super-priority status for unremitted special pension payments

The BIA[1] and the CCAA[2], as they presently exist, provide a measure of protection for certain unremitted pension amounts:

- In restructurings (i.e. BIA proposals or CCAA plans of arrangement) - by making the payment of these amounts a precondition to: (i) the ratification of the proposal or plan by the Court (sections 60(1.5) of the BIA and Section 6(6) of the CCAA respectively); or (ii) obtaining approval from the Court for a sale of assets out of the ordinary course of business (section 65.1(8) of the BIA and section 36(7) of the CCAA), and

- In bankruptcies and receiverships - by creating a super priority secured status for these unremitted amounts (sections 81.5 and 81.6 of the BIA).

The unremitted pension amounts that benefit from these measures of protection are limited to amounts that were: (i) withheld from employee wages; (ii) amounts that would be considered as the "normal cost" for defined benefits plans (as defined in the subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*[3] (the "**Regulations**"); and (iii) unremitted contributions for defined contributions plans (as defined in the Regulations).

The Bills[4] contemplate changes to the CCAA and BIA (the "**Pension Proposal**") that would expand the super priority treatment referred to above in restructuring, bankruptcy and receivership proceedings, to encompass (in addition to the amounts already protected under the legislation) the special payments ordered by a pension regulator to fund a solvency deficit in the plan to the extent such payments have come due and have not been remitted prior to commencement of a formal proceeding under the BIA or CCAA[5].

CAIRP understands that the intended effect of the Pension Proposal is to improve the likelihood of defined benefit pension beneficiaries receiving their expected benefits, by granting first ranking security to defined benefit pension plans for funding payments that would otherwise be unsecured claims in insolvency proceedings.

Based on the use of the past tense in the Bills ("….that <u>were</u> required to be paid by the employer to the fund…" [emphasis added]), CAIRP understands that this super-priority would not extend to special payments that have been ordered by a pension regulator but are not yet due.

However, certain statements have been made in connection with the Bills that would imply that the super-priority status would be extended to the entire deficit related to a defined benefit pension plan

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1 R.S.C. 1985, c. B-3, as amended.

2 R.S.C. 1985, c. C-36, as amended.

3 SOR/87-19, the regulations to the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd supp.), as amended.

4 Bill C-476 (40th Parliament, 2nd Session), Bill C-501 (40th Parliament, 3rd Session) and Bill S-214 (40th Parliament, 3rd Session).

5 Specific extract from the Bill: "any amount considered to meet the standards for solvency determined in accordance with section 9 of those Regulations, **that were required to be paid** by the employer to the fund"(emphasis added)

(i.e. not just the past due special funding payments) and that the Bills would be amended[6]. As a result of this situation, CAIRP's principal comments in both respects are set out below:

I. CAIRP comments if the super priority is intended to apply only to past due amounts

CAIRP notes that the issue of the priority of pension payments in BIA and CCAA proceedings was recently considered by Parliament and that such consideration was taken into account in the recent amendments to those statutes[7]. The recent amendments gave rise to various provisions of the BIA and CCAA which provide a measure of protection in formal insolvency proceedings, as follows:

- In restructuring proceedings under the BIA and the CCAA, by limiting the Court's discretion to approve a proposal or a plan of arrangement[8]. Unless the parties agree otherwise and the pension regulator approves of this agreement, the Court may only approve a proposal/plan if it provides for the remittance to the pension plan of amounts previously deducted from the employees' wages and not remitted, of the normal cost payments due in the case of defined benefit pension plans and of unremitted contributions in the case of defined contribution plans, and if the Court is satisfied that the debtor can and will make the payments.

- In restructuring proceedings under the BIA and CCAA, by limiting the Court's discretion to approve a sale of assets outside the ordinary course of business[9]. The Court may grant such an authorization only when the Court is satisfied that the debtor can and will make the payments that would be required if a proposal or plan were approved by the Court.

- In bankruptcy and receivership proceedings, by creating a super-priority statutory security over all the assets of the insolvent person[10], subject only to the deemed trust claims in favour of the Crown for unremitted source deductions, the super-priority statutory security for employees' unpaid wages, the rights of unpaid vendors to recover recently delivered merchandise, and the rights of farmer, fishermen or aquaculturists.

CAIRP also refers the reader to the discussion of public policy considerations in Section II.7 below.

Subject to the preceding, CAIRP is of the view that expanding the statutory priority to all amounts that were required to be paid and are in arrears (i.e. only past due amounts, and not amounts required to be paid in the future on account of special payments) could be accommodated with reasonable efficiency within the existing framework for Canadian insolvency and restructuring proceedings and would not have a substantial negative impact on such proceedings.

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6 Bill C-9 (40th Parliament, 3rd session), contains provisions that could be interpreted as effecting such a change, by causing an acceleration of certain amounts relating to pension deficits to become immediately due and owing in case of insolvency. See for instance section 1816(5) of Bill C-9, modifying section 29(6.4) of the *Pension Benefits Standards Act, 1985*.

7 S.C. 2005, c. 47, as supplemented and modified by S.C. 2007, c. 36. The relevant provisions came in force in part on July 8, 2008 and in part on September 18, 2009.

8 Section 60(1.5) BIA and section 6(6) CCAA.

9 Section 65.1(8) BIA and section 36(7) CCAA

10 Sections 81.5 and 81.6 BIA.

II. CAIRP comments if the super priority is intended to apply to the entire pension plan deficit

1. The Pension Proposal assumes that any deficit in a defined benefit pension plan can be accurately determined on a timely basis at any point in time. This assumption is flawed.

    - The estimation of the surplus or deficit of a defined-benefit pension plan is an inherently imprecise exercise. A surplus or deficit represents the present value of the estimated future net pension inflows (pension contributions, investment earnings and return of capital) and outflows (payment of benefits and administrative costs) within the pension plan, under various assumptions regarding market yields and the characteristics of the workforce (age, life expectancy, etc.). However, the actual net cash flows in a pension plan cannot be known with certainty until the plan is wound up or until all beneficiaries entitled to benefits have received all of their entitlements (very often, when they become deceased). As such, the actual surplus or deficit in a continuing defined benefit pension plan, at any point in time, can only be estimated, through a process of making assumptions about all of the variables that affect the pension plan and the current and future pensioners, in a process that is inherently imperfect. Examples of key assumptions that have to be made include:

        - demographic trends (for example, the length of time employees will remain with the employer, and the life span of current and future retirees);

        - economic trends (for example, the future earnings of plan members and the earnings or loss from the assets in the plan);

        - appropriate discount rates to calculate the present value of the resulting net cash flows; and

        - inflation and interest rates.

    - With the median age of a Canadian worker at 41.2 years[11] and average Canadian life expectancy at 80.4 years[12], this means some trends may need to be estimated almost 40 years into the future. Over such extended periods, precise estimates are simply not possible; furthermore, the effect of compounding means that the assumptions selected have a huge impact on estimated net present value[13].

    - In pension plan wind-up situations, the surplus or deficit is calculated on a solvency basis (which assumes the termination of the plan on a specific date and compares the value of the plan assets at that date to the benefits accumulated by the plan members to that date). While calculating the deficit on a solvency basis removes a number of future demographic and economic assumptions, solvency based valuations may still be inaccurate because a pension plan cannot be wound up instantaneously; in other words, until all plan assets have been

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[11] source: Statistics Canada 2006 census

[12] source: Statistics Canada January 2008 survey

[13] To choose a hypothetical example, the present value of $1,000,000 discounted for 40 years at 5.5% per annum is $117,463.14. If the discount rate is reduced to 5.0% per annum, the present value increases to $142,045.68, meaning that a reduction of 0.5% per annum in the discount rate increases the present value by more than 20%.

realized and pension benefits have been distributed via lump-sum payments or the purchase of annuities, the surplus or deficit is not known with certainty.

- CAIRP's consultations with professionals specializing in pension plan wind-ups indicate that in the case of a pension plan with data of good quality and no outstanding regulatory and legal issues, a reasonable time frame from the termination of the plan to the distribution of benefits averages 12 to 18 months.

- During the wind-up, there may be significant fluctuations in asset values[14] and/or the annuity value that can be purchased for a given dollar amount[15].

- Accordingly, there is no certainty that the surplus or deficit calculated on a solvency basis for a continuing plan as at a specific date will closely approximate the final surplus or deficit if the plan were actually terminated on that date.

- The issue is further complicated by the time (often 1-2 months) and expense required to prepare a solvency-based actuarial valuation, and the fact that fluctuations in asset and/or annuity values could cause significant short-term changes in a plan's solvency position that may not be relevant in a continuing plan[16].

- The long-term nature of pension obligations is reflected in the existing approach of Canadian pension legislation to solvency deficits: in Ontario, for instance, a new actuarial valuation is required tri-annually and any solvency deficit identified in that valuation must be remedied via additional special payments (in excess of "normal cost" payments) over five years (note, the Ontario government recently permitted solvency deficits to be funded over ten years in certain circumstances).

2. The Pension Proposal assumes the pension deficit, once calculated, is a fixed amount that will not fluctuate. This assumption is flawed.

    - As indicated above, the calculation of the pension deficit is performed at a point in time, based on a set of assumptions drawn from existing conditions and demographics. The Pension Proposal creates a super-priority for the entire solvency deficit without making allowance for the fact that the solvency deficit will change over time (e.g. the solvency deficit could reduce if market conditions get better, or increase if actuarial assumptions were too optimistic).

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[14] for example, the 26% decline in the value of the TSX Composite Index from September 25- October 16, 2008 or the 10% increase in the value of the TSX Composite Index from July 9-27, 2009

[15] In order to match assets and liabilities, the insurers that provide annuities price them based on available fixed income yields with adjustments for credit default, capital requirements, profit, expenses and margins for adverse deviation. In periods of economic uncertainty insurers are likely to increase their estimates of credit default and margins for adverse deviation; this would increase the price of annuity contracts, which would have the effect of increasing the cost of pension plan benefits and reducing the plan surplus/increasing the plan deficit.

[16] Both of these factors are consistent with the long-term nature of a pension plan. For example, if a continuing plan invests in bonds with the intention to hold them to maturity then a decline in the market value of those bonds prior to maturity that is caused by general market conditions, rather than increased default risk of the specific bonds, is arguably irrelevant.

- The Pension Proposal does not address what would happen if the actual final deficit was different than estimated:

    - If the solvency deficit was greater than the estimated amount, there would be a shortfall to the beneficiaries – who would fund this shortfall, or would the beneficiaries then be required to take a reduction in benefits; or

    - If the solvency deficit was less than the estimated amount, there would be a surplus – who would the surplus be paid to: the beneficiaries or the other creditors.

3. The Pension Proposal could have significant negative impacts on attempts to restructure organizations with defined-benefit pension plans:

    - In general, uncertainty complicates the restructuring of a distressed organization: the lower the understanding of the impact of various alternatives on a stakeholder's economic interest, the more difficult it will be for that stakeholder to make informed decisions. CAIRP acknowledges that it is not possible to completely eliminate uncertainty from a restructuring: for instance, stakeholders will never have perfect ability to predict the future operating results of a restructured organization, or the value a purchaser might be prepared to pay for that organization in the future. However, in CAIRP's experience it is clear that increased uncertainty tends to:

        - Prolong the restructuring timeline as stakeholders prepare, and/or request and review, additional analyses to attempt to evaluate and quantify the uncertainty. This is particularly true in very large situations where a small percentage change can have a significant absolute dollar impact; and/or

        - Result in lower values, as restructuring costs increase and/or stakeholders discount asset values for the perceived increased risk.

    - Giving super-priority status to any deficit in a defined-benefit pension plan would significantly increase the uncertainty in any restructuring of the insolvent debtor/sponsoring employer, as it is not possible to accurately determine the liability on a timely basis (as set out above). Accordingly, not only would stakeholders have to deal with the inherent inability to predict future operating results and realizable values, but they would also lack certainty as to the amount of claims that ranked in priority to them.

    - Although there can be a myriad of permutations depending on the specific circumstances, there are three basic alternatives available to address the allocation of value to a liability such as a pension plan deficit that is contingent (because until the plan is terminated and wound up, it will not be known whether there is a deficit) and/or unliquidated (meaning that the amount of the liability is not known with certainty):

        - Defer dealing with the liability until its existence and amount are known with certainty (in the case of a pension plan, this would mean terminating the plan and waiting until the wind-up was completed before proceeding to restructure the plan sponsor);

        - Estimate a reserve that is sufficiently large to encompass any reasonable estimate of the liability, and use the amount of the reserve as a proxy in restructuring discussions pending the actual amount being known (a solvency-based actuarial valuation might

potentially be used as the basis for an initial estimate, but the pension plan would have to be terminated and wound up in order to determine the actual amount); or

- Negotiate a value for the liability that is agreed to by the affected stakeholders, and use that amount in restructuring discussions.

- Giving super-priority status to a liability of this nature would mean that many, and possibly all, of the other stakeholders would be unable to determine the value (if any) potentially available to them until the contingent and/or unliquidated liability was crystallized. Based on its experience, CAIRP anticipates that this dynamic would have a number of potentially detrimental effects, including:

  - Slowing many restructurings to a standstill until the amount of any pension plan deficit was agreed or conclusively determined. As noted above, even in the fastest-case scenario (i.e. the unlikely case when all stakeholders immediately agreed to be bound by the same solvency-basis actuarial valuation) this process would take at least 1-2 months; if the solvency deficit could not be agreed to by all parties and the plan then had to be wound up in order to conclusively determine the amount of the solvency deficit, the solvency deficit might not be known for at least 12 to 18 months (and possibly longer). In CAIRP's experience, prolonging restructuring proceedings usually reduces overall recoveries to all stakeholders, as the business in question loses revenues, customers and key personnel to solvent competitors; or

  - Significantly increasing the likelihood that once a restructuring proceeding is commenced, any defined benefit pension plans would be immediately terminated, so that the amount of any deficit that would have super-priority status would be known with certainty.

- Given the fact that pension plan benefits are oftentimes an integral part of a collective bargaining agreement, and the fact that in implementing the last round of changes to the BIA and CCAA parliament adopted a policy objective of leaving collective agreements unaffected unless both parties to the collective agreement agree to modify same[17], it is uncertain whether it would be possible to terminate a pension plan in the context of a restructuring. Since the stakeholders may need the pension plan to be terminated to assess the size of the "real" deficit, CAIRP is concerned that the uncertainty created by the super-priority status for the actuarially calculated solvency deficit may effectively impede the possibility of reaching a successful restructuring.

- In light of the foregoing, CAIRP believes such a change would be detrimental, as it would pit the policy objective of the legislation of facilitating restructurings in order to preserve employment and value against the other policy objective of protecting the rights of employees and former employees to recover funds in the context of the insolvency of an employer.

[17] Section 65.12(6) BIA and section 33(8) CCAA.

4. The uncertainty created by super-priority for pension plan deficits could result in a severe contraction of credit for all borrowers with defined benefit pension plans, particularly those known or believed to be in a deficit position, potentially triggering loan defaults and insolvencies that might not otherwise occur.

    - Banks making secured loans lend up to the net collateral values of the borrower's assets. The net collateral value is determined by taking the gross collateral value of the assets (i.e. the amount the bank would realize if the assets were sold) and reducing it by the amount of potential encumbrances that would have priority over the gross realizations (such as unremitted source deductions, the priority rights of employees under sections 81.3 and 81.4 of the BIA, the existing priority rights of pension claims under sections 81.5 and 81.6 of the BIA, and the rights of suppliers of recently delivered merchandise under section 81.1 and 81.2 of the BIA).

    - However, pension deficits are fundamentally different from the other obligations for which lenders typically reduce borrowing availability, for the following reasons:

        - As described above, the actual amount of a defined benefit pension plan deficit cannot be known with certainty until the plan is wound up;

        - A defined benefit pension plan deficit has no direct correlation with the number of current employees (unlike the priority afforded to employee claims under the BIA, which currently[18] provides for a fixed maximum amount per employee);

        - The actual or estimated quantum of a defined benefit pension plan deficit is impacted by factors (such as securities markets and interest rates) outside the organization's control, and can change significantly if those factors are volatile; and

        - Unlike other potential prior claims such as unremitted source deductions, GST or PST, there is no existing monthly return or regulatory statement that specifies or states the amount of a pension plan deficit. Instead, as described above, a solvency-based actuarial valuation is currently only required tri-annually in Ontario, due in part to the time and expense required to prepare one.

    - In combination, the above factors mean that it is simply not practicable for a lender to accurately monitor the solvency position of a defined benefit pension plan on a continuing basis in the same manner as other potential prior claims. Accordingly, CAIRP expects that if defined benefit pension plan deficits were accorded super-priority the effect on available credit would be much more pronounced than for other potential priority amounts:

        - The potential existence of a solvency deficit would not be known until indicated by an updated actuarial valuation;

        - Once a solvency deficit is known to exist, the company's lenders would likely immediately reduce the credit otherwise available to the borrower by the amount of the deficit plus a cushion for potential further solvency deteriorations. This would have the

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[18] We mention that the priority currently provides for a fixed maximum, because the Bill contains provisions that would remove the fixed maximum, in respect of certain amounts due to employees or former employees of an insolvent employer. We invite you to read CAIRP's comments on these provisions, in a subsequent section of this submission.

effect of reducing the borrower's liquidity, impairing its ability to contribute the special funding typically required by statute to remedy the solvency deficit, and increasing the likelihood of the borrower becoming insolvent. It is also possible that borrowers with pension plans that are in a surplus position would also be negatively impacted, as lenders make conservative assumptions regarding the future potential deficit of such a plan, potentially creating a reserve for such future deficits; and

- The company's lenders would likely begin to require the preparation of more frequent solvency-basis actuarial valuations to ensure the existing reserve for the super-priority amount was adequate. This is an expensive task and would divert funding from operations, further deteriorating the borrower's liquidity.

- CAIRP theorizes that a similar approach might be taken by trade suppliers, who would reduce the trade credit terms extended to (or, in the limit, discontinue doing business with) an organization that was known or believed to have a sizeable pension plan deficit. This would further constrain the overall liquidity of the pension plan sponsor.

5. By creating a statutory super-priority without a marshalling scheme, the Bills compound the problem that presently exists with statutory super-priority security provisions in the legislation (for example, in connection with employee claims, pension plans and certain claims of the Crown for payroll source withholdings). The statutory super-priority provision does not address who bears the burden of the additional encumbrance in situations where there are several secured creditors who could be affected by the charge, and does not provide for a replacement charge on assets which are not otherwise encumbered by the security of the secured creditor who is affected by the statutory super-priority.

6. The Pension Proposal could result in adverse consequences that could be detrimental for employees and retirees, which the Pension Proposal is trying to protect:

   - CAIRP considers it likely that if pension deficits are given super priority status, secured lenders will reduce credit availability by the amount of the super-priority amount, and may decrease credit availability in general due to the increased perceived risk. This may well result in companies that are otherwise "healthy" and able to fund the "special payments" on a continuing basis becoming financially distressed or insolvent, as a result of the reduced credit availability.

   - The Pension Proposal could also result in the premature winding up on otherwise solvent plans, as employers/plan sponsors seek to minimize the ongoing negative impacts of the legislation.

   - CAIRP questions whether these events ultimately benefit the employees and retirees that the Pension Proposal is trying to protect.

7. The Pension Proposal could result in an <u>unfair</u> re-allocation of value from other creditors to the pension plan beneficiaries:

   - Ultimately, a restructuring or a liquidation under the insolvency statutes is about distributing value amongst the various stakeholders of the insolvent debtor. Pursuant to the Pension Proposal, the pension plan deficit would be funded from assets or resources that would otherwise be available to the other stakeholders of the insolvent plan sponsor, whether they be secured lenders, trade creditors, tax authorities or employees (e.g. severance and termination).

- As described above, because of the nature of pension obligations, the other stakeholders have minimal ability to monitor the existence or quantum of a pension plan deficit in order to manage their exposure without being overly cautious.

- Although CAIRP is of the view that protection of employee pensions is a laudable public policy objective, CAIRP questions whether it is equitable that one creditor group benefit so significantly, at the clear expense of all other stakeholders in order to achieve that objective.

8. The Pension Proposal, in the context of restructuring proceedings where the pension plan is not terminated and is "tied to" a collective bargaining agreement, is unnecessary.

    - As indicated above, the pension plan benefit entitlements are oftentimes an integral part of a collective bargaining agreement that cannot be modified in the context of a restructuring, save with the consent of all parties to the collective agreement. To the extent that the pension plan continues, the fact that a solvency deficit exists or may exist at a certain date, or that arrears are due in respect of the "special payments", is irrelevant, since the pension plan has to be subjected to an actuarial re-valuation periodically, and as such any amount unpaid is reinstated through the requirement for a revaluation and amortization payments.

    - The need for a priority or accelerated payment is only relevant in a context where the pension plan is terminated or risks being terminated imminently, at a time where a deficit would result.

The WEPPA Proposal[1]

Currently, the *Wage Earner Protection Program Act*[2] ("**WEPPA**") provides a measure of protection to employees that suffer a loss of their employment and who have unpaid wages or termination and severance pay from their former employer that is in bankruptcy or receivership. Pursuant to the WEPPA, the federal government funds payments to such employees for amounts owing in respect of outstanding wages earned in the 6 months before the date of the bankruptcy or receivership, and severance and termination pay relating to an employment that terminated in the 6 months before the date of bankruptcy or receivership, to a maximum aggregate amount, currently $3,323.08[3] for 2010.

The Bills[1] contemplate changes to the WEPPA that would increase the measure of protection, by making the program apply not only in the event of bankruptcy or receivership, but also in the event of a loss of employment where the employer has filed a proposal under the BIA or a plan of arrangement under the CCAA (the "**WEPPA Proposal**").

CAIRP's principal comments on the WEPPA Proposal are the following:

1. The concept underlying the WEPPA Proposal appears to be reasonable, as it corrects a number of inequities that became apparent after the WEPPA was implemented, namely that the entitlement to the benefits provided through WEPPA: (i) are unavailable if employment is lost while the employer is neither bankrupt nor in receivership, and (ii) could be lost due to the expiry of time, if the employer becomes bankrupt after a lengthy or protracted restructuring process[4]. An additional issue with WEPPA, as it is currently drafted, is that in certain circumstances the fact that the provisions apply only in the event of a bankruptcy/receivership could be counterproductive to the success of a restructuring plan, if the rejection of the plan provided an enhanced recovery for employees in bankruptcy/receivership and they therefore voted against the plan (e.g. in a CCAA proceeding where employees are terminated before the plan is filed, their claim would be an ordinary unsecured claim in the CCAA plan, but they would receive payments under WEPPA if the proposal/plan were rejected and the employer became bankrupt[5]. The

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1 Bill C-476 (40th Parliament, 2nd Session), Bill C-501 (40th Parliament, 3rd Session) and Bill S-214 (40th Parliament, 3rd Session). The provision referred to herein is not addressed in Bill C-501, but is part of Bills C-476 and S-214.

2 S.C. 2005, c. 47, as amended

3 The maximum is the higher of $3,000 and 4 times the maximum weekly insurable earnings under the *Employment Insurance Act*.

4 WEPPA provides that in the event of bankruptcy or receivership, an indemnity is payable to an employee whose employment was terminated in the 6 months preceding the date of the bankruptcy or receivership (section 2(1)(b) of the WEPPA). However, in the case of a restructuring proceeding, there could be up to a 6 months delay between the inception of the restructuring proceedings and the filing of a proposal under the BIA, and the delay could even be longer under the CCAA, such that if the restructuring fails because the creditors do not approve the proposal or plan, or the Court does not approve the proposal or plan, the delay between the loss of employment and the date of bankruptcy could very well be longer than 6 months. Accordingly, an employee whose employment was terminated a few days before a restructuring proceeding was commenced may not be protected by the legislation, because of the time delay between the inception of the restructuring proceedings and the ultimate bankruptcy or receivership.

5 This negative impact is mitigated to a certain extent, as the plan of arrangement would require, as a condition obtaining sanction by the Court, provision for payment to the employees of amounts they would be entitled under section 136(1)(d) of the BIA (which is the equivalent of the amount under section 81.3 of the BIA) had the

change suggested by the Bills would appear to correct these deficiencies, by making it neutral for an employee, in terms of protection, whether the employer is bankrupt, in receivership, or is undergoing a restructuring process under the BIA or CCAA.

2. Changes to the WEPPA legislation would be required as a result of the WEPPA Proposal:

   a. Under WEPPA, the trustee in bankruptcy or the receiver who is the primary person responsible for the administration of the proceedings, has the responsibility and powers to access the employer's payroll data and personnel files, in order to complete the documentation required by WEPPA. However, in a proposal or CCAA, the employer/debtor still has possession and control of the business, assets and operations. As such, in CAIRP's view, the WEPPA would have to be amended to make the employer/debtor in a BIA proposal/CCAA proceeding responsible for filing all necessary documentation (including a certification by management that the data has been prepared accurately), with a "failsafe" of the proposal trustee/monitor being the party to complete the documentation when the debtor is manifestly unable to complete such obligation. In this latter respect, the proposal trustee/monitor would have to be provided with the necessary status and authority to fulfill these obligations.

   b. The provisions of WEPPA should be adjusted to ensure that the legislation provides adequate protection to employees that lose their employment in the period that begins 6 months (or such other date that the legislator would consider appropriate) before the Date of the Initial Bankruptcy Event[6] and ends with the approval of a plan or proposal by the Court, bankruptcy or receivership. CAIRP notes that the changes suggested by the WEPPA Proposal merely address the conceptual issue of extending payment of wages and severance and termination pay owing to employees of entities that are undergoing restructuring proceedings, without explicitly adjusting the periods for which claims can be made (which are different in restructurings than in bankruptcies/receiverships), or the delays in asserting a claim. CAIRP believes that without changes to the timelines contemplated in WEPPA, the suggested changes may be of little usefulness to employees of entities undergoing a restructuring process.

3. CAIRP questions whether further amendments should be made to WEPPA to extend it to all employees who lose their employment and are owed monies. To illustrate, it is possible that when an employer experiences financial difficulty, it ceases operating and terminates all its employees without compensation (i.e. it simply "closes its doors."), but does not commence any formal insolvency proceeding (e.g. because its assets are insufficient to cover the costs of a formal proceeding). As drafted, the WEPPA Proposal does not address this situation. However, if the WEPPA were to be extended to cover these circumstances, a mechanism would have to be

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company become bankrupt. However the mitigation is not complete, as amount covered under section 81.3 BIA does not include severance; the amounts of the benefits available under WEPPA are slightly higher than the maximum entitlement under the BIA (the maximum amount of benefit available under WEPPA is currently $3,323.08, compared with a maximum entitlement of $2,000 under section 81.3 or 136(1)(d) of the BIA); and there exists a risk that benefits available under WEPPA will be lost if the restructuring is not successful and extends over 6 months.

[6] The "Date of the Initial Bankruptcy Event" is the date on which the insolvency proceedings commence which, depending on the type of filing, is the earlier of the filing of a notice of intention to make a proposal under the BIA, the filing of a proposal under the BIA, the filing of a petition for an initial order under the CCAA, or the commencement of a receivership or a bankruptcy.

put in place to deal with administration requirements where there is no responsible party (e.g. no employer, proposal trustee or monitor).

CAIRP would welcome the opportunity to work with HRSDC to create solutions to deal with these issues.

The Directors' Proposal

The *Canada Business Corporations Act*[1] (the "**CBCA**") and the provincial legislation addressing corporations provide a measure of protection for employees, by making directors personally responsible for unpaid amounts, in certain circumstances. For example, Section 119 of the CBCA essentially provides that directors are jointly and severally responsible for all amounts due to employees for services rendered to the corporation (including vacation pay, but excluding severance pay), to a maximum amount equivalent to 6 months' wages, if the corporation becomes bankrupt or is liquidated, or is sued for the debt and execution has been returned unsatisfied.

The Bills[2] contemplate changes to the CBCA that increase the measure of protection by creating a new adjudication process, whereby the claims under Section 119 of the CBCA of current and former employees against directors would be adjudicated on an expedited basis by an adjudicator once filed in a prescribed manner. The ability of directors to subsequently litigate the claims and/or appeal/stay an order of the adjudicator would be eliminated by the Directors' Proposal.

CAIRP understands the intended effect of the Directors' Proposal is to streamline the process to make claims by employees with qualifying unpaid wage amounts and reduce the delay between the date of bankruptcy and the payment of amounts due by the directors to employees.

CAIRP's principal comments on the Directors' Proposal are the following:

1. The Directors' Proposal would only benefit employees of corporations that are bankrupt, and will do nothing to enhance protection for employees who are owed monies by entities that have filed under the CCAA or are attempting to restructure through a proposal under the BIA. We note that most of the employee terminations in the larger insolvencies (e.g. Nortel, Abitibi, Air Canada, Eatons) occur pursuant to filings made under the CCAA.

2. CAIRP questions the necessity to streamline the process to make a claim against directors, in view of the protection afforded under WEPPA (which has as its main objective protecting employees against losses of their remuneration in the event of the bankruptcy or receivership of their employer). The WEPPA provides a system whereby the employees can obtain an eligible wage claim payment in a streamlined, rapid process, and the amount that the employees are paid and could have otherwise claimed from the directors are statutorily assigned to the Crown[3], concurrently with the payment under WEPPA. The only usefulness of the Director's Proposal provision would be where an employee chooses to forgo the benefit available under WEPPA, or where that amount that could be due to the employee by a director in virtue of section 119 of the CBCA exceeds the maximum indemnity available under WEPPA.

3. CAIRP considers that there is a potential for the Directors' Proposal to compromise the leadership of companies in financial difficulty. Due to a perceived concern that directors could consider that the proposed adjudication process is biased against them, this could dissuade existing directors remaining as directors as a company starts to get into financial difficulty, or

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1 R.S.C. 1985, c. C-44, as amended.

2 Bill C-476 (40th Parliament, 2nd Session), Bill C-501 (40th Parliament, 3rd Session) and Bill S-214 (40th Parliament, 3rd Session).

3 Section 36(1)(b) WEPPA

hinder the ability of the company to attract replacement directors. Such a loss of leadership may lead to corporations being left without capable directors at a time when talent and leadership is most needed.

4. The Directors' Proposal may result in an increase in the costs of directors' and officers' insurance, or make it difficult/impossible to renew such insurance when a company gets into financial difficulty. Without consulting insurance companies for specific comments, it is our view that premiums will rise and/or renewals will be denied when the perceived risk increases, which it clearly would given that the adjudicator's decision cannot be appealed under the Directors' Proposal.

5. The Directors' Proposal has the potential to further complicate the already difficult period at the outset of bankruptcy proceedings for trustees, and may negatively affect asset realizations. It contemplates the adjudication process commencing within 30 days of a complaint having been filed; such a complaint filed early in a bankruptcy could require significant document production requirements at the very busiest time of a bankruptcy proceeding for the trustee. Asset realizations, dealing with creditor issues that arise on filing, and the resolution of WEPPA obligations (including the satisfaction of obligations that could eliminate the requirement for the adjudication process) could all be compromised as a result. CAIRP suggests that in order to avoid these detrimental effects, a minimum period of time must elapse before the complaint can be filed (e.g. 90 days). The Directors' Proposal also assumes that the bankrupts' books and records will be in "good shape" and the required information will be readily available – as practicing trustees, we note that frequently this is not the case.

6. All of the foregoing will increase the work of the trustee, which will increase the cost of the bankruptcy and reduce potential recoveries for all other creditors (e.g. lenders, trade creditors, pensioners and others). Inevitably, there will be increased trustee fees or increased employee costs, as people are required to collect the data necessitated by the Directors' Proposal, but the Director's Proposal does not address who will fund these additional costs. CAIRP considers it would be unfair for all creditors to bear these costs, where only one group benefits from same. As such, CAIRP considers the beneficiaries of such payments should bear the costs. In addition, CAIRP recommends that, to avoid abuse of this new process, provision should be made for complainants to be made responsible for a portion of the incremental costs incurred in the event the complaint is unwarranted.

7. The Directors' Proposal would not benefit employees of provincially-incorporated companies. It may be effective in connection with corporations incorporated under the CBCA, but will not assist in the protection of employees of corporations incorporated under provincial statutes and may in fact lead to corporations choosing to incorporate/change their statute of incorporation to more friendly provincial legislation. Albeit we acknowledge that the Provinces may seek to amend their respective provincial corporate statutes to incorporate the provisions of the Directors' Proposal.

8. The stakeholders affected by the Directors' Proposal include both employees and the Federal Government, which could create an actual or perceived conflict of interest in the adjudication process. In view of the operation of WEPPA, through which the Government pays certain outstanding pre-bankruptcy wages to employees, the Government would stand in the shoes of the

employees so paid[4]. As such, the Government might be the principal party seeking to recover those payments from the directors if no assets remain in the bankrupt's estate to settle them. Since in the Directors' Proposal the Government also names the adjudicator, and the decision of the adjudicator is not appealable, the changes suggested by the Directors' Proposal seem to create a conflict of interest, or in the very least an appearance of conflict, that might be inequitable for directors.

9. CAIRP questions the fairness of certain aspects of the Directors' Proposal, specifically, the inability to appeal the adjudicator's decision. CAIRP notes that it is usual in arbitration situations, where the arbitrator's decision is to be final and binding, that both parties have willingly made the decision to go to binding arbitration and have had input in the choice of arbitrator. This is clearly not the case with respect to the Directors' Proposal. While CAIRP understands the rationale for making the adjudicator's decision not subject to appeal, CAIRP does not consider this to be reasonable in the circumstances and considers an ability to appeal the adjudicator's decision as necessary.

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[4] See note 3 above.

The Severance and Termination Pay Proposal

The BIA[1], as it presently exists, provides a measure of protection for employees in the event of the bankruptcy or receivership of their employer, by creating a super priority secured status for the wage claims of these employees (sections 81.3(1) and 81.4(1) of the BIA). The measure of protection is limited to amounts earned by the employee for services rendered before the bankruptcy or receivership in the 6 months preceding the date of initial bankruptcy event or receivership, to a maximum amount of $2,000 (an additional amount is available in the case of expenses incurred by a travelling salesperson). However, sections 81.3 and 81.4 do not provide protection for severance and termination pay, and this lack of protection is not an oversight of the legislator, as is evident by the definition of "compensation" contained in sections 81.3(9) and 81.4(9) of the BIA (which specifically excludes from the definition of compensation severance and termination pay).

The Bills[2] contemplate changes to the BIA that would substantially increase the measure of protection, to provide a super priority charge for all severance or termination pay that is due to an employee, as a result of the termination of the employment, from a person subject to bankruptcy or receivership (the "**Severance and Termination Pay Proposal**"). The suggested changes are drafted as additional paragraphs after sections 81.3(1) and 81.4(1) of the BIA, and as such would operate independently of these sections (i.e. would not be subject to the maximum of $2,000 provided for in those sections).

CAIRP understands the intended effect of the Severance and Termination Pay Proposal is to address the lack of protection provided for severance and termination pay and the resulting low recoveries that employees typically receive on account of their severance and termination pay claims in bankruptcies and receiverships.

CAIRP's principal comments on the Severance and Termination Pay Proposal are the following:

1. The Severance and Termination Pay Proposal may result in a significant contraction of available credit. CAIRP's view is based on the adjustments made by secured lenders after the introduction of sections 81.3 and 81.4 of the BIA, which saw secured lenders reducing the amount of available credit by an amount equal to $2,000 per employee, regardless of the amount of wages actually due to the employees. CAIRP's view is that if the Severance and Termination Pay Proposal is implemented, secured lenders will require borrowers to provide calculations of the quantum of severance and termination pay owing and will reduce available credit by this amount. CAIRP has serious concerns that this contraction of credit may create significant new financial stresses for many employers, potentially resulting in additional insolvencies and job losses that would not have otherwise occurred without the Severance and Termination Pay Proposal being implemented.

2. By creating a statutory super-priority without a marshalling scheme, the Bills compound the problem that presently exists with statutory super-priority security provisions in the legislation (for example, in connection with employee claims, pension plans and certain claims of the Crown for payroll source withholdings). The statutory super-priority provision does not address

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[1] R.S.C. 1985, c. B-3, as amended

[2] Bill C-476 (40th Parliament, 2nd Session), Bill C-501 (40th Parliament, 3rd Session) and Bill S-214 (40th Parliament, 3rd Session).

who bears the burden of the additional encumbrance in situations where there are several secured creditors who could be affected by the charge, and does not provide for a replacement charge on assets which are not otherwise encumbered by the security of the secured creditor who is affected by the statutory super-priority.

3. The lack of a statutory cap for severance and termination pay is inconsistent with the $2,000 cap imposed by the BIA in respect of wage arrears. Pursuant to sections 81.3 and 81.4 of the BIA, the super-priority for wage arrears is capped at $2,000 per employee, which has the effect of balancing wage protection for employees with the possible dampening effect of this protection on credit availability and the resulting significant negative consequences for employers. On this premise, it is CAIRP's view that if the Severance and Termination Pay Proposal is retained as an option, it should be modified to provide for a similar cap in respect of severance and termination pay claims, as in CAIRP's view the quantum of severance and termination pay outstanding will likely significantly exceed the amount given super-priority status by sections 81.3 and 81.4 of the BIA.

4. Furthermore, quantifying amounts owing for severance and termination pay is complicated and subjective, as the amount of severance and termination pay entitlement can vary widely, depending on the province of employment, common law and other factors that do not directly affect the loss sustained by the employee as a result of the termination (e.g. in Ontario, the statutory severance pay entitlement per employee is dependant on the size of the employee complement at the time of the terminations). This would likely impact all borrowers, as secured lenders would require the severance calculation to be performed monthly or quarterly (to reflect the changing composition of the work-force and employee entitlement that increases with the passage of time), which would be both costly and time consuming for borrowers. In addition, due to the issues identified above, the calculation would be subjective and require a number of assumptions to be made. It is likely that lenders would require that conservative assumptions be used, to avoid any unnecessary lender exposure to an under-statement of this liability, which would further constrain the availability of credit and exacerbate the financial issues caused by this change. In this respect, implementation of a standardized <u>national</u> methodology/approach to calculate severance and termination pay owing for purposes of the Severance and Termination Pay Proposal would mitigate some of the complexity and uncertainty.

5. The Severance and Termination Pay Proposal may provide a false sense of security to employees regarding the certainty of payment of their severance and termination pay amounts, as the quantum of super-priority charges against the employers' current assets could exceed the realizable value of the current assets. The Severance and Termination Pay Proposal would result in a further super priority claim against the current assets of an enterprise (i.e. an additional super-priority claim in addition to the super priority amounts due under sections 81.1 and 81.2 of the BIA, deemed trusts for unremitted employee source deductions, and the wage protections provided by sections 81.3 and 81.4 of the BIA). If there was insufficient value in the current assets to discharge all of these super-priority amounts, the balance of these super-priority amounts and any other "junior" super-priority amounts owing (e.g. amounts owing in respect of pension claims under sections 81.5 and 81.6 of the BIA as well as the super priority charge for pension deficits proposed by the Pension Proposal) could still end up as unsecured claims.

6. The Severance and Termination Pay Proposal does not address the relative ranking of rights of employees for their wage claims as compared to their severance and termination amounts, in instances where the realizations from the current assets are insufficient to pay the entire claim

(i.e. after taking into consideration the super priority amounts due under sections 81.1 and 81.2 of the BIA and the deemed trust amounts for unremitted employee source deductions). In the event that the current asset realizations are insufficient, the legislation should provide for the relative ranking of the various types of claims. In CAIRP's view, amounts owing for unpaid wages and vacation pay should have priority.

7. As noted in the Pension Proposal, a restructuring or liquidation is about distributing value amongst the various stakeholders of the insolvent debtor. Pursuant to the Severance and Termination Pay Proposal, the amount of severance and termination pay owing would be funded from assets or resources that would otherwise be available to other stakeholders of the insolvent employer, whether they be the "junior" super-priority amounts noted in (4) above (such as pension plan beneficiaries pursuant to section 81.5 and 81.6 of the BIA), secured lenders, trade creditors or tax authorities. CAIRP is concerned that the multiplication of priority charges may be counter-productive to one of the principal objectives of insolvency and restructuring legislation, which is the fair distribution of value among all the various stakeholders.

8. The Severance and Termination Pay Proposal could have other negative effects for employees, such as discrimination against older workers with higher severance entitlements and contracting out. As each employee's severance and termination pay entitlement increases with his/her length of service, it is possible that employers may start to discriminate against long-serving employees (balancing the benefit of the productive efficiencies and training cost savings that come from having long-serving employees). In addition, CAIRP notes that in order to avoid incurring these liabilities, employers may be tempted to enter into alternative work practices (e.g. contracting out) that eliminate the employer's liabilities and that may not ultimately be beneficial to the employees' interest.

The Disability Plan Proposal

The BIA[1] and the CCAA[2], as they presently exist, do not provide for any special protection for employees receiving long term disability benefits or for employees health benefits. The only protection that is specifically provided for in the BIA relates to a preferred claim for injuries sustained by employees of a bankrupt, to the extent that these injuries are not covered under any act respecting workers' compensation, which preferred claim is limited to the amount received by the bankrupt from a person guaranteeing the bankrupt against damages resulting from these injuries (i.e. an insurance company). The preferred claim effectively allows the benefits to pass through the estate for the benefit of the injured workers[3].

The Bills[4] contemplate changes to the CCAA and BIA (the "**Disability Plan Proposal**") that would implement a measure of protection for workers that lose various long term disability and health benefits (collectively, the "**Benefits**")[5] that they were receiving prior to the commencement of the restructuring proceedings, the bankruptcy or the receivership. The Bills use different language and concepts to achieve this result and, in certain respects are vague, but essentially Bills C-487 and S-216 provide for the following:

- In the event of a restructuring proceeding (either by way of a proposal under Division I of Part III of the BIA or an arrangement under the CCAA), the proposal or plan of arrangement must provide for the continuation of the Benefits or the payment to a fund of the unfunded portion of the liabilities relating to the Benefits ("**Benefit Liabilities**")[6], and the court must be satisfied that the employer can and will make these payments.

- In the event of a bankruptcy or receivership, the Benefits must be continued by making payments to the benefit plan, or by the trustee or receiver creating a fund sufficient to pay the unfunded portion of the Benefit Liabilities until the Benefits terminate.

- Bill C-487 would create the protection by establishing a super-priority statutory charge over all the employer's assets in the event of bankruptcy or receivership, while Bill S-216 would create the protection through a fund with a financial institution authorized to establish a group disability plan, compelling trustees and receivers to transfers assets to this fund sufficient to pay the benefits to the beneficiaries until age 65, or if assets are insufficient, compelling trustees and receivers to transfer all available assets to a sinking fund to pay benefits until the sinking fund is

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1 R.S.C. 1985, c. B-3, as amended.

2 R.S.C. 1985, c. C-36, as amended.

3 Section 136(1)(i) of the BIA

4 Bill C-487 (40th Parliament, 2nd Session) and Bill S-216 (40th Parliament, 3rd Session).

5 For purposes of both Bill C-487 and Bill S-216, the Benefits would consist of long term disability benefits and health related benefits payable to long term disability beneficiaries until the age of 65. For purposes of Bill C-487, the Benefits would also include health related benefits for all employees for a period of 5 years, with the same terms of coverage and level of benefits as were being provided to the employees prior to the inception of the restructuring proceedings.

6 Both Bill C-487 and Bill S-216 suggest a calculation based on an actuarial method. As such, the unfunded portion of the Benefit Liabilities would be the difference between the assets available in the benefit plan (if any) and the present value of future obligations relating to the Benefits, as determined by an actuary (similar to the calculation performed by an actuary of a deficit/surplus in a defined benefit pension plan).

empty. Bill S-216 does not state what security these payments would have, other than compelling the receiver/trustee to make such payments.

The Bills contain differing protection with respect to the Benefits:

- Although both Bill C-487 and Bill S-216 contemplate a protection for long term disability benefits and health related benefits payable to the long term disability beneficiaries, Bill S-216 limits its scope to self insured long term disability plans, while Bill C-487 addresses all long term disability plans, whether or not they are self insured.

- Bill C-487 also provides for protection for all employees in respect of all health related benefit plans, whether or not they are self insured, with a view to provide employees with the same terms of coverage and level of benefits as were being provided to the employees prior to the inception of the restructuring proceedings, the bankruptcy or the receivership.

CAIRP understands that the insolvency of the employer can be a significant hardship on employees who are unable to work as a result of a long term disability and are therefore reliant on the employers long term disability plans, and that an effort to better protect this highly vulnerable group of stakeholders is commendable.

However, CAIRP is concerned that the protection contemplated by the Disability Plan Proposal could have a very detrimental impact on the insolvency system, as well as potentially being unnecessary, for the reasons indicated below:

1. As with CAIRP's concerns with the Pension Proposal, the calculation of the amount of the fund or the amount of the super priority secured claim will depend upon an actuarial valuation that will attempt to estimate the present value of future benefit costs. The present value of future benefits can only be estimated through a process of making assumptions about all the variables that affect the beneficiaries, such as the life expectancy of beneficiaries, possible changes in the severity of the beneficiaries' condition, changes in the cost of benefits and health related costs over time, and yield of the investments set aside as a fund to cover future benefits. This process is inherently imperfect.

2. The Disability Plan Proposal contemplates the creation of a fund or a statutory super priority secured claim in the event of a bankruptcy or receivership, but does not address the administrative difficulties inherent to the creation of such a fund or statutory security, such as the length of time and cost to administer the claims if the protection is in the form of a statutory security, who would be responsible to administer such claims until the beneficiaries all reach the age of 65, what would happen if the actuarial assumptions are incorrect and as a result there is a shortfall in the assets available to cover the benefits before all beneficiaries reach the age of 65, and finally who would get a surplus, and when, if the actuarial assumptions are incorrect and as a result there is a surplus of assets when the last beneficiary reaches 65.

   The possibility that there could be a shortfall in assets available to cover the benefits before all beneficiaries reach the age of 65 (which is contemplated in Bill S-216 by the creation of a sinking fund), leads to the possibility of an imbalance in the treatment of some of the long term disability beneficiaries as compared to others, as some of the beneficiaries may receive all of their entitlements while others may receive only a portion of the benefits (as the fund becomes depleted).

The Disability Plan Proposal as drafted could lead to a situation where the administration of estates in bankruptcy or receivership could not be wound down until after all beneficiaries have reached the age of 65, resulting in long, costly administration of estates, and long delays in providing a recovery to ordinary unsecured creditors on account of their claims.

3. The Disability Plan Proposal could have an impact on attempts to restructure organizations with self-insured disability benefit plans. CAIRP is concerned that the time required to quantify the long term disability obligation and the additional costs required to do so would be counterproductive to a restructuring process. In addition, the possibility of having to segregate assets into a fund to cover the long term benefit obligations or the possibility of a priority in the event of bankruptcy could create additional uncertainty in the negotiation between the stakeholders, who may have difficulty in assessing what value is available to be shared in the context of a restructuring plan.

4. By creating a statutory super-priority without a marshalling scheme, Bill C-487 compounds the problem that presently exists with statutory super-priority security provisions in the legislation (for example, in connection with employee claims, pension plans and certain claims of the Crown for payroll source withholdings). The statutory super-priority provision does not address who bears the burden of the additional encumbrance in situations where there are several secured creditors who could be affected by the charge, and does not provide for a replacement charge on assets which are not otherwise encumbered by the security of the secured creditor who is affected by the statutory super-priority.

   A similar issue exists with respect to Bill S-216. While Bill S-216 does not create a statutory super-priority security, it compels payment by the trustee or receiver, without addressing how the burden of such payment should be borne.

5. The uncertainty created by the super-priority for long term disability benefits could result in a severe contraction of credit for the employers who self-insure. Banks making secured loans lend up to the net collateral values of the borrower's assets. The net collateral value is determined by taking the gross collateral value of the assets (i.e. the amount the bank would realize if the assets were sold) and reducing it by the amount of potential encumbrances that would have priority over the gross realizations (such as unremitted source deductions, the priority rights of employees under sections 81.3 and 81.4 of the BIA, the existing priority rights of pension claims under sections 81.5 and 81.6 of the BIA, and the rights of suppliers of recently delivered merchandise under section 81.1 and 81.2 of the BIA). As well, institutional lenders and bondholders factor risk in their lending practices, and the chance of additional encumbrances that would rank ahead of the lenders in the event of a default would increase risk, which in turn would translate into higher interest rates for borrowers, increased transaction costs and/or lower credit availability.

   The Disability Plan Proposal would create a further encumbrance on the assets in the event of insolvency, either as a super-priority statutory charge or an obligation to set up a fund, and this would increase risk for lenders.

6. By creating uncertainty and risk, the Disability Plan Proposal may adversely affect employees, former employees and people that are unable to work due to a long term disability. CAIRP considers it likely that if long term disability obligations are given super priority status, secured lenders will reduce credit availability by the amount of the super-priority amount, and may

decrease credit availability in general due to the increased perceived risk. This may well result in companies that are otherwise "healthy" and able to fund the disability benefit costs on a continuing basis becoming financially distressed or insolvent, as a result of the reduced credit availability.

7. The Disability Plan Proposal may also result in companies with large Benefit Liabilities being unable to make a viable plan/proposal due to the quantum of the Benefit Liabilities that must be paid – these employers would then be forced to liquidate. Ultimately, while the long term disability beneficiaries may benefit in a liquidation, it may come at the cost of secured creditors, the current employees' employment, pension beneficiaries and trade creditors. As with CAIRP's concerns with the Pension Proposal, CAIRP questions whether it is appropriate that one group benefit so significantly, at the clear expense of all other stakeholders.

8. With respect to the protection for all employees in respect of all health related benefits for a period of 5 years contemplated by Bill C-487, CAIRP questions what would be the public policy objective of providing an enhanced protection for these amounts, for this length of time. The health related benefits are part of an employee's remuneration package, and it is customarily understood that these benefits are only available while the employment lasts, and that unless provided otherwise by contractual agreement, the employee benefits cease when the employment is terminated, for whatever reason. To the extent that the termination of the employment is considered to be an unwarranted breach of the employment agreement, the loss of earnings (and as a result, the loss of the entitlement to employee benefits) may constitute a claim in the nature of damages for termination, and may give rise to a claim against the employer, however this claim is related to the loss of employment. The claims related to severance and termination have been discussed elsewhere in document, as part of the Severance and Termination Proposal.

   Furthermore, the entitlement to benefits for a period of 5 years after the termination of employment as a result of bankruptcy, receivership or a restructuring does not take into consideration the fact that the employees' claim may be mitigated by the fact that equivalent benefits are being provided by a new employer, in the situations where the employees find new employment within five years after the bankruptcy, receivership or restructuring proceeding of their former employer.

   CAIRP believes that implementing a protection in connection with all health related benefits of all employees for a period of 5 years may constitute a duplication of a claim that is already addressed by the severance and termination provisions of employment law, and CAIRP does not know of any compelling reason to extend the protection to all employees for that length of time.

9. The Disability Plan Proposal could result in an <u>unfair</u> re-allocation of value from other creditors to the long term disability beneficiaries. Ultimately, a restructuring or a liquidation under the insolvency statutes is about distributing value amongst the various stakeholders of the insolvent debtor. Pursuant to the Disability Plan Proposal, the long term disability obligations would be funded from assets or resources that would otherwise be available to the other stakeholders of the insolvent employer, whether they be secured lenders, trade creditors, tax authorities or employees (e.g. severance and termination). As described above, because of the nature of the long term disability obligations, the other stakeholders have minimal ability to monitor the existence or quantum of the long term disability liabilities in order to manage their exposure without being overly cautious.

10. Except for the provisions of Bill C-487 addressing all health benefits for a period of 5 years, the Disability Plan Proposal affect a relatively small number of workers in Canada, as the problem with non availability of long term disability benefits is restricted to those employers who chose to self-insure, while the majority of employers who provide these benefits do so through an insurance company that specializes in administering group plans. In fact, a better way of protecting workers might be to create incentives for employers to provide these benefits through an insurance plan, rather than a self-insured plan, as insurance companies are better suited in administering these types of benefit plans, and are subject to strict regulations.

In summary, the concerns that arise from the Disability Plan Proposal are substantially the same as those expressed in respect of the Pension Proposal. CAIRP is concerned that the creation of an additional encumbrance may affect companies in general by restricting credit, may affect the ability of a company to restructure by creating uncertainty and delays, and may affect the length of time required to administer estates that are bankrupt or in receivership, leading to additional costs and delays that would reduce the recovery for all creditors.

CAIRP believes that a policy objective of protecting employees who are beneficiaries of long term disability plans is laudable, however CAIRP believes this objective would be better achieved through other means as described above.