

ESSENTIALS OF  
CANADIAN LAW

# PENSION LAW

SECOND EDITION

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### b) Duty to notify

A custodial trustee must notify the Superintendent if it is not given the summary of required contributions from the administrator.<sup>72</sup> Once the trustee receives the summary, the trustee is required to notify the Superintendent in the event contributions are not paid when due in accordance with the summary.<sup>73</sup>

## 7) Statutory Deemed Trust

### a) Introduction

The PBA establishes a statutory deemed trust with respect to contributions owing, but not yet remitted, to the pension fund.<sup>74</sup> The purpose of the deemed trust is to exempt contributions owing to a pension plan, which are held by an employer, from being seized or attached by other creditors of the employer. The deemed trust applies only to contributions not yet remitted to the pension fund—it does not make the pension fund itself, *per se*, impressed with a trust,<sup>75</sup> nor does the deemed trust apply with respect to other assets of the employer that are not associated with pension contributions.

### b) Application

Generally, the deemed trust operates in an ongoing plan and on plan wind up. The deemed trust covers employee contributions held by an employer prior to deposit in the pension fund,<sup>76</sup> and employer contri-

72 PBA, s 56.1(2). The trustee must give the Superintendent this notice within thirty days after the day on which the summary was required to be given: PBA, Reg, s 6.2(4).

73 PBA, s 56.1(3). The trustee must give the Superintendent notice that a contribution was not paid when due within sixty days after the day on which the contribution became due: PBA, Reg, s 6.2(5).

74 PBA, ss 57(1)–(4). See also Alberta (AEPPA, s 52).

75 *Crownx Inc v Edwards* (1991), 7 OR (3d) 27 at para 54 (Gen Div), aff'd (1994), 120 DLR (4th) 270 (Ont CA). It should be observed that in an earlier Ontario court decision, the court stated that "it is common ground that pursuant to s 23(3) of the Act [the deemed trust provision in the pre-1987 PBA] the Plan is a trust." see *King Seagrave Ltd v Canada Permanent Trust Co* (1985), 51 OR (2d) 667 (HCJ), aff'd in the result [1986] OJ No 2124 (CA). However, in that case, unlike in *Crownx*, not much turned on this finding given the court's principal conclusion in *King Seagrave* that the plan in that case was subject to a true trust based on the application of common law principles. In any event, the pension fund may not be seized nor attached by creditors of the employer as it does not form part of the assets of the employer: see Chapter 5, Section C(7).

76 PBA, ss 57(1) & (2).

butions that are due, but not yet paid into the pension fund.<sup>77</sup> Amounts equal to the required contributions are deemed to be held in trust by the employer until paid into the pension fund, and the plan administrator has a lien and charge on the assets of the employer for an amount equal to the deemed trust.<sup>78</sup>

Where a pension plan is being wound up, the deemed trust covers all employer contributions that have accrued up to the date of wind up but have not yet become due.<sup>79</sup> The employer is “deemed to hold in trust the amount necessary to satisfy the wind-up deficiency,” but that the wind-up deemed trust entitlement “arises only once the condition precedent of the plan being wound up has been fulfilled. This is true even if it is certain that the plan will be wound up in the future.”<sup>80</sup>

The deemed trust extends over these contributions, whether the assets are commingled in the general revenue accounts of the employer or held in a separate account.<sup>81</sup> The deemed trust also extends to the interest accruing on employer and employee contributions that are owing, but not yet remitted, to the pension fund.<sup>82</sup>

#### c) Limitations

There are a number of important limitations on the application of the statutory deemed trust. First, the deemed trust covers the regular,

77 PBA, s 57(3).

78 PBA, s 57(5).

79 PBA, s 57(4). See also *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6 at paras 26-47 [Indalex].

80 *Indalex*, *ibid* at paras 45-46. In dissent, Cromwell J would not have included the wind-up deficiency in the statutory deemed trust, stating that “the wind-up deficiency only arises upon wind-up and it is neither ascertained nor ascertainable on the date fixed for wind-up” (*ibid* at para 121). Citing a previous edition of this text, he concluded that a wind up gives rise to new liabilities since a wind up accords statutory entitlements and protections to employees that would not otherwise be available: *ibid* at para 145.

81 PBA, s 57(6).

82 PBA, ss 58(1) & (2) and Reg, s 24; and *Usarco*, above note 42. See, however, *Ivaco Inc (Re)* (2005), 47 CCPB 62 at para 13 (Ont SCJ), *aff'd* (2006), 83 OR (3d) 108 (CA), leave to appeal to SCC discontinued, [2006] SCCA No 490, where the court distinguished its earlier decision in *Usarco* on the facts and declined to give effect to the deemed trust on the basis that in the earlier decision, “while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward,” whereas “in the present case . . . there are major creditors who wish to proceed forthwith—and for the reason that such a bankruptcy will enhance their position (i.e., the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims).” See also *Harbert Distressed Investment Fund, LP v General Chemical Canada Ltd*, 2007 ONCA 600, leave to appeal to SCC refused, [2007] SCCA No 539.

"normal cost," contributions together with any "special payment" (that is, contributions required to fund a plan deficit) which were required to have been made by the employer, but were not. The deemed trust does not extend to the obligation of an employer to fund pension obligations that have not yet become due or which "crystallize" only upon the wind up of the pension plan. In these circumstances, a creditor will have a "secured position which will prevail against these additional obligations . . . which have not yet required to be paid into the fund."<sup>83</sup>

Second, the statutory deemed trust does not exempt pension contributions in the hands of an employer from being made available for distribution among an employer's creditors in bankruptcy and insolvency proceedings.<sup>84</sup> Although section 67(1)(a) of the *Bankruptcy and Insolvency Act (BIA)*<sup>85</sup> exempts property held by the bankrupt "in trust" for another person from being divisible among creditors, a provincially-created statutory deemed trust (such as the PBA) is not operative for the purposes of the BIA, unless the trust, in addition, "has all the requisite elements of a common law trust."<sup>86</sup> As explained:

While in a non-bankruptcy situation, the [employer's] assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s 57(3) of the *Pension Benefits Act (Ontario)*, in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true

83 *Usarco*, *ibid* at para 26.

84 *Ivaco Inc (Re)*, above note 82 and *Indalex*, above note 79. The Ontario Superior Court in *Ivaco* also noted that "there is no provision in [the PBA] that the monies be paid out to the pension plan at any particular time" (para 17). As such, even though the deemed trust operates prior to bankruptcy, if it is not acted upon until after bankruptcy, "those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy." See also *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24 [*Henfrey*].

85 RSC 1985, c B-3, as amended [BIA].

86 *Edmonton Pipe Industry*, above note 67 at para 41. Because bankruptcy is a matter under federal jurisdiction, provincial statutory deemed trusts that do not conform to "general trust principles" cannot operate "to reorder the priorities in a bankruptcy." Therefore, although deemed trusts are effective in accordance with the provincial legislation when a person or business is solvent and operating, upon bankruptcy "the funds that are subject to a deemed trust, but are not held in accordance with general trust principles, will not be excluded from the property of the bankrupt under s 67(1)(a) of the BIA and will be distributed in the priority prescribed by the BIA:" see *GMAC Commercial Credit Corp-Canada v TCT Logistics Inc* (2005), 74 OR (3d) 382 at para 15 (CA) [*GMAC*]. See also *Henfrey*, above note 84; *Usarco*, above note 42.

trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object.<sup>87</sup>

If, therefore, an administrator or employees can establish that a "true trust" extends over the assets of an insolvent employer, those assets will be exempt from attachment by creditors and a proof of claim on behalf of employees may be allowed. Generally speaking, "[f]or these three certainties to be met, the trust funds must be segregated from the [employer's] general funds."<sup>88</sup> It is important to observe that for certainty of subject matter to be met, the trust funds must be "identifiable" and "traceable." Historically where, prior to a bankruptcy, an employer has failed to remit to the pension fund employee pension contributions that it deducted from payroll and, instead, has commingled the contributions with its general revenues and used them for business operating expenses, the contributions became converted funds that are no longer identifiable and traceable. In such circumstances, the pension contributions lose their character as trust property held by a bankrupt employer and a claim by employees to recover their funds was disallowed by the trustee in bankruptcy.<sup>89</sup>

Third, a bank's security under section 427 of the *Bank Act*,<sup>90</sup> both prior to and after an employer's bankruptcy, has priority over any assets impressed by the PBA's statutory deemed trust.

Finally, in 2005, Parliament enacted the *Wage Earner Protection Program Act*<sup>91</sup> (WEPPA) which amended the *BIA* and the *Companies'*

87 *Ivaco Inc (Re)*, above note 82 at para 11.

88 *Ibid.*

89 *Re Graphicshoppe Ltd* (2005), 78 OR (3d) 401 (CA), rev'g (2004), 74 OR (3d) 121 (SCJ) [*Graphicshoppe*]: Supporting the court's reasoning was the fact that prior to the date of the employer's bankruptcy, the employer's account had a negative balance and therefore, none of the employee contributions remained intact. In a strong dissent, Juriensz JA held that the employees' trust claim should be allowed, as there was "no doubt that the pension contributions were the employees' money, and it is conceded that [the employer] held that money in trust upon deducting it from the employees' pay." In the minority's view, the pension contributions were an "indivisible asset" that could be traced to the employer's general account, based on the principle that "the mere commingling of trust funds with the trustee's own funds does not destroy a trust and, as such, does not in itself eliminate a beneficiary's right to claim a proprietary remedy" (paras 65, 66, and 105). See also, generally, *Edmonton Pipe Industry*, above note 67 and *GMAC*, above note 86. See also *Law Society of Upper Canada v Mazzucco*, 2009 CarswellOnt 200 at paras 52-54 (SCJ), distinguishing *Graphicshoppe*.

90 SC 1991, c 46.

91 SC 2005, c 47, s 1 [WEPPA].

*Creditors Arrangement Act*<sup>92</sup> (CCAA) to provide that normal pre-filing<sup>93</sup> pension contributions owing, but not yet remitted, to the pension fund at the time of a bankruptcy or receivership will have priority status ranking above secured creditors. Historically, pension claims did not have priority status under the *BIA* and an employee's pension claim was an unsecured claim.<sup>94</sup> As a result of the *WEPPA*, in respect of a prescribed pension plan, the *BIA* offers security for unpaid amounts on the date of bankruptcy equal to the sum of all contributions deducted from employees' remuneration for payment to the pension fund; the normal cost that was required to be paid by the employer into the fund; and all amounts required to be paid by the employer to the pension fund on account of defined contribution benefits.<sup>95</sup>

## 8) Contributions During Employer Financial Hardship

### a) Introduction

As stated by the Ontario Court of Appeal:

A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs.<sup>96</sup>

When an employer becomes insolvent, the receiver or trustee in bankruptcy, as the case may be, is put in place to realize the assets of the debtor company and distribute the proceeds to the creditors. The re-

92 RSC 1985, c C-36 [CCAA].

93 The *BIA* makes the distinction between regular pension payments, i.e., normal pre-filing contributions, which are protected, and special contributions (i.e., payments made in order to make up for fund's deficiency), which are not given priority over secured creditors under the *BIA*.

94 *Abraham v Canadian Admiral Corp (Receiver and Manager of)* (1998), 39 OR (3d) 176 (CA), leave to appeal to SCC refused, [1998] SCCA No 276. See the strong dissent in *Abraham* by Laskin JA, who focused on the public policy reasons to prefer employee pension contribution claims over bank claims (at para 70):

It seems to me to be unjust on policy grounds, and contrary to "the realities of the arrangement" for the bank to permit its borrower to carry on business and thus enhance the value of its security and then deny compensation to those responsible for its enhancement. Workers improve the value of inventory by their labour and services.

95 *BIA*, s 81.5.

96 *Re Royal Crest Lifecare Group Inc* (2004), 46 CBR (4th) 126 at para 21 (CA), aff'g (2003), 40 CBR (4th) 146 (Ont SCJ) leave to appeal to SCC refused, [2004] SCCA No 104 [*Royal Crest Lifecare*].