

Bill C-97 Senate Submission Defined Benefit Pension Protection

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Pension protection for Canadians is long overdue. When a company becomes insolvent and its defined benefit pension is underfunded, pensioners are powerless to intervene and secure their pensions. Sears, Nortel and other corporate pensioners experienced sharp reductions in their annual pension income after those companies failed. In March of this year, Imperial Tobacco filed for protection under the Companies' Creditors Arrangement Act (CCAA). Yet another group of defined benefit pensioners now find themselves potentially facing cuts to their pensions. Action to resolve this issue is long overdue.

The Issue

Over 1.3 million Canadian retirees and their spouses have private defined benefit pension plans. In Canada, there are no real protections for defined benefit pensioners when a company goes bankrupt. While all other creditors can negotiate terms to protect their interests, pensioners have no such ability. Creditors in name only, pensioners are entirely dependent on legislation to protect their interests. Pensioners are not allocated a seat at the table, unless the court grants them one.

Under current insolvency legislation, pension obligations fall nearly to the bottom and there is often not enough money or assets left to cover the unfunded portion. Sears is the most recent example of this failure. While Sears pensioners in Ontario received some protection under the Ontario Pension Benefits Guarantee Fund, pensioners in the rest of Canada received no protection and had their pensions dramatically reduced by 30%.

Defined benefit pensions are "deferred earnings", earned by people while they work and payable when they retire. When companies file for insolvency, their pension plan is often under-funded by 20% or more. Companies that offer defined benefit pensions have an obligation to honour their pension commitments.

The Financial Services Commission of Ontario estimates that 78% of defined benefit pension plans in Ontario alone are under-funded. In the event of an insolvency, those pensioners will not receive their full pension, putting a potential 850,000 pensioners at risk.

Proposed Solutions

The Canadian Federation of Pensioners and the National Pensioners Federation participated in the federal government consultations, "Enhancing Retirement Security for Canadians", in December 2018. At that time, we identified specific measures the government could take to address this disparity and ensure pensions are left whole in the event of corporate insolvency.

1. Create a Pension Insurance Plan that insures 100% of the pension liability. This should be fully funded by the plan sponsors. If pensions were 100% insured, pension solvency requirements could be relaxed, resulting in a break-even or reduced cost for sponsors.

The Financial Services Commission of Ontario provided data that shows that over the past 30 some years the cost to fully fund pensions of insolvent companies (in Ontario) was only \$84 million per year on average. This is significant as Ontario regulates 80%+ of Canadian private defined benefit pensions.

2. Amend insolvency legislation (specifically the CCAA and BIA) to extend super-priority to the unfunded pension liability. While this would not guarantee pensioners receive 100% of their pensions, it is an action the federal government could take to provide increased pension security to all pensioners of companies entering insolvency whether regulated federally or provincially.

3. Establish a recurring refundable tax credit equal to the annual pension loss experienced by a pensioner. If legislation is amended to ensure pensioners receive their full pension or if a pension insurance program is created, this credit will serve as a backstop to ensure these changes work to protect pensioners.

We have been engaged in this discussion for several years. We have steadfastly proposed solutions that would provide full or very close to full pension protection. Our proposals have been supported by evidence, which we included in our submission to the December 2018 federal pension consultation. In all of that time there has never been a proposed solution to fully protect pensions from either the insolvency sector or the federal government.

Bill C-97 Does Not Protect Defined Benefit Pensioners

While Bill C-97 acknowledges the inherent unfairness to pensioners and the inequities of current bankruptcy and insolvency legislation, the proposed legislative amendments to the Companies' Creditors Arrangement Act, the Bankruptcy and Insolvency Act, the Canada Business Corporations Act and the Pension Benefits Standards Act, 1985 do not offer any tangible solutions to protect pensioners. Nor do any of these changes empower pensioners to

protect their interests by providing them with a seat at the table when the assets of the insolvent company are disbursed.

Bill C-97 offers a commitment to enhance transparency and fairness and increase pension oversight and accessibility. But it fails to address the lack of legislative protection for pensioners in the event of insolvency. Rather, the proposed amendments provide the courts with greater authority and latitude to look at corporate behaviour and consider whether directors have acted in good faith. While this is a good start, it fails to address the underlying issues or provide any certainty for pensioners.

Specifically:

- Changes to the CCAA and BIA are dependent on decisions of the court in proceedings that often do not include direct representation by pensioners. Who, for example, would argue on behalf of pensioners that the company was not acting in good faith?
- Restrictions on "certain payments" are only enforceable, again at the court's discretion, if the company was insolvent at the time of the payment or if those payments directly resulted in insolvency. Recent events have clearly demonstrated that companies have monetized assets and disbursed capital before insolvency, but these decisions contributed to the insolvency. This language should be changed to include any "certain payments" if the pension is underfunded.
- Restrictions on "certain payments" are only enforceable, again at the court's discretion, if the event occurred within 12 months of the insolvency filing. This restriction ignores the fact that companies often plan their insolvency for months prior to filing. Often the unrecoverable downward spiral to insolvency begins years before filing. Sears pensioners (a member group of the Canadian Federation of Pensioners) approached the pension regulator (Financial Services Commission of Ontario) over 3 years before Sears filed for bankruptcy. The pensioners had a compelling case that the sale and monetization of key revenue generating assets would lead to insolvency. The regulator felt it did not have the power to act. To be effective, restrictions on "certain payments" should be a least 24 months.

As a country, we need to do better to protect Canadian pensioners. Any changes to federal insolvency legislation should extend super-priority to the unfunded pension liability, and for federally regulated corporations, include the creation of a pension insurance fund.

Pension Protection Is Good Public Policy

As the FSCO estimates demonstrate, the real cost of protecting pensions pales in comparison to the cost to our communities and our economy when defined benefit pensions fail.

When Canadians lose 20% or more of their pension income, there are financial repercussions that impact all of us. For example, in a conservative scenario, a pensioner could see a 20% reduction in income from \$30,000 to \$24,000 per year, resulting in an annual tax revenue loss of \$1,500 to \$2,000 per pensioner (depending on the province).

This loss also undermines the fabric of our communities and can shift pensioners from leaders and volunteers to leaning on communities for support. Pensioners contribute to their communities in many ways, particularly as volunteers. When they lose a substantial amount of their income, they cut back on community engagement or seek post-retirement employment. How can they help out at the seniors' centre or provide transportation for medical treatment when they even can't afford the gas?

Those opposed to improving the status of pensioners in insolvency often state that there is no need for change, as very few companies go bankrupt. While we agree that few companies become insolvent, when it does happen, the impact for affected pensioners is devastating. Given the number of insolvencies is so small, why can't we fix this problem?

As the combined voice of our more than 1.4 million members, we respectfully ask the Senate of Canada to protect defined benefit pensioners by asking the legislature to extend super-priority to defined benefit pensioners under the Companies' Creditors Arrangement Act and other applicable legislation. The Senate has an opportunity to act in the best interest of defined benefit pensioners and strongly encourage the federal government to move swiftly to address this inequity. Bill C-97 in its current iteration fails to offer real protections for Canadian pensioners.

About Us

The Canadian Federation of Pensioners (CFP) advocates on behalf of defined benefit pension plans and their members. Founded in 2005, the CFP is the united voice of 20 retiree groups who work together to improve pension security across Canada. CFP is a member of the National Pensioners Federation.

The National Pensioners Federation (NPF) is a national, non-profit, nonpartisan umbrella organization of more than 350 seniors chapters, clubs, and groups across Canada. We work together to influence government policy and legislation to support a better life for all ageing Canadians. With over one million collective members, the NPF is a clear, unified voice for older Canadians and the issues that matter most to us.