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**Submission to Consultation Paper**  
**“Enhancing Retirement Security for Canadians**  
**A Consultation Document”**

**Consultations on enhancing retirement security**  
**Innovation, Science and Economic Development Canada**

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## Executive Summary

Thank you very much for the opportunity to comment on ways to improve Pension Security for Canadians.

This discussion is highly topical, given recent events around Sears Canada and the much longer running issues around the Nortel Pension Plan windup and Nortel CCAA proceedings now wrapping up after 10 years.

The comments, observations and recommendations in this paper are based on experiences obtained during the (currently) 10 years of the Nortel Insolvency and the journey through the windup of the Nortel Managerial and Negotiated Pension Plans.

Through no fault of their own, Nortel Pensioners were deprived of up to 50% of their pension income and have waited almost a decade for the extensive CCAA legal battles to end so that they could recover part of their pension losses and move on.

Pension Plan protections, particularly for older pension plan members, and indeed for all plan members, need to be drastically strengthened to provide better transparency and involvement while a plan is in operation and for stronger protection of Pensioners during CCAA and BIA proceedings, including ensuring that Pensioners are set up to be able to represent and defend their interests in complex court proceedings.

Hopefully, these comments, informed by the learnings of the Nortel experience, will help guide the Government of Canada as it considers changes to protect Pensioners and their pensions, and prevent the type of disastrous windup that Nortel Pension Plan members encountered.

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## Introduction

Canada's Federal Government and most of the provinces, in general, provide minimal or no protections for Canada's Defined Benefit Pension Plan (DBPP) members.

Alone in Canada, the Province of Ontario has long had a minimum level of Pensioner protections providing a guarantee for up to \$1500/month for Pensioners whose plans are being wound up when their Plan Sponsors become insolvent.

Specifically for the Nortel Plans, when Nortel entered insolvency, the Ontario Government contributed over \$300M dollars to the PBGF to support protection for up to \$1000/month

of Nortel Pensioner's DBPP pension income. This has since increased, no doubt informed by the Nortel experience.

Quebec provides the ability for Pensioners whose plans have defaulted to transfer their pension funds into *Québec Retraite* accounts for professional management. This provides some limited ability for Pension Plan Members with earned service in Quebec to recover pension losses through investment management over a 5 to 10 year period.

Contrast this with other Nortel Pension jurisdictions such as the United Kingdom which guarantees up to 90% of a DBPP entitlement (with inflation protections)<sup>1</sup> and the United States, which protected up to \$48K USD annually for a 65 year old Nortel Pensioner at the time of the failure of the Nortel DBPPs.<sup>2</sup>

Canada's protections for Pensioners is woefully inadequate.

Pensioners, unlike corporations, have no ability to recover from the loss of part or all of their pensions, usually their primary source of income in retirement.

They can't rebuild their capital, are unable to return to the work place to rebuild savings, and are the most vulnerable when placed into the position of being a creditor to a failing corporation.

And most have been penalized for being a pension plan member by having their ability to contribute to a Registered Retirement Savings Plan (RRSP) severely curtailed.

Canada must do more to protect Pensioners from pension losses and give them more involvement and transparency when their plans get into trouble.

The Federal Government has the opportunity, though these consultations and subsequent action, to provide true leadership in this space and set an example for Pension Protections that can serve as a model for future protections across Canada.

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## Observations

The Nortel DBPP windup affected almost 20,000 Pensioners across Canada, and many more worldwide. The Nortel CCAA process and the subsequent wind down of the DBPPs, is the poster child for a complex, multi-jurisdictional CCAA restructuring and windup, with attendant legal battles, and the Pension Plan Members stuck in the middle.

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<sup>1</sup> <https://www.ppf.co.uk/what-it-means-ppf>

<sup>2</sup> <https://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc>

The journey from the original CCAA filing to the final windup of the Nortel Pension Plan and eventual distribution of the fund of the Nortel Estate informs a number of observations that will help suggest some important Principles to better protect Pensioners.

Specifically:

- Nortel Pensioners only knew the status of their Pensions Plans from a 2006 Pension Report to FSCO, published every three years. While there were rumours of pension underfunding prior to the 2009 CCAA filing, the full \$2B shortfall was only revealed once the windup process had started.
- The legal processes around CCAA and Bankruptcy are potentially overwhelming to Pensioners, who are usually more senior and possibly elderly and unwell; individuals who are ill equipped to deal with the complex legal and pension issues that arise. This was a long and complex journey.
- The majority of Pensioners, usually in retirement age, have **little to no ability** to recover from the devastating effects of significant loss of pension income. Corporations that manage to navigate through the CCAA process can emerge with the ability to rebuild and move forward.
- In addition, the CCAA legal process ensures that Estates can spend extraordinary amounts in legal fees. In Nortel's case, the legal fees were estimated in the \$2.0B+ range, money that, in the end, did not end up repaying the obligations to the creditors or Pension Plans.
- Under current Provincial regulations, members of DBPP Pensions have zero ability to provide direction on Plan issues nor the ability to input to or review administration decisions in the windup of their plans. They have no ability to review the financial expenditures of the plan as it is wound up. All of the decision making power is in the hands of the Pension Plan Windup Administrator and the Provincial Regulator.
- Insolvency is being used more and more as a strategy by Multi-National Corporations to avoid their obligations to Pensioners. One only has to look at Sears Holdings and their subsidiary Sears Canada as an example of that strategy; to strip assets from companies in Canada and leave shells unable to make good on their obligations to employees and Pensioners.
- Provincial Regulators, in fact, manage the pension processes for Pension Plans registered in their province and for Pensioners who retire in those provinces. This meant that, in Nortel's case, most regulators in Canada were involved in the wind-up, leading to extra costs for the Pension Plan and delays for Pensions. All windup costs are paid by the Pension plan, not by the Estate.

- Some Pension Plan sponsors do take opportunities<sup>3</sup> to recognize and protect their obligations to their plan members by de-risking their plans via offloading to annuities or other de-risking strategies.

## Principles

These observations suggest that there should be a set of Principles for Pension Protections that put in place when considering reforms.

The Principles include:

- DBPP Members are entitled to the full benefits earned over their working careers; this needs to be a fundamental tenet of Pension Protection Legislation. These benefits should be protected at all costs in any situation where a DBPP is in trouble.
- Pensioners need full transparency on state of their Pension Plans both during the normal operations of their plan (on an annual basis) and during the windup process.
- DBPP Plan status and indeed all Pension Plans need to provide updated status Reports annually. All reports must be made available to Pension Plan Members, distributed to those in pay as well as deferred members.
- Pensioners need to be involved in the decision making process once their Pension Plan fails. Currently DBPP Pension Plan Members have no ability to provide direction on issues, nor the ability to provide input or review administration decisions in the windup of their plans.
- Members, via direct means or a representative committee, need to be involved in key decisions on their Pension Plan while operating. Members in failing plans need the ability to vote on key issues that affect their pensions throughout the windup process.
- Pension Plan Members as a group, need to be a special class of creditor so that pension obligations are placed in a special status, to ensure that their claims are considered and paid in advance of general creditors. The framework exists in current CCAA/BIA for tiered creditors and this would require a small modification to that framework.
- Pension Plans that are in underfunded status need to be put into a special status that ensures that pension plan obligations are managed as a higher priority over the

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<sup>3</sup> <https://business.financialpost.com/news/fp-street/pension-funds-on-track-to-buy-4-billion-in-annuities-as-de-risking-trend-grows>

majority of corporate discretionary funding such as dividends or executive bonuses. Plans should remain in that status until the plan is funded at 120%.

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## Implementation

In reality, these Principles may prove difficult or impossible to implement across Canada.

There are a number that will cause consternation to the “Financial Community” in Canada, with claimed potential issues around the impact to the availability of capital in an environment that will arise. We saw this on a number of occasions during the Nortel - proceedings.

There will need to be some level of provincial buy-in and corresponding regulations put in place to support the introduction of these Principles.

Governments and Financial Markets will need to be given time to adapt to the new environment.

These Principles and potential impacts will need to be considered and studied by the Government to come to a reasonable balance and to develop a roadmap to implement over time.

But doing nothing should not be an option.

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## Comments on Consultation Paper

### **Pension Options**

**Solvency reserve accounts (SRAs):** A SRA is an account of the pension plan into which companies could remit solvency special payments to eliminate pension deficits. Once the deficit is eliminated and the plan is in surplus, employers would be permitted to recover portions of their special payments from the SRA, in the form of plan surplus, that are no longer required to secure pension benefits.

Allowing for SRAs would provide greater flexibility for employers when meeting their pension funding obligations and could provide greater incentive for companies to keep their pension plans well-funded by allowing employers to access certain surplus. To protect benefit security, employer withdrawals from the SRA would not be permitted to create a funding deficit.

*Response:*

*This is a useful tool to provide incentives to employers to fully fund their pension obligations, specifically protecting plan member's deferred wages that are "banked" to use to fund their retirement income.*

*As we learned from Nortel, a Pension Plan can end up in an underfunded position for a number of years and for various reasons. This can quickly evolve into a more severe underfunded situation due to external events such as severe economic downturns when the company election to enter into CCAA protection.*

*For this reason, we would recommend that the use of SRA Accounts is carefully monitored and that any and all withdrawals be managed to ensure that an adequate funding ratio on a going concern basis of at least 120% of requirements is maintained in the plan prior to any withdrawals occurring.*

*The interaction with the provisions of the ITA with respect to Employer Contributions and Deductions and this type of account needs to be scrutinized to avoid unintended consequences.*

**Pension funding relief criteria:** The Minister of Finance has the authority to provide employers with special pension funding relief to improve the long-term sustainability of their pension plans. This can help avoid the scenario of employer insolvency and the termination of an underfunded plan. To enhance the Minister's authority in this regard and improve corporate responsibility, employers seeking funding relief could be required to agree to certain specified criteria or conditions, such as a prohibition of dividend payments while pension funding relief measures remain in place. However, in complex cases, employer insolvency and benefit reductions may be unavoidable.

*Response:*

*This type of relief has proven problematic in the past, for example with the solvency relief provided to GM Canada after the 2008 economic downturn. Employees were denied protections of the Ontario PBGF in exchange for a plan that provided GM with 10 years of managed pension deferrals.*

*FSCO in Ontario has been modifying the Ontario rules for Solvency Relief, based on their experiences since 2009, including adding plan members involvement on applications to extent relief from 5 years to 10 years. It would be useful for ISED to consult with FSCO on this topic.*

*The issue with this type of funding relief is that there appear to be very few denials of these requests at the provincial level and there is no consultation with the pension plans or its member, who are the ones most directly affected.*

*If this is implemented, one key requirement is to increase the level of due diligence and oversight to ensure that any such relief requests are indeed warranted and supported by evidence. This should also be viewed as a last resort option with clearly demonstrable need.*

*Any such relief must be also tied to specific employer related conditions, including plan member agreement, cessation of share-owner dividends, a limit on share buy backs, and negotiated limits on executive compensation.*

**Transfers to self-managed accounts:** When a federally regulated DB plan is terminated, it must purchase annuities for retirees that replicate plan benefits. Where plans are underfunded due to employer bankruptcy, purchasing annuities leads to permanently reduced benefits. Retirees could be provided with an 6 additional option to transfer their reduced pension amount, as a lump sum, to a personally managed locked-in savings plan in order to allow for recoupment of losses through future investment returns. However, this would expose retirees to further risks, such as investment losses and the possibility of outliving their retirement savings.

*Response.*

*This option should be made available to Pension Plan Members when their plan is being wound up. While risks of “outliving” their savings are valid, the option to “get their money out” and to control their own destiny has proven to be a viable option, particularly for younger plan members in a Pension Plan.*

*While annuities for older Plan Members is a viable option to protect what is left of their pensions, the locking in process inherent with annuities offers no capability to recover from significant shortfalls in pension payments.*

*For younger Members, prudent financial management of the remainder of their pension assets may allow at least partial recovery from the damage of an underfunded plan.*

*In Ontario, Nortel DBPP members won the opportunity, under the Liberal Government of Dalton McGuinty, to take their individual Commuted Value (CV) amounts out of the plan and transfer those funds to locked-in retirement accounts.*

*This offered the option to Nortel Plan members to attempt to make up for pension losses of up to 30% after the PBGF top up.*



*One issue with this approach needs to be addressed. An unintended consequence that Nortel Pension Plan members encountered when exercising this option was the negative impact of the Income Tax Act (ITA) Maximum Transfer limit<sup>4</sup>.*

*This is an outdated, punitive section of the ITA that severely penalizes Commuted Value withdrawals. It is currently based on age and obsolete limits that fail to recognize the issues with plan failure.*

*The existence of these limits makes this transfer option highly unattractive unless the limits are changed to more modern amounts that allow for the **full transfer** of pension plan assets to a members locked in account.*

*In Quebec, the Québec Retraite has offered the option to Nortel Pensioners who retired in the Province to transfer their CV funds to a registered account with the ability to improve the balances via managed investments over a 5-10 year period.*

*This is an innovative approach that ISED may wish to consider as an alternative to a complete CV withdrawal.*

**Clarify benefit entitlement:** Federal pension legislation provides that members are entitled to their accrued pension benefits, with the intent that the full pension benefits are to be provided regardless of whether the plan remains ongoing or is terminated. Nevertheless, it has been suggested that the legislation may be unclear in this respect, leading some plan sponsors to propose amendments that would provide for different benefits on plan termination compared to while it remains ongoing (e.g., indexation only payable on plan termination if sufficient assets remain in the plan). This could result in members experiencing reductions for those benefits if a plan is terminated underfunded, particularly in an insolvency situation.

In order to ensure that all pension benefits are afforded equal protection regardless of whether the plan is ongoing or terminated, the legislation could be clarified to provide explicitly that entitlement to pension benefits cannot be made conditional on the continued operation of the plan. Alternatively, amendments would be required to provide flexibility for DB pension plans to offer different benefits in different circumstances in pursuit of plan-specific objectives, such as addressing affordability and sustainability issues that may be critical to the employer.

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<sup>4</sup> Section 8517 of the Income Tax Regulations.

*Response:*

*Pensioners have foregone higher wages during their working lives in exchange for a pledge from their employer to provide sound financial basis for their retirement years. In addition, Pension Plan Members are severely penalized for be participants in a Pension Plan by restrictions on their RRSP contributions, with no ability to recover RRSP room or to make contributions on Plan failure.*

*Plan sponsors need to be held accountable for the delivery of that pledge and sponsors should not be allowed to unilaterally and retroactively change that agreement.*

*Legislation needs to be consistent with ensuring that Plan Sponsors are clear on their obligations and that members get their full entitlements from the Pension Plan.*

## **Corporate Governance Options**

**Restrictions on corporate behaviour:** Dividend payments, share redemptions and executive compensation packages could be restricted under the CBCA in cases where a company has a large pension deficit. However, these proposals would apply only to CBCA corporations.

*Response:*

*This is a critical Governance capability that should be implemented at both Provincial and Federal levels to give Regulators another tool to ensure that Pension Plan shortfalls are corrected.*

**Increased corporate reporting and disclosure requirements:** Currently, the CBCA requires corporations to make annual reports and disclosures to shareholders regarding corporate financial information. Recent CBCA amendments, while not yet in effect, will also require publicly traded corporations to disclose to shareholders prescribed information pertaining to diversity among the board and senior management, and on diversity policies.

In order to strengthen corporate social responsibility towards employees and Pensioners, the CBCA could be amended to require corporations to report on policies that pertain to the interests of Workers and Pensioners, and require directors to promote the company's success for the benefit of all its stakeholders, including Pensioners and Employees. As with other potential federal corporate governance changes, only CBCA corporations would be affected.

*Response:*

*Any changes that increase the interaction between the Pension Plan Sponsor and the Plan Members would be welcome.*

*As a minimum, increased reporting on Plan Status (both as a going concern and in windup), creation of Pension Advisory Committees, and Member voting on key issues while in operation as well as in Windup are all key changes that are needed.*

## **Insolvency Options**

**Enhanced “look-back” period:** The BIA allows a court to set aside dividend payments or share redemptions made by an insolvent corporation within one year of the bankruptcy. The BIA and CCAA also allow a court to set aside reviewable transactions (transfers at undervalue) by the debtor company up to five years before insolvency. In order to enhance corporate accountability and better align corporate decision making with Pensioner interests, the “look-back” period in the BIA and the CCAA could be enhanced to include the power for a court to set aside executive bonuses and compensation increases where a company with unfunded pension liabilities enters insolvency within a fixed period. The proceeds recovered could be earmarked for funding pension obligations. However, the proposal could create marketplace uncertainty as executives and shareholders would face greater risks of retroactive claw backs.

*Response:*

*The Sears Canada proceedings are a perfect example of the need for an extended look back period.*

*Sears Canada Pensioners lobbied their Regulator to take action while Sears Canada's parent corporation transferred Billions of dollars out of Canada and drove Sears Canada into extinction.*

*Regulators need to have ability to review significant corporate transactions for underfunded plans in the present, and to look back at corporate transactions in BIA and CCAA for wrongdoing and remediation.*

*Any limitation on the look-back period should be waived where there is evidence that the employer has not upheld a fiduciary duty to plan members or has clearly stripped corporate assets while Pension Plans are underfunded.*

**Enhanced transparency in the CCAA process:** In CCAA proceedings, the debtor company can negotiate with its creditors under court supervision on an agreement to restructure its debts. Pensioner interests in restructuring proceedings may be affected by limitations in the current court-supervised process. To better ensure fairness and equity for Pensioners and employees, as well as to enhance transparency, the following amendments to the CCAA could be considered:

- Increasing participation for Pensioners and employee groups at the outset of proceedings by limiting the scope of initial orders;
- Enhanced transparency for all creditors by requiring creditors to disclose their real economic interests; and
- Creating a more equitable process by imposing an express duty of good faith on all parties to the restructuring.

*Response:*

*Having been through a long and protracted CCAA process with Nortel, the suggested transparency as described is not sufficient to fully protect Pensioners in insolvency proceedings.*

*Pensioners need to be a special class of creditor to provide an enhanced level of protection in the CCAA process to ensure that their interests are fully represented.*

- *All Pensioners and their claims should have protected status to ensure that they are properly organized and represented in BIA and CCAA proceedings.*
- *Pension Claims should be placed in a different, more senior position to that of General Creditors.*
- *The Initial Order process should be used to establish these protections and ensure proper legal and financial representation from day one of the court proceedings.*
- *Where significant pension plan underfunding exists, the Pensioner group should have the right to veto any Plan of Arrangement or Windup Plan.*

*As noted earlier, the Sears Canada insolvency demonstrates that international companies with Canadian subsidiaries as a means to close Canadian operations have stripped assets and the use of the CCAA process has allowed them to avoid the resulting obligations to Pensioners.*

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## Summary

Once again, thank you for the opportunity to comment on this Consultation Paper.

The issues raised in this consultation document have been with us since the start of the implementation of the first DBPP in Canada.

What's needed is effective leadership to take the first steps to put better protections in place.

The Federal Government can demonstrate to the Provincial Regulators that it is serious about protecting Pensions and Pensioners rights, and that it has a roadmap of changes and enhancements to go about putting protections in place.

Recent economic events, including the downturn of 2008 and more recently, Nortel, Stelco and Sear Canada insolvencies have shown that many current Laws and Regulations, including BIA/CCAA, the Income Tax Act and individual Provincial Pension Regulations do a poor job of protecting Pensioners when their Plan Sponsors encounter financial difficulty or their Pension Plans are wound up.

The Government of Canada, through implementation of even a partial set of the recommendations received via these Consultations, can start to ensure that protections of Pension Plan Members and their "deferred wages" are improved.

And in the end, to ensure that the tragic and extreme examples of Pension Plan failures such as Nortel and Sears Canada are not repeated.