



**SUBMISSION BY THE UNITED
STEELWORKERS
TO THE
INNOVATION, SCIENCE AND ECONOMIC
DEVELOPMENT CONSULTATION ON
ENHANCING RETIREMENT SECURITY FOR
CANADIANS**

December 21, 2018

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WHO WE ARE

The United Steelworkers (the “Union” or the “USW” or the “Steelworkers”) is an international trade union with over 220,000 members in Canada.

Steelworkers are men and women of every social, cultural and ethnic background in every industry and job. From our roots in core industrial sectors such as mining and steel, the Steelworkers has grown into the most diverse union in Canada, representing employees in all areas of manufacturing including electronics, auto parts, rubber, aluminum and glass, plastics, appliances and paints. In addition, the Steelworkers represent service employees in call-centers, retail stores, hotels, banks, nursing homes, security guards, truck drivers and university employees. We remain Canada’s predominant union in the mining sector.

The Steelworkers is committed to ensuring that employees in Canada, whether members of our organization or not, are treated with dignity, respect and equality in Canadian workplaces and communities. We negotiate strong collective agreements with good wages to ensure that the economic lives of our members and their families are improved and that they are treated with dignity and respect in their workplaces.

The USW is particularly responsive to, and has been active in, ensuring retirement security for our members. We have made it a priority to negotiate good pensions and secure health and welfare benefits so that our members are financially stable during their retirement years. And we have fought to hold on to those negotiated pensions and benefits from employers who seek to take them away.

In addition to prioritizing retirement security during collective agreement negotiations, we have advocated to safeguard the economic security of our members and all working Canadians in their retirement years through our political action and advocacy work. We have successfully fought, together with our brothers and sisters in the Canadian Labour Congress, to increase benefit levels under the *Canada Pension Plan*; made some headway in prioritizing unpaid pension amounts in bankruptcy and insolvency proceedings; and created and managed our own multi-employer pension plan to try and give

employees in low-wage sectors, like the security guard industry, access to pensions where they would otherwise have none.

However, we still have more work to do. We welcome the opportunity to comment on how this Government can further enhance retirement security for working Canadians.

We have reviewed the Canada Labour Congress's submission to the Government on this issue. We endorse that submission. In addition, we make the following comments on the issues raised in the Government's consultation paper. We would welcome the opportunity to sit down with representatives of the Government to further discuss the paper and our comments below.

THE PRESENT SITUATION

In its 2018 Federal Budget, the Government of Canada said "All Canadians deserve more peace of mind when it comes to their retirement, and companies must act in good faith towards their employees."¹

The need to give working Canadians greater peace of mind in their retirement years is growing. Over the last two decades, it has become harder and harder for workers in Canada to achieve retirement security through good faith negotiation with their employers. Fewer employers offer workers good, defined benefit pension plans. Of those that continue to administer such plans, many employers come to the bargaining table with proposals to either reduce benefits for future retirees, eliminate access to defined benefit plans entirely for newly hired workers, eliminate or reduce ancillary benefits such as those for early retirement, or all or some combination of the above.

Most disturbing, in our view, is the financial distress incurred by pensioners when companies with underfunded defined benefit pension plans seek bankruptcy protection or go bankrupt.

¹ Government of Canada; *Federal Budget 2018*; <https://www.budget.gc.ca/2018/docs/plan/chap-01-en.html#A-More-Secure-Retirement>

Our union is all too familiar with such stories: the retiree who worked for thirty years for an employer, only to have his pension benefit cut by 25% and his health and welfare benefits eliminated when his employer went bankrupt; the spouse of a member who calls us wondering how she will survive on \$400 less a month; the pensioner who can no longer afford the costly medications that keep him alive now that his post-employment benefits have been eliminated while the company he worked for is under bankruptcy protection.

In 2018, Canadians do not have peace of mind in retirement. In many communities, like Hamilton, or Wabush, or every city that ever had a Sears store or warehouse, older Canadians are struggling. For them, going out and finding a job after retirement just isn't an option.

Ensuring the retirement security of older Canadians should be one of the top priorities of this or any government: as long as some Canadians are insecure, all Canadians are at risk.

As a result, we urge this Government not just to consult with Canadians on this issue, but to take immediate action to enhance Canadians' retirement security and mitigate the dire effects of employer insolvency on Canadian pensioners.

Pension and health and welfare benefits are not a windfall for those who retire from (often lifetime) employment with a company. Employees take a lower wage during their working life in order to ensure they can live with dignity in their old age. Workers plan their retirement on the continuation of pension and other health and welfare benefits for which they have already paid. To that extent, defined benefit pension plans and post-employment health and welfare benefits are akin to retirement "insurance" whereby employees contribute and/or pay premiums (usually in the form of deferred wages) during their employment years in order to guarantee income and coverage at retirement.

WHAT WE MUST DO TO ENHANCE RETIREMENT SECURITY FOR ALL CANADIANS

If this Government is serious about enhancing the retirement security of older Canadians, and guaranteeing them peace of mind in their retirement years, it must do the following:

- (a) Safeguard employee pension benefits in the *Companies Creditors' Arrangement Act* (CCAA) and *Bankruptcy and Insolvency Act* (BIA) by recognizing a super-priority for pension debts, and a priority for health and welfare insurance plan liabilities. Further, ensure employer contributions to pension and health and welfare benefit plans continue during proceedings under the BIA and CCAA;
- (b) make alterations to federal corporate governance legislation to better protect employee pension plans, and ensure fairness for workers while an employer is in bankruptcy protection; and
- (c) amend the federal *Pension Benefits Standards Act* (PBSA) to better protect the rights and interests of plan beneficiaries;

Prioritize Employee Pension Plans In CCAA and BIA Proceedings

As noted above, our Union has far too much experience with the financial hardship on pensioners occasioned by the insolvency of an employer with an underfunded pension plan.

We know of tens of thousands of workers and retirees who have had their pensions adversely affected by employer insolvencies and/or bankruptcies. In the past ten years alone:

- Nortel Canada filed for bankruptcy with unfunded pension liabilities of over \$1.5 billion resulting in approximately 12,000 employees facing pension cuts of 40%.²
- Sears' pension plan is underfunded by more than \$260 million. Sears' 18,000 pensioners have seen their pensions cut by up to 30%, and their retirement benefits, included extended health and dental care, eliminated since the company sought bankruptcy protection.³
- Over 10,000 employees of Indalex, Algoma, Grant Forest Products and others have had their pensions cut when companies closed and/or went bankrupt and pension plans were underfunded.

None of this is surprising given that, as of January 1, 2016, Canadian corporate pensions had a median funding rate of approximately 85%, in large part because long-term low interest rates caused pension liabilities to increase substantially.⁴ Coupled with bankruptcy and insolvency laws which do not sufficiently prioritize unfunded pension liabilities, and the result has been tragic for many pensioners.

Under current bankruptcy and insolvency laws, unfunded pension liabilities are unsecured claims in bankruptcy proceedings. So are unpaid health and welfare benefit claims. As a result, once other priority creditors have received what is owed to them, there are usually no realizable assets left in the bankrupt estate for unsecured creditors, including pension plans and drug, dental or extended health claims. Further, plans of arrangement or proposals under the CCAA and BIA, respectively, do not require funding of unfunded pension liabilities (or the continuation of health and welfare plans) in order to obtain court approval.

Yet, tens of thousands of Canadians rely on earned benefits from their former employer (or their spouse's former employer) for retirement income and critical drug, dental and extended health benefits. The loss of those entitlements have

² Wikipedia, *Nortel Retirees and Former Employees Protection Canada*, 2013. www.nortelpensioners.ca

³ <https://www.cbc.ca/news/business/sears-canada-pension-retirees-1.4773283>

⁴ <http://www.aon.com/canada/attachments/human-capital-consulting/news-AonCanada-Q1-2018-Solvency.pdf>. Since January 1, 2016 the median pension plan funding level for Canadian DB plans has increased slightly as a result of the rise in interest rates.

dire consequences for retirees. Under current bankruptcy proceedings the interests of retired Canadians remain virtually ignored. Retirees lose everything before others lose anything. Further, unlike suppliers, lenders, and even active employees, who can diversify their risk or make an adjustment when a company fails, retirees have no such ability. Instead, their loss is permanent. They must simply make do with less.

The vulnerability created by our current laws must be rectified. To do so, we urge this Government to amend the BIA and CCAA to:

- (a) provide a super-priority charge for the amount of any wind-up deficiency in a pension plan. This includes requiring the amount be included in any proposal or plan of arrangement approved by a court;
- (b) amend the BIA and CCAA to ensure that an employer is required to continue to make contributions to any group insurance, group sickness or accident or private health services plan during the CCAA or BIA proposal process; and
- (c) amend the BIA to provide that amounts required to indemnify beneficiaries of group insurance plans in which the employer has ceased participation, and unpaid termination and severance pay, rank as preferred rather than unsecured claims.

There are currently two private members' bills (Bill C-384 and Bill C-372) before Parliament which seek to revise bankruptcy and insolvency legislation in Canada to better protect retirees' pension and health and welfare benefit entitlements. The government should allow those bills to proceed to committee and should work to ensure that those bills are amended, as necessary, to provide for the protections outlined above.

We are well aware of the dire prophecies of those in the financial community to the suggestion that existing creditor priorities in insolvencies be altered. Those predictions run the gambit from significant increases in the cost of borrowing to the end of the free market economy as we know it.

We note that similarly dire predictions were made following the issuance of the Supreme Court of Canada's decision *Sun Indalex Finance LLC v. United Steelworkers et al.*⁵ ("Indalex"). Yet, surprisingly, the sky has yet to fall. Credit continues to be available to those organizations that require it.

In its consultation paper, the Government focuses on the importance of striking the appropriate "balance" in insolvency proceedings between the need to improve retirement security and the need to balance the interests of other creditors, and credit costs and availability. It expresses the concern that changes to existing legislation not be made that might reduce the likelihood of a successful restructuring that could save jobs and preserve business value.

With respect, the current system does not provide any such "balance", either in respect of the insolvency process itself, or in terms of substantive protection for retiree pensions and benefits under the BIA and/or CCAA.

Retired workers have been described as the "lost voice" in bankruptcy proceedings.⁶ Until the Supreme Court of Canada's decision in *Indalex*, pension plan beneficiaries often received no formal notice of bankruptcy and insolvency proceedings, and there was little recognition by the courts that pensioners had interests that were in conflict with, and differed from, those of the plan administrator (usually the insolvent employer). Even where retired workers do receive notice of insolvency proceedings, it is often difficult for them to organize collectively (absent a trade union to advocate for them) and they may not have the financial means to afford representation and make themselves heard. This stands in stark contrast to large financial institutions and lenders, who have far greater financial and legal resources, and whose voices dominate the insolvency process.

Coupled with the difficulties retired workers face in having their voices heard throughout the insolvency process, the current system provides *no protection* for retirees where a former employer becomes insolvent and an existing defined benefit pension plan is underfunded, or post-employment benefits are at risk. This despite the fact that retired workers are arguably the *most vulnerable* creditors in any insolvency proceeding. Unlike an investor or credit provider,

⁵ *Sun Indalex Finance LLC v. United Steelworkers et al* [2013] 1 S.C.R. 271

⁶ Fiona Stewart "Benefit Protection: Priority Creditor Rights for Pension Funds", *OECD Working Papers on Insurance and Private Pensions*, No. 6 OECD Publishing. <http://www.oecd.org/pensions/insurance/37977393.pdf>, p.7

employees of a company have not had access to the sort of financial data investors (or suppliers, for that matter) do when assessing their level of risk, and, even if such information were available, they are unlikely to be able to manage that risk in the same way as an investor, supplier or credit provider.

Further, employees cannot diversify their risk during their employment years in the same way as an investor, supplier or creditor provider can, and pensioners certainly can't. Pensioners sink or swim depending on what happens to the company ship, despite having no control over who is steering the boat.

As a result, pensioners require greater procedural and substantive legislative protections, as outlined above, to ensure fairness and balance in the insolvency process.

Corporate Governance

For the reasons outlined in the CLC's submission, the USW supports the amendment of federal corporate governance legislation and the BIA and CCAA, as required, to better protect defined benefit pension plans. This includes:

- (a) amending federal corporate governance legislation to require companies that pay dividends (or issue share redemptions) where a pension plan is in deficit to match the dividend payment/value of the share redemption until the plan is fully funded;
- (b) extending the "look-back" period under the BIA and CCAA, which permits a court to set aside dividend payments or share redemptions made by an insolvent company;
- (c) extending the "look-back" period to give the court the power to set aside executive bonuses and compensation increases for a period of time where a company with unfunded pension liabilities enters insolvency;

- (d) amending federal corporate governance legislation to report on policies affecting the interests of workers and pensioners, such as the ratio of executive to median worker compensation; and
- (e) making the insolvency process more transparent and inclusive for active and retired pension plan members. This means all creditors in CCAA should be required to disclose their real economic interests and any potential conflicts of interest. There should also be an express duty of good faith imposed on all parties involved in the process.

Finally, we support the CLC's submission that this Government should work with the provinces to ensure that provincially-incorporated businesses are subject to similar requirements to ensure consistency across jurisdictions.

Protecting the Interests of Plan Beneficiaries

The USW submits that the following changes should be made to federal pension legislation in order to better protect the interests of plan beneficiaries in the event of a company insolvency:

(a) Solvency Reserve Accounts (SRA)

The USW supports the amendment of the PBSA to provide for the establishment of solvency reserve accounts (SRA). The establishment of such accounts was proposed by the Alberta/British Columbia Joint Expert Panel on Pension Standards in their 2008 report *Getting Our Acts Together: Pension Reform in Alberta and British Columbia* and they have now been implemented in Alberta.⁷

The USW proposes that under such an amendment, the PBSA would provide for a solvency reserve account that while accounted for separately, would form part of the assets of the trust fund. The regular pension fund would continue to receive contributions required to meet going concern, unfunded liability and solvency funding obligations.

⁷ Report of the Joint Expert Panel on Pension Standards; *Getting Our Acts Together: Pension Reform in Alberta and British Columbia*; <http://www.assembly.ab.ca/lao/library/egovdocs/2008/alz/170139r.pdf>, p. 131

Under our proposal, when a pension plan eliminated its solvency deficiency, the employer would be required to contribute an amount equal to 20% of the going concern funding to an SRA until such time as the SRA reached 20% of going concern liabilities. If the plan thereafter incurred a solvency deficiency, the employer would be required to transfer the assets from the SRA to the trust fund to meet solvency funding obligations until such time as the solvency deficiency was extinguished or the SRA account had been used in its entirety.

(b) Pension Funding Criteria

The USW supports the amendment of the PBSA to provide the Minister with enhanced powers and greater direction in the exercise of its authority to provide employers with special funding relief.

In particular, the USW supports:

- Controls on the use of retained earnings/dividends out while pensions are in deficit;
- greater power to pension regulators to monitor and make orders on underfunded plans; and
- providing joint governance models of pension administration at the federal level like those available in Ontario, British Columbia, Alberta and Quebec.

(c) Transfers to Self-Managed Accounts

The USW rejects the proposal that the PBSA be amended to permit the transfer of an employee's assets in a defined benefit pension plan to a personally managed locked-in savings plans where an employer goes bankrupt and the pension plan is underfunded. While the current requirement of purchasing annuities does lead to permanently reduced benefits, the current system at least results in a consistent, reliable benefit for the remainder of the individual's life. This is not the case where an individual transfers their reduced pension amount as a lump sum into an RRSP, which exposes an

individual's retirement fund to the risk of loss. Such an outcome is akin to converting an employee's defined benefit plan into an inferior defined contribution plan, and has the effect of reducing rather than enhancing the retirement security of working Canadians.

(d) Multi-Employer Pension Plans

While the Government's consultation paper did not refer to negotiated contribution plans or MEPPs specifically, the USW believes that steps to facilitate the establishment and operation of MEPPs should be part of any Government action plan to enhance retirement security for Canadians.

Unlike single employer pension plans, MEPPs have proven to be an effective method of providing secure retirement benefits for plan members. Unfortunately, while the PBSA provides for the establishment of MEPPs, the current regulatory framework remains a serious impediment to their use.

To that end, the USW adopts the submissions made by the Multi-Employer Benefit Plan Council of Canada (MEBCO) in this consultation, and, in particular, their position that an appropriate funding framework for MEPPS should require only reasonable going concern funding requirements. That is, solvency funding should not apply to MEPPs.

Similarly, the USW adopts the submission of the Canadian Energy and Related Industries Pension Plan (CERi), of which the USW is a founding member. CERi now represents over 2,700 members, all of whom were former members of the Public Service Pension Plan. Under the current funding rules, CERi is unable to transition to a target benefit pension plan. Regulatory changes which eliminate the requirement of solvency funding for MEPPs is necessary if CERi (and others) are to have the opportunity to ensure greater retirement security for federal workers and retirees.

CONCLUSION

In order to ensure greater retirement security for Canadian workers, this Government must act.

It must amend pension benefits and corporate governance legislation to anticipate and forestall the dire consequences that can occur for pensioners when companies fail.

Most importantly, when companies fail, as they inevitably will, this Government must do more to protect the interests of retired workers. This means amending existing bankruptcy and insolvency legislation to ensure that retirees have their voices heard during the insolvency process, that their pension plan payments and health and welfare benefits are continued during that process, and that their pensions and group insurance benefits are protected by law. Such protection requires, among other things, granting a super-priority charge in the amount of any wind-up deficit, and prioritizing health and welfare benefit amounts, so that pensioners can continue to rely on the income which they earned and which they require to ensure their health and well-being.

Finally, this Government can and should move quickly to make the amendments necessary in the regulatory framework to the PBSA to facilitate the establishment and operation of MEPPs by eliminating the requirement for solvency funding of such plans.

Only if these steps are taken will this Government achieve the “balance” it seeks where employer insolvencies arise, and give Canadian workers greater peace of mind in their retirement years.