

Bankruptcy and Insolvency Act

Hon. Art Eggleton moved second reading of Bill S-253, An Act to amend the Bankruptcy and Insolvency Act and other Acts and Regulations (pension plans).

He said: Colleagues, it was almost 10 years ago that Canadian telecommunications giant Nortel filed for bankruptcy. As the country watched the company collapse in real time, it became readily apparent that its nearly 20,000 pensioners were at risk of losing the pensions that they had been promised. This fostered a mood for change. Canadians wanted to see laws passed that would better protect pensioners in future bankruptcy proceedings.

Yet nothing was done. The federal government never moved to protect these private pension plans. Now, almost a decade later, we are witnessing it all over again. When Sears filed for bankruptcy protection last year, it left in question the futures of nearly 16,000 pensioners who had worked for the company.

Court proceedings are still ongoing. However, if we use the Nortel case as an example, it could be years before these individuals receive any kind of settlement. We can be sure of one thing, however, that the pensions they end up receiving will not be the pensions that they were promised.

That is why I have introduced Bill S-253, to give real protection to pensioners and ensure that when the next Canadian company goes under, the financial futures of these Canadian workers will not be thrown into disarray.

Colleagues, this bill aims to accomplish two things: to protect pensioners in bankruptcy proceedings and to ensure that pension plans remain healthy when a company is solvent.

The first item is straightforward. Bill S-253 would amend the Companies' Creditors Arrangement Act, or CCAA, and the Bankruptcy Insolvency Act to put pensions on an equal footing

with owed or unpaid wages in bankruptcy proceedings, putting them above the unsecured creditor status that they currently receive.

This is not a new proposal, colleagues. It has been debated for some time. Detractors of this idea argue that lenders would be reluctant to lend to businesses if their loans have a lower credit ranking than pension plans in the event of bankruptcy, and that the wheels of business might grind to a halt.

This is absurd. Banks and businesses make money off of loans, which entail risk. The very nature of their business is risk and, routinely, credit risk is addressed through loan pricing — the interest rates which lenders charge. Why should pensioners be forced to carry this credit risk instead? In effect, that is what the current rules require.

Banks and businesses have other customers and other loans. They have an opportunity to manage risk via loan pricing and to carry on profitable business with other clients. Pensioners are not so fortunate. They are retired. They had planned their financial futures around the set amount that their former employer is contractually obligated to provide.

It is important to remember that these defined benefit pension plans are not a gift or a goodwill gesture. They are a cost of doing business, created, offered and operated to attract and retain the best workers.

Not only that, they are also something an employee pays for directly or indirectly. Whether or not it's paid for by the employer or employee contributions, the pension promise is, effectively, compensation that employees forego in the here and now so that they can have secure retirements. In other words, pensions are funded with money that employees could have set aside and invested themselves. When a pension promise is not kept, it is a betrayal of that bargain.

Take the workers at Sears Canada, for instance. When they were hired, they signed a contract that determined they would be paid partly in wages and partly in future pensions. The employees fulfilled their obligations, some working over the course of decades, foregoing some pay in exchange for retirement security. Now they are told that not only will they not receive what they were promised, but that their deferred wages will be going to lenders like banks and bondholders instead.

That is wrong. Though it is frustrating that thousands of Canadian workers find themselves in this situation again, there is reason for some optimism, because currently there are two private members' bills in the House of Commons that aim to secure the rights of pensioners in bankruptcy proceedings. However, they have languished on the Order Paper for some time. It gives me reason to believe that there is some will in the other place for this kind of change.

Furthermore, the government's own party has called for such a move. At this year's policy convention the Liberal Party adopted a policy resolution that would see pensioners receive the kind of security that this bill calls for.

It is, after all, in the government's best interest to protect these pensions. When a pension is cut, it is not just the retiree that suffers but the taxpayer as well. Pensioners who lose all or part of their benefits may have to claim greater benefits from social security programs which are funded from general tax revenues. This will tax an already overburdened social security system that is showing signs of strain as the retirement of the baby boom generation of workers is accelerating. Other countries in the OECD have recognized this and have taken steps to ensure that when a company becomes insolvent, the burden of these pensions is not downloaded onto the taxpayer.

It is in all our interest to prioritize Canadians when it comes to these bankruptcy proceedings to ensure that the company pays, not the pensioner and not the Canadian taxpayer.

Colleagues, as I mentioned earlier, there is another aspect of this bill as well. It would amend the Pension Benefits Standards Act, 1985 by empowering the Superintendent of Financial Institutions to effectively restrict businesses subject to the act from issuing dividends or share buy-backs when there is a pension deficit.

What I am proposing here is not a prohibition on all dividend payments or share buy-backs. Rather, it would require that an employer must notify the superintendent, in writing, of any proposed or actual transaction, event or decision of the employer that could hinder the solvency funding of a pension plan.

If the superintendent determines that the pension fund is impaired, they shall advise the employer of that determination, and of the prescribed measures that are to be taken by the employer in respect to the funding of that plan, and could request that the plan be made solvent immediately or over a specified time or number of years. The superintendent's power would be discretionary, and it would weigh other factors before making that decision. The superintendent's power relates to all federally regulated businesses.

The Sears case provides us with an example of what this bill is trying to prevent. In 2005, U.S. hedge fund manager Edward Lampert gained control of Sears Roebuck in the United States, thereby becoming the controlling shareholder of Sears Canada.

Between 2005 and 2013, Sears Canada paid \$3.4 billion in dividends to shareholders. To fund these payments, Sears Canada saw some of its most important assets sold off. This included Sears Credit and Financial Services, which was profitable at the time, as well as flagship stores in Calgary, Vancouver and Toronto. Sears Canada saw its operating income

drop every year after 2007, all while shareholders continued to get richer. In fact, between 2005 and 2011, the average dividend yield for Sears shareholders was 17.8 per cent. Other companies on the Toronto Stock Exchange averaged a dividend yield of 3 per cent in the same time span.

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When Sears Canada filed for bankruptcy in 2017, it became clear that while it was making these generous payments to shareholders, it had allowed its pension fund to become severely underfunded to the tune of \$267 million. Put another way, since 2010, Sears Canada paid back five and a half times more to its shareholders than it would have cost to erase the pension deficit.

Perhaps the most egregious aspect of this was that the pensioners could see it coming and had been raising alarm bells for years. They wrote to the CEO of Sears Canada in 2013 and the chairman of the board in 2016.

One letter addressed to Sears Canada board dated January 20, 2014, read:

The substance of Sears Canada's management conduct is asset stripping, and has resulted in a company with negative operating earnings and cash flow, and deteriorating key performance measures. Sears is on a path where it will not have sufficient cash to meet its funding obligations under the Sears Canada Plan and retiree plans.

Since 2012, the pensioners from Sears took 41 steps to address the funding deficit, yet nothing was done. Instead, enormous shareholder payouts continued to be approved by the board of directors.

This practice was not limited to Sears Canada either. A 2017 study done by the Canadian Centre for Policy Alternatives found

that in every one of the past six years, the aggregated pension plans among Canada's biggest public companies were in deficit.

The study also found:

In each of the past six years, payments to shareholders substantially exceeded the pension deficit; in 2016 alone, payments to shareholders were four times the value of the pension deficit for those companies with pension plans.

Twenty-five of the companies listed on the S&P/TSX 60 with a pension deficit could make up their pension shortfalls with under a year's worth of shareholder payments.

With the exception of one, all others could be fully funded with less than two years' worth of payments to shareholders.

It is clear Sears was not alone in this practice, and should any one of these companies file for bankruptcy, we could again be witness to shareholders being enriched or executives through their various bonus payments — I saw it in Nortel; it was outrageous — at the expense of Canadian workers.

It is important to note that my proposed changes to the Pension Benefits Standards Act would have done nothing to remedy what is happening at Sears Canada. There is a very definitive distinction in this country between which pensions are regulated federally and which are regulated provincially, Sears being regulated by the latter. But this does not mean that federal legislators are off the hook.

The companies listed in the Canadian Centre for Policy Alternatives study as having a pension funding deficit include airlines and banks; these pension plans are governed federally by the Pension Benefits Standards Act. Nor should we discount the value of federal leadership in this area in setting an example for the provinces to subsequently act upon.

This is not to suggest that the number of federally regulated companies with pension plans is insignificant, however. According to the latest report of the Office of the Superintendent of Financial Institutions, 7 per cent of private pension plans came under federal jurisdiction as of March of last year. That's 1,230 private pension plans that cover more than 1.1 million active members and other beneficiaries in federally regulated areas of employment, with a value of approximately \$206 billion.

Of these plans, 420 are either defined benefit or a hybrid of a defined benefit/defined contribution plan, covering roughly 494,000 workers. That's nearly half a million Canadian workers that could see their pensions strengthened and protected through the latter part of the legislation.

Similar regulations exist in other countries. The Pension Benefit Guaranty Corporation in the United States uses the payment of extraordinary dividends as a criteria to determine when it will intervene and stabilize distressed pension plans. In the United Kingdom, the Pensions Regulator's "moral hazard" powers allow it to consider shareholder payouts in the context of pension regulation. So this is already being done in a number of countries.

Even Ontario came close to enacting such powers for its pension regulator. In 2017, the former Ontario government proposed the creation of a new entity, the financial services regulator authority. This regulator would have implemented a disclosable events regime, making the disclosure of certain corporate events mandatory. This would have alerted the regulator to potential issues, such as "significant asset stripping or the issuance of extraordinary dividends."

This is in line with what my bill proposes — not to hinder dividends or share buybacks entirely, but to ensure these payments are not being made at the expense of pensioners.

Colleagues, it is clear the time has long passed to address this. As I watched the Nortel saga play out nearly a decade ago, I was hopeful that public pressure would have been enough to instill some kind of guarantee for pensioners. If we had taken action then, it may have been the last time we saw executives and shareholders line their pockets at the expense of workers and the pensions they paid into. Let us not waste another opportunity to protect the financial futures of our Canadian workers. Thank you.

The Hon. the Speaker pro tempore: Would you take a question, Senator Eggleton?

Senator Eggleton: Certainly.

[Translation]

Hon. Diane Bellemare (Legislative Deputy to the Government Representative in the Senate): I want to congratulate you on this bill, Senator Eggleton. It is very interesting.

[English]

Is this bill similar to provincial laws, like some in Quebec, or is it different? If it differs, do you know how and why?

Senator Eggleton: I can't tell you specifically how it differs from what is being done in Quebec. There are different things done in different places. There are not too many that are very effective.

I know the Ontario plan, for example, a little better. It only provides for the first thousand dollars. It provides a small amount, not a big amount.

You'll find a lot greater involvement in the U.K. or Germany or even the United States, in terms of protection for pensioners.

The U.K. plan is a particularly extensive one. It involves a lot more protection, and it is essentially paid for by the companies. They pay into it. There could be some administrative costs picked up by the government, but by and large, they expect the companies to

pay in, they take over pensions and they ensure if something is going wrong in a company that the pensioners are going to be protected. That's what this is all about, the need to protect those pensioners.

As for the amount of money that the Ontario plan gives, for people on the Canada Pension Plan who are also getting Old Age Security, that generally will keep them out of poverty, not in every case, but it generally has kept a lot of people out of poverty. But there are a lot of people who maybe made 50, 60 or \$70,000 a year. They're not going to get nearly enough out of those plans to sustain the kind of quality of life or standard of living they had in the past.

So the private pension plan becomes an important part of the mix. There are not enough people who have private pension plans, and fewer and fewer have defined benefit plans. Nevertheless, let's protect what we can and what they have as their earnings and not allow this fire sale of assets and different means of fattening up the dividend cheques and bonuses at the expense of these people.

