# Consultation on Enhancing Retirement Security

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# Introduction

The Canadian Labour Congress (CLC) is Canada's largest labour central, encompassing over 50 national and international unions, 12 provincial and territorial federations of labour, over 100 labour councils. On behalf of over 3 million workers employed in every region and sector in the country, the CLC speaks out on national issues important to working people, including pensions and retirement security.

The CLC welcomes the government of Canada's consultations on enhancing retirement security, which references Canada's retirement income system (RIS) in its entirety, as well as each of its three pillars. The labour movement supports the broad and integrated approach implied by this framing. Canada's unions have long argued for the need for a comprehensive and integrated approach to ensuring retirement income adequacy and security for everyone in this country. We believe that a "balanced, principled and evidence-based approach to RIS policy" requires us to understand the interaction and inter-relationships between the various components of Canada's RIS, rather than examining its constituent parts in isolation from one another.

With this in mind, we are disappointed at the consultation document's inattention to the need for reform of public pensions in Canada (Pillars 1 and 2). With the retreat of private-sector workplace pension plans, the steady transfer of risk from employers to individual workers and their growing exposure to income shocks, declining participation in RRSPs, unsustainable and growing levels of household indebtedness, and the collapse in Canada's household saving rate, improvements to public pensions are urgently needed. According to Finance Canada research, an estimated 1 in 4 families nearing retirement age, equivalent to 1 million households in Canada, risk a drop in their standard of living because of inadequate retirement incomes. This figure rises to 1 in 3 of families with no workplace pension assets.[1]

[1] Department of Finance Canada, "*Backgrounder: Canada Pension Plan (CPP) Enhancement*", https://www.fin.gc.ca/n16/data/16-113_3-eng.asp (accessed December 15, 2018).

In our view, an integrated approach to improving public pensions within a strengthened retirement income system should examine further enhancements to the Guaranteed Income Supplement (GIS), targeted to low-income seniors, as part of Canada's Poverty Reduction Strategy. In particular, the GIS clawback on additional income should be reformed. The government should also explore improving the Old Age Security (OAS) benefit, the flat-rate residency-based benefit with the greatest value for low- and modest earners, women, Indigenous Canadians, and workers with disabilities. Indexed to inflation rather than the average nominal wage, the relative value of the OAS benefit and the relative incomes of OAS recipients will continue to fall unless the indexation of the benefit is improved. The government should also to continue to explore the opportunity to further improve Canada Pension Plan (CPP) and Quebec Pension Plan (QPP) benefits.

**Pensions and Solvency**

The CLC believes that the stress, suffering and material loss of pension and other post-retirement benefits experienced by pensioners and their families when defined-benefit (DB) plan sponsors enter restructuring and bankruptcy is unconscionable and unacceptable. Like all Canadians, union members have been shocked and deeply offended by the spectacle of pensioners suffering cuts in promised benefit and denial of medical and dental benefits, after a lifetime of sacrifice required to earn these benefits, especially when corporate owners, executives and their financial lenders, escape losses or are even enriched in the course of the insolvency process. This reprehensible and recurring spectacle is unfair, outrageous, and entirely unnecessary. In our view, governments in Canada could have taken steps long ago to prevent this phenomenon but they have chosen not to do so. It is frustrating in the extreme to hear government representatives and commentators defend the status quo as unfortunate but inescapable.

Many private-sector DB plans are closed to new entrants and even new accruals but the challenge of protecting plan members and pensioners in bankruptcy will continue for years. As corporate management practices associated with hedge funds and private equity firms, epitomized by the controlling investors in Sears Canada and Toys “R” Us, become increasingly common in Canada, the threat of large-scale corporate failures and widespread pension losses may even grow in future.

The CLC strongly opposes cosmetic or minimal improvements to protections for plan members that are primarily intended to indemnify firms against legal liability imposed by the courts. Reforms of this nature would take workers and pensioners backwards and would represent a betrayal of their interests, in the service of employers. The government must implement serious and sufficient reforms to prevent further tragedies brought on by Canada’s unfair and inadequate insolvency regime.

Precisely because of the complex and multi-faceted nature of the challenge, the federal government has various policy instruments available to reduce the risk to workers and pensioners prior to, during, and following the insolvency process. The CLC strongly urges the government to design and implement a coordinated and multi-pronged approach to strengthening and preserving DB plans and protecting workers and pensioners. The following are the recommendations of the CLC in this respect:

1. Undertake an open and inclusive review of federal solvency funding rules with the goal of preserving and promoting DB plans and strengthening benefit security. The CLC does not support weakening solvency funding requirements for sponsors that are capable of fully funding their pension plans but choose not to do so. Blanket relaxation of solvency funding rules, applying in all circumstances, is therefore inappropriate. However, the CLC calls on the government to engage sponsors, unions, pensioners and other stakeholders in a dialogue over ways that funding rules can appropriately support the continuation and expansion of DB plans,

strengthen benefit security, and improve pension coverage for workers in the federally-regulated private sector. In particular, the current funding rules governing multi-employer pension plans (MEPPs) should be reviewed. Finally, the CLC also strongly supports a mandatory mechanism requiring the consent of plan members in all circumstances in which solvency funding requirements are loosened.

2. Convene and promote a parliamentary debate, by allowing Bill C-384 and/or Bill C-372 to proceed to committee, on amending the *Bankruptcy and Insolvency Act* to implement a super-priority charge for the wind-up deficiency. The government's consultation has thus far consulted stakeholders separately, in silos, without the opportunity to engage one another. A committee study would permit open inquiry, information gathering, and a healthy exchange on the risks and advantages of altering the priority of claims under the Act.

3. Work with provincial governments and large federal and provincial public-sector plans to explore ways to facilitate the transfer of assets and liabilities from distressed DB plans to large, securely-funded public-sector plans where plan members, unions and trustees consent to do so. The OPSEU Pension Trust (OPTrust) and Ontario Colleges of Applied Arts and Technology (CAAT) Pension Plan have recently created new career-average DB benefits aimed at employers in the not-for-profit sector (OPTrust Select) and private sector (CAAT DBPlus). Other jointly-sponsored pension plans (JSPPs) may expand their offerings as well. As innovation proceeds, rules should make it possible for private-sector plans to explore mergers with the JSPPs where it makes sense for unions, plan members and trustees, and where there is plan member consent to explore this. While the CLC and unions remain opposed to attempts simply to reduce benefits in this process, in specific circumstances, mergers or transfers may make sense for plan members.

4. The federal government should explore the feasibility of working with provincial governments to establish a national, mandatory pension insurance scheme, akin to Ontario's Pension Benefits Guarantee Fund, to insure pensions against losses from restructuring and bankruptcy. Government representatives have suggested that this innovation would be cost-prohibitive. However, arguments and data in this respect have yet to be publicly shared and tested. In particular, different design options for a national mandatory pension insurance fund should be assessed and subjected to public scrutiny and debate.

5. Amending the *Canada Business Corporations Act* (CBCA), and working with provincial counterparts, legislate greater protections for plan members when sponsors pursue shareholder buybacks, dividends and executive compensation where a solvency deficiency exists in the pension plan. The federal government should ensure that shareholder and executive payouts are restricted in these circumstances. The government should explore making dividends, share repurchases and increases in executive and director compensation contingent on the solvency funding ratio surpassing a specified threshold, and increasing required special payments and/or accelerating amortization schedules as a pre-condition for approving executive and shareholder payouts. This should be legislated as general requirements, rather than left to the discretion of the Minister in specific circumstances.

6. Work with provincial governments to strengthen the authority and obligation of pension and corporate regulators at all levels to scrutinize, remain apprised of, and if necessary, intervene in corporate financial practices that raise the risk of a sponsor entering insolvency proceedings with a wind-up deficiency. The 2018 Ontario budget introduced changes that will require plan sponsors to disclose major financial events affecting the company or a pension plan, including asset stripping and extraordinary dividends. This information should be made available to pension regulators through

the Canadian Association of Pension Supervisory Authorities (CAPSA). Reforms of this nature would follow the lead of United States and United Kingdom regulators that have the power to compel disclosure in specific circumstances. Bill S-253, currently before the Senate, has recommendations in this regard that the CLC urges the government to consider adopting.

7. Conduct a feasibility study of the Government of Canada returning to its historical role as provider of annuities. From roughly 1908 to 1975, the Government of Canada provided annuities of a limited size to individuals and groups, on a not-for-profit basis. At one point administered through the post office, this service was intended to provide "both groups and individuals with the opportunity for supplementary protection at more favourable rates than private companies could offer."[2] Given the high cost and limitations of the private annuity market in Canada, the government should explore the need and opportunity to once again provide annuities to Canadians.

8. At the federal level, and working with provincial counterparts, increase the government's capacity to provide sponsors and plan members with options, and avoid "adverse annuitization" on wind-up by taking over and administering stranded, underfunded plans until long-term interest rates rise, annuity prices improve, and losses can be minimized or avoided altogether. This would permit plan members to benefit from continued growth in the plan's assets.

9. Withdraw federal Bill C-27 and repudiate plan design innovations that enable sponsors to abandon their legal requirement to fund DB plan benefits. By proposing to withdraw the legal obligation requirement defined-benefit pension plan sponsors

[2] Kenneth Bryden, *Old Age Pensions and Policy-Making in Canada* (Montreal: McGill-Queen's University Press, 1974), p. 58.

to fund earned and promised benefits, and to permit those benefits to be surrendered and subsequently reduced, Bill C-27 increases the risks to pensioners, plan members and unions prior to and during restructuring and insolvency proceedings.

Turning to the specific proposals raised in the consultation document, the CLC makes the following comments.

## Pension Options

### Solvency Reserve Accounts (SRAs)

The CLC supports a consultation on these proposals, ideally in conjunction with an open and inclusive review of federal solvency funding rules recommended above. The question of ownership of the plan surplus, while waning in significance over the past decade, remains a fraught and contested issue. The CLC would want to consider proposals for SRAs in light of this question, provincial experience where similar rules are in place, and existing incentives in the *Income Tax Act* to sponsors fostering a funding excess in the plan.

### Pension Funding Criteria

The CLC believes that funding relief should be considered on a case-by-case basis, rather than in blanket terms. That said, there should a review of rules that are restricting plans in situations where solvency funding requirements are arguably unwarranted (e.g. MEPPs).

### Transfers to Self-managed Accounts

The CLC supports an expanded set of options available to terminating plan members, including collective solutions. Transfers to individual, self-managed accounts leave plan members at the mercy of the financial industry. As described above, we would prefer measures that allow, strictly with plan members' consent, distressed plans to transfer assets and liabilities to large public-sector plans, or to an entity responsible for

continuing to administer abandoned plans.

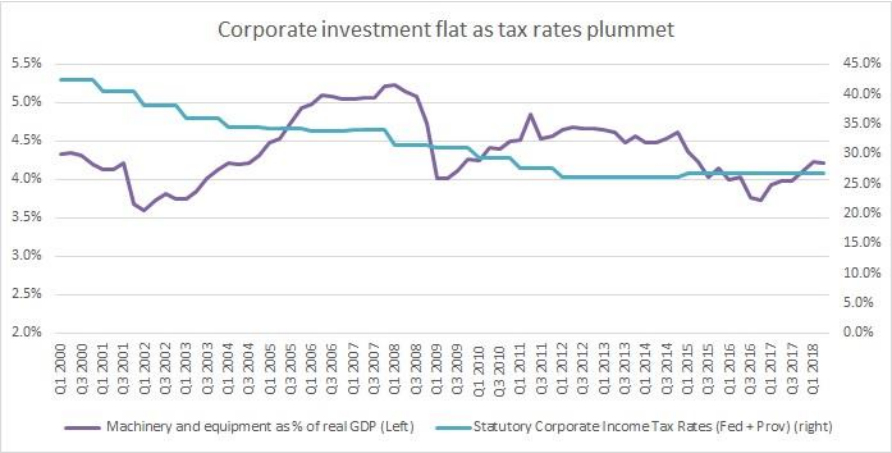
### Clarify Benefit Entitlement

The CLC believes that as a basic principle, plan members' earned and promised DB benefits are protected by moral obligation and legal covenant, and must not be forfeited in bankruptcy. Insolvency does not alter this fundamental constraint.

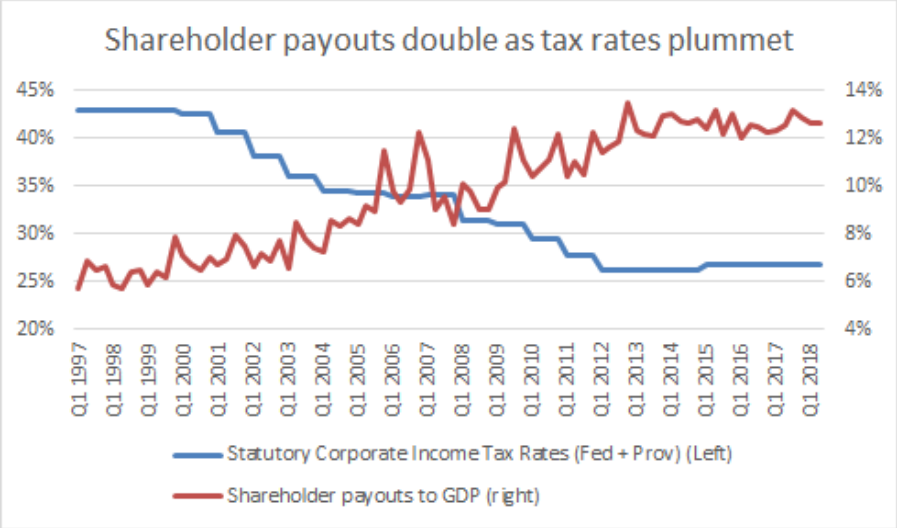
## Corporate Governance Options

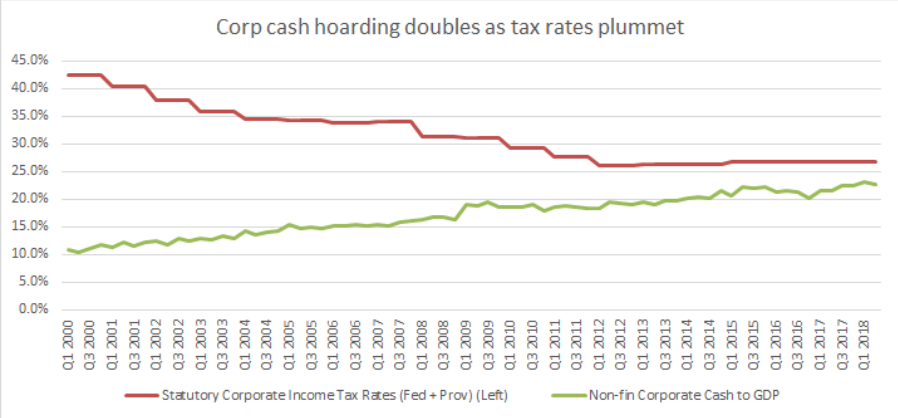
### Restrictions on Corporate Behaviour

Beyond ensuring benefit security, there are many reasons why governments should review share buyback rules and better regulate shareholder payouts. There is mounting evidence that tax cuts and favours bestowed on corporations are not being invested in innovation and enhanced productivity, new hiring, training, or wage increases, but rather dividends and stock buybacks that enrich corporate executives and shareholders.[3] In Canada, corporate income tax cuts have coincided with subdued business investment, rising shareholder payouts and a growing corporate hoard of 'dead money'.




[3] E.g. United States Securities and Exchange Commissioner Robert Jackson, "Stock Buybacks and Corporate Cashouts," speech to the Center for American Progress, Washington D.C., June 11, 2018; Lu Wang, "Record Buybacks Put Shareholder Payouts on Pace for $1 Trillion," *Bloomberg Businessweek*, 17 May 2018; William Lazonick, "The Curse of Stock Buybacks," *American Prospect*, June 25, 2018.




Source: David Macdonald, "*Corporate tax cuts enrich shareholders, not competitiveness*," CCPA Behind the Numbers blog, November 21, 2018 http://behindthenumbers.ca/2018/11/21/corporate-tax-cuts-enrich-shareholders-not-competitiveness/ (accessed December 15, 2018)

As a first step, the government should amend the CBCA to restrict dividends, share repurchases, and executive compensation increases when the pension plan is in significant deficit. The federal government should work with the provinces to ensure that provincially-incorporated businesses are subject to similar requirements.

### Increased Corporate Reporting and Disclosure Requirements

Private and publicly-traded companies should be required to disclose financial

transactions to plan members. The CLC agrees that in order to encourage responsible corporate behaviour toward pensioners, plan members and employees, the government should amend the CBCA to report on policies affecting the interests of workers and pensioners, such as the ratio of executive to median worker compensation, and the ratio of shareholder payouts (buybacks and dividend payments) to any unfunded liability in the pension plan. A high ratio of executive compensation to median compensation of employees itself may be a predictor of value extraction and predatory financial practices that raise risks to plan members and retirees.

## Insolvency Options

### Enhanced 'look-back' Period

An extended look-back period for courts, and expanded powers to nullify certain transactions preceding an insolvency filing, are welcome. The CLC agrees that enhanced powers to set aside executive compensation increases if a company with a an unfunded plan enters insolvency within a specific period. However, insofar as companies currently game corporate decisions in order to evade courts' look-back and set aside powers, slightly extending the look-back period is unlikely to prevent underhanded corporate practices. Therefore, the CLC recommends that stronger regulator powers to monitor corporate practices on an ongoing basis complement improvements in this area. The government should also amend the *Companies' Creditors Arrangement Act* (CCAA) and *Bankruptcy and Insolvency Act* (BIA) to allow courts to order the clawback of inappropriate share redemptions, dividend payments, and executive bonuses and other compensation within a five-year time frame prior to insolvency.

### Enhanced Transparency in the CCAA Process

The CLC agrees that the insolvency process must be made more transparent and inclusive for active and retired plan members. All creditors in CCAA proceedings should be required to disclose their real economic interests and any potential conflicts of

interest. An express duty of good faith, imposed on all parties, would reinforce this expectation.

## Concluding Comments

The CLC welcomes the government's consultation on this important issue, and is hopeful that the government will swiftly undertake concrete reforms to reduce the hardship suffered by DB plan members and pensioners when sponsors enter insolvency. The CLC firmly believes that jurisdictional complexities of regulating pensions and plan sponsors in the Canadian federation are not sufficient reason for failing to take action to prevent the ongoing tragedy of worker and pensioner losses in corporate restructuring and bankruptcy. The Government of Canada routinely and creatively engages provincial counterparts when harmonized rules are required under international trade agreements, national securities regulation, and a host of other initiatives. Jurisdictional challenges should not be held up as an excuse for inaction. Finally, the CLC urges the federal government to engage its provincial counterparts in a dialogue aimed at identifying ways to better coordinate and synchronize pension regulation in Canada. The complex and variegated landscape for pension regulation deters private-sector employers, operating at a national and regional scale, from sponsoring pension plans. We therefore urge the federal government to lead the provincial regulators in a conversation to find opportunities for simplifying, and where possible, harmonizing, pension regulation in Canada.