

PROPOSAL FOR A NATIONAL PENSIONS AND BENEFITS LAW SECTION

A. Preliminary Comments

Pensions and benefits law is of national importance. Pensions and benefits issues affect all members of the public across Canada, in all provincial jurisdictions and in the federal sector. The legal issues are very complex, involving many areas of law, including tax law, family law, corporate law, bankruptcy and insolvency law, labour law, employment law and administrative law. There is a need for a national non-partisan voice to further the knowledge of pensions and benefits law within the legal profession across Canada, to contribute to national policy, harmonization and legislative initiatives and to serve as a legal resource for the public.

B. What is Pensions and Benefits Law?

Pensions and benefits law encompasses all the laws, regulatory policies and judicial decisions pertaining to pensions and benefits. The term “pensions” includes the laws and policy initiatives in respect of all forms of retirement savings, both registered and non-registered, including the public pension regimes. The term “benefits” encompasses those benefits covered by provincial healthcare regimes, insured benefits such as supplemental health insurance, life insurance and disability insurance, and all other forms of non-pension benefits. Although the focus of pensions and benefits law is often on pensions and benefits programs in the employment context, the scope is much broader.

The laws governing pensions and benefits include the provincial and federal pensions statutes, other pensions statutes in respect of specific entities or persons, trust laws, insurance laws, family laws, the federal Income Tax Act, the Quebec Taxation Act, employment standards and labour statutes, bankruptcy and insolvency statutes, the Canada Pension Plan, the Old Age Security Act, provincial means-tested income supplement legislation and provincial health insurance legislation.

The practice of pensions and benefits law includes many diverse subjects and transactions, including: providing counsel on the pensions and benefits aspects of corporate reorganizations, counsel on bankruptcy and insolvency matters, counsel on pension division on marriage breakdown, counsel in estates matters, litigation, including class action law suits representing classes of pension and benefit plan members, counsel and regulatory negotiations and filings in pension plan registrations, amendments, mergers and wind-ups, and counsel to plan sponsors and boards of trustees in respect of fiduciary duties and plan governance.

There have been many prominent legal decisions in the past decade concerning pension issues, at the courts of appeal across Canada and at the Supreme Court of Canada. Most of these cases have national implications, notwithstanding the differences in provincial pension legislation. Some of the decisions are as follows: *Schmidt v. Air Products of Canada Ltd.*, [1994] 2 S.C.R. 611, *Buschau v. Rogers Communications Inc.*, [2004] B.C.J. No. 297, [2004] S.C.C.A. No. 350, *Bower v. Cominco Ltd.*, [2004] B.C.J. No. 2293 (C.A.), *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, (2004) 242 D.L.R. (4th) 193 (S.C.C.), *Association provinciale des retraites d'Hydro Quebec c. Hydro Quebec*, [2005] J.Q. no 1644 (C.A.), *T.S.C.O. of Canada Ltd. c. Chateaufort*, [1995] R.J.Q. 637 (C.A.), *Dinney v. Great-West Life Assurance Co.*, [2005] M.J. No. 69 (C.A.), *Butler Brothers Supplies Ltd. v. British Columbia (Superintendent of Pensions Financial Institutions Commission)*, [2005] B.C.J. No. 1387 (C.A.), *Markle et al. v. The City of Toronto et al.*, (2003), 63 O.R. (3d) 321 (C.A.), *Aegon Canada Inc. v. ING Canada Inc.*, [2003] 179 O.A.C. 196 (C.A.), *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33.

C. Who are the Stakeholders?

Every member of the public in Canada is affected by the laws and regulations pertaining to pensions and benefits. For example, members of the public may either contribute to a registered retirement savings plan or to a pension plan or be a beneficiary of such plan and are thus affected by the laws governing those plans. Members of the public may also be covered by provincial health insurance or by employer-sponsored supplemental insurance programs and are subject to the laws that pertain thereto.

In addition to the public at large, the following identifiable persons, groups and professional bodies have specific interests in pensions and benefits laws and policy: pension and benefit plan sponsors, unions, plan members, retirees, human resource professionals, accountants, actuaries, insurance companies, investment managers and lawyers.

An example of a pensions issue affecting all persons in Canada with locked-in pension assets is highlighted in a recent article (copy attached) written by Ms. Glorianne Stromberg, a securities lawyer and former commissioner of the Ontario Securities Commission. In that article she comments on the complex regulation in Ontario that is inconsistent with regulation in other parts of Canada, concerning the conversion of locked-in retirement income funds and the ability to transfer such funds to a financial institution in another province. There are many complex restrictions on such transfers. Ms. Stromberg comments that such restrictions are "at odds with the basic constitutional right of Canadians that permits the free movement of people and goods from one province to another. The restriction also highlights the need to expedite the implementation of uniform pension requirements that apply throughout Canada to eliminate the significant difference to which the [Ontario] policy refers."

D. Why is There a Need for a National Pensions and Benefits Section?

Most Canadian lawyers who practice pensions and benefits law provide advice in respect of pension and benefit plans that have employees or members in multiple jurisdictions. A national pensions and benefits section would enable these practitioners to better serve their clients.

Currently, the Pensions and Benefits Section of the Ontario Bar Association (“OBA”) is consulted to address legal issues pertaining to pensions and benefits across Canada. The OBA is well equipped to comment on the laws and policies applicable in Ontario and to advocate on behalf of stakeholders in Ontario. It is less equipped to respond to issues outside of Ontario. Currently the British Columbia and Alberta branches of the Canadian Bar Association are the only other provincial branches that have pensions and benefits sections. Most notably, the Quebec branch does not have such a section. There is a strong need for a national legal organization to be the leading representative on legal issues in the growing field of pensions and benefits.

The OBA is regularly invited by the federal Department of Finance and by the federal Office of the Superintendent of Financial Institutions to make submissions on federal pension policy and legislative initiatives. The Canadian Association of Pension Supervisory Authorities (“CAPSA”) and the Joint Forum of Financial Market Regulators (“Joint Forum”), both national bodies, also request the OBA to actively participate on national harmonization initiatives in the pension field. We have attached copies of CAPSA’s strategic plan for 2003-2005 and the Joint Forum’s strategic plan for 2005-2008 to show what their respective initiatives are and demonstrate the important role a national pensions and benefits section could assume.

Recently there have been, and continue to be, several harmonization initiatives by both CAPSA and the Joint Forum. These initiatives aim to harmonize pension regulation and policy across Canada. Familiarity with pension legislation in each provincial jurisdiction is required. Recent initiatives include pension plan governance, model pension law, member education in capital accumulation plans and investment products in capital accumulation plans and other investment vehicles. The latter project involves an examination of pension, insurance and securities legislation across Canada and possible strategies for harmonization of rules.

In the benefits field, the Canadian Life and Health Insurance Association (“CLHIA”) works with the Pensions and Benefits Section of the OBA to address benefits issues from a legal perspective.

There are national industry organizations, such as the Association of Canadian Pension Management and the Canadian Pension and Benefit Institute. However, these organizations: (i) are not comprised exclusively of lawyers, (ii) deal with many issues other than legal issues.

E. Can Any Other Section of the Canadian Bar Association Fulfill the Need for a National Pensions and Benefits Section?

As is the case with the sections within the Ontario Bar Association, there is no other section or combination of sections within the Canadian Bar Association that has the expertise or specialized knowledge in pensions and benefits laws or of the pensions and benefits industry necessary to adequately fulfill the functions referred to above. Certain members of the Executive of the Pensions and Benefits Section of the OBA have informally canvassed pensions and benefits lawyers in other provincial jurisdictions. The responses from all lawyers so contacted have been very positive and have reinforced the need for a national section.

F. How Would the CBA Benefit from a National Pensions and Benefits Section?

The CBA would benefit from the establishment of a national pensions and benefits section. A national section would be the only national legal body on pensions and benefits issues and as such would raise the profile of the CBA. A national section would be the point of first contact for all national harmonization initiatives and would be more effective than provincial associations at advancing national reform. A national section would also attract new membership to the CBA.