Prince Edward Island Consultation on Bill 30 *Pension Benefits Act*

NATIONAL PENSIONS AND BENEFITS LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Pensions and Benefits Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Pensions and Benefits Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Pensions and Benefits Law Section of the Canadian Bar Association (CBA Section) is pleased to provide its views on the Prince Edward Island Department of Justice and Public Safety's *Consultation Paper on Bill 30 - Pension Benefits Act*, released in December 2010 (Consultation Paper). The CBA Section has approximately 600 members involved in pensions and benefits law from across the country, including counsel to pension and benefit administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The CBA Section welcomes this initiative. We believe that it is important that PEI adopt legislation concerning pension plans, as it is the only Canadian province that does not have such legislation.

The CBA Section believes that pension legislation adopted by PEI should be harmonized with that in Nova Scotia and New Brunswick. We note that the proposed draft legislation is modeled on the current *Pension Benefits Act* of Nova Scotia. Harmonization of the PEI legislation with the legislation of Nova Scotia and New Brunswick will have several advantages:

1. For multi-jurisdictional pension plans with PEI members registered in other jurisdictions, harmonized legislation will mean that the costs of administration in respect of the PEI members will not be significant, while those members will gain important protections for their benefits.
2. The PEI government may achieve greater efficiency in fulfilling the regulatory responsibilities arising under the new legislation, limiting government resources that may be required.
3. Larger plans that may register under any new PEI legislation are likely to have members in either Nova Scotia or New Brunswick. Harmonization will reduce administrative burden and complexity for these plans.

Both Nova Scotia and New Brunswick are in the process of revising their respective legislation. Nova Scotia has completed a public consultation process,[1] while New Brunswick is currently embarking on one.[2] The CBA Section urges PEI to coordinate its efforts to develop pension standards legislation with reform processes currently underway in other Atlantic provinces. That coordination will ensure that Canadian pension standards legislation is harmonized at least in those provinces.

II. ISSUES FROM THE CONSULTATION PAPER

A. Vesting

The consultation paper asks whether PEI's legislation should maintain the proposed two-year vesting threshold. The CBA Section believes that the legislation should maintain that vesting threshold.

B. Locking In

The proposed legislation includes two exceptions for small amount and shortened life expectancy. The CBA Section sees no compelling reason not to include the financial hardship exceptions from the legislation as well. We question whether allowing monies to be unlocked where there is financial hardship would actually increase cost such that PEI members should be unable to unlock funds in cases of demonstrated economic hardship.

The CBA Section believes that there should be no other exception to the unlocking rule.

The Consultation Paper indicates that: "Finally, neither Bill 30 nor the Nova Scotia legislation gives the Superintendent of Pensions any special powers to override the legislation". We do not believe that the Superintendent should have any special powers to override the legislation.

The CBA Section further recommends that the Superintendent should not review its own decisions. Rather, an independent appeal process should be established. We suggest that appeals be heard either by the:

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1 The CBA Section's submission, *Nova Scotia Discussion Paper on Pensions* (Ottawa: CBA, 2010) online at: http://www.cba.org/CBA/submissions/2010eng/10_45.aspx.

2 See October 2010 press release online at: http://www2.gnb.ca/content/gnb/en/departments/premier/news/news_release.2010.10.1690.html.

1. Island Regulatory and Appeals Commission, which administers a number of provincial statutes dealing with economic regulation and hears appeals. This would be consistent with the proposed Nova Scotia approach where appeals are proposed to be heard by the Utility and Review Board; or
2. Labour Relations Board of PEI.

C. Application and Registration

The CBA Section supports the proposed three-year transition period.

III. ADDITIONAL ISSUES

A. Jointly Sponsored Pension Plans

The CBA Section supports recognizing Jointly Sponsored Pension Plans (JSPP) as a distinct type of plan. The definition of a JSPP will depend on any particular distinctions the PEI government makes to differentiate JSPPs from other types of plans. We suggest the definition include that:

- the plan provides defined benefits;
- members contribute to the cost of the plan;
- members and employer(s) are jointly responsible for determining and amending the terms of the plan;
- members and employer(s) are jointly responsible for appointing the administrator of the plan, which is a board of trustees; and
- the plan could involve a single employer or multiple employers.

Since members would share in the obligation to contribute toward any funding shortfalls that may develop in these plans, we suggest that the legislation should authorize the body governing the JSPP and setting contribution levels to determine how it will respond to a situation where the plan liabilities exceed plan assets. That body should also decide whether to increase contributions, decrease benefits (accrued or future) or some combination of the two. Similarly, the body that governs the JSPP should determine the use of any surplus.

B. Target Benefit Plans

The CBA Section recommends promoting the establishment of Target Benefit Plans (TBPs) to add a greater degree of flexibility for both employers and plan members, and hopefully result in greater coverage. TBPs should be available in both single-employer and multi-employer

circumstances and, in both environments should be jointly governed to provide plan members a voice in the administration of the plan. Also, TBPs should be required to clearly and regularly communicate the nature of the target benefit to plan members so that plan members properly understand the pension promise.

C. Minimum Funding Rules and a 5% Collar

We encourage a move to a ten year amortization period for solvency deficits, with appropriate member consent. This will help reduce the volatility of contributions that many employers have found to be burdensome. It can be balanced by imposing a 5% collar that will prevent any use of surplus unless assets exceed 105% of liabilities and still ensure benefit security for plan members. If PEI instead follows the federal lead and adopts the averaging method, a move to a ten-year amortization period would not be needed since the averaging method effectively mitigates the volatility.

D. Surplus Use and Ownership

The CBA Section membership comprises counsel that act on behalf of all stakeholders within the pension industry. Accordingly, there is no consensus as to the appropriate use of surplus, on ownership issues, or on the appropriate interpretation of the Supreme Court of Canada's decision in the *Kerry*[3] case.

That said, the CBA Section supports the following principles:

- all stakeholders will benefit from greater clarity in surplus use and ownership matters; and
- any usage or distribution of surplus from an ongoing plan should not jeopardize the funded position of the plan and the promised benefits

E. Ancillary Benefits

Depending on plan design, these ancillary benefits may have a significant value comparable to the value of the basic pension benefit promised under the pension plan.

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3 *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678.

Members of the CBA Section representing employees and unions recommend that amendments should only affect benefits on a "go-forward" basis. The reduction or elimination of ancillary benefits when a member has met a significant part of the eligibility criteria should not be permitted. The Quebec approach should be adopted, which allows the elimination of the ancillary benefit only for future accruals.

On the other hand, CBA Section members representing sponsors and administrators recommend that, if ancillary benefits are vested, they should not be subject to amendment. If ancillary benefits are not vested, the Act should permit amendment. Ancillary benefits are vested when all eligibility requirements for the ancillary benefit have been met. The power to amend an ancillary pension benefit may be subject to other restrictions imposed by the pension plan text, collective agreements, employment contracts and employment standards legislation. It is unclear why a longer notice period of five years would be imposed for certain types of ancillary benefits. As noted, ancillary benefits are considered to vest when all eligibility criteria for receipt of that benefit have been met. These Section members support the continuation of this approach.

To appropriately pre-fund ancillary benefits, it is necessary to clarify which benefits are considered to vest on a continual basis and which are considered to vest only after certain eligibility criteria have been met. The legislation should be clear regarding the treatment of indexing provisions (which are not listed as an ancillary benefit). Currently, there is conflicting case law on the ability to amend indexing provisions and the ability to amend early retirement provisions.[4]

F. Partial Wind-Ups

The CBA Section agrees with the requirement in a single-employer plan that the employer must fund any transfer deficiency in the event of an employee terminating employment, whether this is a single termination or group termination. For individual terminations from a single-employer pension plan, we support the requirement that the deficit with respect to a single terminating employee be eliminated within one year of departure through an additional

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4 *Dinney v. Great-West Life Assurance Co. et al*., [2005] 252 D.L.R. (4th) 66, 10 W.W.R. 401, 192 Man. R. (2d) 229; *Lloyd v. Imperial Oil Ltd*., 445 A.R. 32, [2008] 9 W.W.R. 502, 93 Alta. L.R. (4th) 321; *Patrick v. Telus Communications Inc*. [2005], 49 B.C.L.R. (4th) 74; *C.A.S.A.W. v. Alcan Smelters and Chemicals Ltd*., [2001] 198 D.L.R. (4th) 504, 89 B.C.L.R. (3d) 29.

contribution, so the employee may transfer the full commuted value of the pension on termination. However, if there is a group termination, such a funding requirement may not be feasible and could impair security for remaining members. In such cases, the payout could be made in installments over time, through additional contributions, through a letter of credit arrangement or some combination of approaches.

G. Transfer of Surplus from Closed Plans to New Plans

The CBA Section supports greater legislative clarity on issues such as the appropriate use of surplus in a closed plan and the ability to transfer any surplus in a closed plan to a new plan.

H. Investments

The CBA Section reiterates its position[5] concerning Defined Contribution – Employee Investment Choices Disbursement Options, and in particular, supports automatic enrolment with opting out, the establishment of rules governing default options and clear new legislative rules regarding disclosure of information to members and the rights and obligations of all participants.

I. Grow-In Benefits

To avoid unnecessary litigation, we suggest that rules be developed to clarify when a plan will be considered to provide grow-in benefits if legislation does not include the mandatory provision. A transition period should be provided in which a plan may be amended to clarify whether grow-in benefits were intended. For instance, if the plan references the Act with respect to the provision of grow-in benefits, presumably grow-in benefits are not provided under the plan once the Act no longer requires it. The ability to amend grow-in benefits after the transition period should also be clarified.

IV. CONCLUSION

The CBA Section trusts that our comments will assist the Department of Justice and Public Safety in its work. We would be pleased to respond to any questions and provide further information regarding any of the items addressed in this submission or otherwise in connection with the review.

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5 See the Section's previous submission responding to the Panel's Position Paper, *Nova Scotia Discussion Paper on Pensions* (Ottawa: CBA, 2008), online at: http://www.cba.org/CBA/submissions/2008eng/08_63.aspx.