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BAR ASSOCIATION

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Québec - Bill 80
***An Act respecting voluntary
retirement savings plans***
(39th legislature, 2nd session)

**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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Québec - Bill 80

An Act respecting voluntary retirement savings plans

I. INTRODUCTION

The Canadian Bar Association's National Pensions and Benefits Law Section (CBA Section) is pleased to comment on Québec Bill 80 - *An Act respecting voluntary retirement savings plans* (Bill). While the legislation tabled during the 39th legislature, 2nd session died on the Order Paper with the recent election, the CBA Section believes that these comments may be useful for any future considerations of similar legislation.

The CBA Section comprises lawyers from across Canada who practice in the pensions and benefits area of law, 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 understands that the goal of voluntary retirement savings plans (VRSPs) is to improve the retirement savings system by providing an accessible, straightforward and administratively low-cost retirement savings option, particularly for the self-employed and employees of small and medium sized businesses who do not participate in a registered pension plan.

While the CBA Section supports the objectives of the legislation, we have a number of concerns in how to achieve these goals. Our concerns and recommendations on the Bill are organized by Chapter and section numbers.

The CBA Section believes that the rules governing VRSPs should strive for provincial harmonization and be harmonized with the pooled registered pension plans (PRPPs) governed by the *Pooled Registered Pension Plans Act*, S.C. 2012, c. 16 (PRPP Act) to achieve the desired effect of offering simple, low-cost plans. Having to accommodate differing provincial treatment

or differing treatment with PRPPs will increase costs and could prevent eligible administrators from offering a single VRSP across the country.

A. Chapter I - Purpose and Application

Section 2 of the Bill clearly anticipates individuals joining a VRSP. The legislation is focused on employers and their relationship with the VRSP “administrator”, but more guidance should be given to potential administrators on whether or not their dealings with individual VRSP members will be any different.

B. Chapter II - Registration of the Plan

Generally, the focus of the VRSP is simplicity. This notion should also apply to the procedures required to register the plan (referred to in **sections 3 and 4** of the Bill), to reduce the time required for approval, and to keep costs low. It will be important for potential administrators to fully understand the expectations of the *Régie des rentes du Québec (Régie)* for the “text of the plan” being a “single complete document”.

Section 8 of the Bill raises the possible difficulties faced by potential administrators and regulators alike, with the January 1, 2013 deadline rapidly approaching. If the *Autorités des marchés financiers* (AMF), the *Régie* and Canada Revenue Agency (CRA) do not have mechanisms in place to approve administrator licenses, and the VRSP plans of those administrators for provincial registration, and federally for income tax purposes, prior to January 1, 2013, then it is difficult to see that any VRSP will be available on January 1, 2013. Additionally, if administrator approvals are granted on a “first come, first served” basis, it could negatively impact the competitive landscape and provide an advantage to some administrators over others. It is difficult to see how approvals might be in place for VRSPs to be available on January 1, 2013. The government should either push the date back or provide guidance very quickly as to how they anticipate the process working so that potential administrators can be ready.

Section 11 of the Bill envisions only one VRSP in Québec for each administrator, with **section 19** mandating that the plan be provided at the same cost to all participants. The CBA Section believes that while controlling variations on the product theme and directing all contributions into one pool will assist in fostering lower costs, only permitting one plan may be too restrictive and could detract from future flexibility that might be required. The legislation

already mandates that administrators provide the plan at a low cost, so these measures may not be necessary to drive that behaviour. The administrators will need to take steps to ensure that they meet and report on this requirement. The PRPP Act does not unduly restrict the number of PRPPs an administrator may offer, and legislative harmony should be an objective wherever possible. If the restriction is dropped, other sections of the legislation that touch on this restriction may need to be amended as well.

C. Chapter III – Administration of the Plan

Division I - Administrator

The CBA Section understands that the duty placed on the administrator by **section 14** of the Bill is similar to that in the *Québec Supplemental Pension Plans Act*, R.S.Q. ch. R-15.1 (SPPA). Regulations should be drafted to deal with potential conflicts of interest on the part of the VRSP administrators, who will serve VRSP members but are also in private businesses that seek to make a profit. Administrators should not be penalized in this regard or for using in-house fund management services, etc.

Section 16 of the Bill mandates the “contract” issued to an employer or individual to conform to the “plan” previously registered with the *Régie*. Firstly, the CBA Section wonders if the intent is that the “plan” and the “contract” are the same document, or that the “plan” is simply a description of the contract. Secondly, where the legislation provides: “The contract between the administrator and the employer or the member....,” is unclear. Is this reference to “member” intended to encompass the individual “savers” and the self-employed, meaning that the exact same contract must be issued to employers, the self-employed and individual savers?

Section 17 of the Bill is one of several notice provisions in the legislation that could cause confusion and increased costs. For example, **section 34** requires a “pre-contract” notice to be sent by the employer to employees before the employer enters into a contract with an administrator. Once the contract is signed, the administrator is bound to send a plan summary to the employees within 30 days, and then, under **section 36**, either the employer or the administrator must send another notice within 30 days of the contract being signed, setting out additional information. There appears to be unnecessary duplication of effort in these processes and the CBA Section would recommend combining various notice provisions into one, particularly those in **sections 17 and 36**.

The CBA Section assumes that the regulations to be established pursuant to **section 18** of the Bill will provide sufficient scope to administrators to refuse an application where the administrator, on reasonable grounds, believes, for example, that an applicant's intentions are suspicious, or has a history of non-compliance.

Section 19 of the Bill requires that a plan be provided at the same cost and on the same conditions to everyone who participates in the plan. Again, if the government follows the PRPP Act model and permits more than one VRSP per administrator, the CBA Section recommends this provision be changed to require the same price and the same conditions within a given plan. Offering more than one plan would allow, for example, different distribution models to be used that may have different costs associated with each, so the costs for a particular model would be the same for all members enrolled under that model.

Section 20 of the Bill is similar to the equivalent PRPP Act provision. The CBA Section recommends that the regulations not restrict normal business practices, for example, combining or "bundling" products.

The CBA Section recommends that the meaning of **section 21** of the Bill be clarified. Is it contemplated that the audit of the required financial report be performed by an accountant who might be employed internally by an administrator, or by an independent accounting firm?

Section 23 of the Bill prevents the administrator from changing a member's investment choice, except on request or in the circumstances determined by regulation. The regulations should recognize that, from time to time, administrators may need to discontinue a relationship with a particular fund manager, in which case a fund with a comparable risk profile and costs could be substituted without obtaining consent. This is normal business practice. However, in that event, a notice to the affected members should be provided.

In drafting regulations pursuant to **section 24** of the Bill, on what constitutes "low cost", the CBA Section recommends a "principles based" approach in describing the criteria, rather than prescribing a particular number, which could require legislative changes as the economy and the business environment shift.

The CBA Section wonders if regulations adopted pursuant to **sections 28, 29 and 30** will establish a notice and rectification period before the AMF revokes or cancels an administrator's license, apart from a criminal or other "emergency" situation. Additionally, it would be helpful to clarify the reference to the AMF cancelling an administrator's license that has been obtained "as a result of an error". Is this a reference to the AMF mistakenly issuing a license or an error on the part of the administrator that has applied for a license? If the latter, the error should be specified to be a "material" error.

Division II - Employers

Section 33 provides that any employer who, on 31 December, employs five eligible employees or more must, in the year that follows, subscribe to a VRSP with the administrator of a plan and automatically register those employees in the plan. An "eligible employee" includes an employee who does not have a registered retirement savings plan in the enterprise of the employer or a registered pension plan established by the employer, for which payroll deductions may be made.

An employer, who offers a non-contributive defined benefit registered pension plan, will be required to subscribe a VRSP for employees who are eligible for such a plan. The CBA Section believes that **section 33** should be amended so that an employer not be required to offer a VRSP in this case. Section 33 should clarify whether an employer is required to offer a VRSP to employees other than "eligible employees". Section 33(1) read in conjunction with section 34(3) is not clear on this issue.

In addition, making plans mandatory may keep costs low, but it may not always be in the best interest of the employee. Many employees may be better served through tax-free savings accounts or using disposable income to pay off mortgages and other debts. Furthermore, employees may already have their own RRSPs. There is no provision for member education in this respect. The CBA Section suggests that the required member notice explaining the 60-day opt out period also identify that the VRSP may not be a suitable option in every circumstance, and encourage people to speak with an appropriate professional if they are uncertain.

Section 34 requires the employer to provide a written notice to each employee of its intent to subscribe to a VRSP and other information indicated in that section. **Section 36**, however, requires either the employer or the administrator to notify in writing each employee of their

membership in the VRSP, as determined by the parties and set out in the contract between the employer and administrator. As drafted, this creates the possibility for potentially duplicative and inconsistent communication among members of a VRSP.

The CBA Section recommends that once the employer has elected to enter into a contract with the administrator, the administrator be the sole entity responsible for written communications to employees on the VRSP. In **section 37**, an alternative approach would be to require employers to provide the relevant information to the administrator upon a new hiring, and the administrator to notify new employees. This would enable consistent and effective communications with all members of a VRSP.

Section 34(2) requires the employer to notify each employee of any existing business relationship the employer has with the administrator. The disclosure of business relationships unrelated to the VRSP may require an employer to reveal contractual arrangements generally not publicly disclosed and could compromise the employer's competitive advantages or other business interests. In particular, where the employer maintains other arrangements with the VRSP administrator unrelated to the provision of the VRSP or other employee benefits (e.g., general operating accounts, general insurance policies), the employer should not be required to disclose those arrangements unless the terms and conditions will be altered as a result of the employer's intent to contract with the VRSP administrator.

Section 34(2) should be amended to limit the disclosure of existing business relationships to those that could reasonably be expected to have an impact on the members of the VRSP or on all employees of the employer, or relationships between the employer and administrator unrelated to the employees but only to the extent that a relationship has been entered into or altered as a result of the employer contracting with the VRSP administrator.

The CBA Section believes that the disclosure under section 34 should not require the details of the relationship in place, only the existence and its nature. It would, however, be reasonable for the disclosure to include details on any impact the relationship has on VRSP costs or fees. If a disclosure is required, the CBA Section recommends that regulations prescribe its form in order to enhance consistency of communications and to minimize costs for employers, when such disclosures are required and whether periodic disclosures are required.

Section 35 prescribes the elements that must be included in the contract between an employer and an administrator, such as the employer's responsibility for remitting employee contributions and any employer contributions and informing the administrator of any change to the contribution rate, and the frequency of remittances. The CBA Section recommends that the frequency of remittances should also be prescribed by regulation and not left to negotiation between employers and administrators. This would be consistent with the administration of registered pension plans under the SPPA, which prescribes monthly contribution remittances.

Section 36(1) requires that employees be notified of their right to renounce membership in the VRSP by notifying the employer within 60 days of the notice. Notification only to the employer creates an extra layer of administration, requiring the employer to transmit the employee's notification to the administrator. While it is logical for the employer to be notified of the employee's wish to terminate, to prevent the deduction of contributions, the proposed approach could result in a delay between notice to the employer and transmission of the notice to the administrator. The CBA Section recommends that members be required to notify the employer and the administrator if they wish to renounce membership or terminate membership in the VSRP.

Section 37(2) requires an employer to offer the VRSP every two years to any eligible employee who renounced or terminated membership in the VRSP from the date of renunciation or termination. To simplify administration, the CBA Section recommends that an employer should be permitted to provide periodical communication to that effect (e.g. every two years) to all eligible employees. This would avoid having to do an individual follow up on each employee who renounced or terminated membership.

Section 39 deals with the employer changing VRSP. Section 39 only mentions that the employer must pay all costs related to the transfer of plan assets but does not address other relevant issues related to the transfer of assets, such as the responsibility for transferring the assets of the former plan. This should be a responsibility of both the employer and the two VRSP administrators. The CBA Section recommends amending section 39 to specify that if an employer enters into a new contract with a VRSP administrator, the contract must require the administrator to accept the assets of the existing employee accounts from the predecessor VRSP. Section 39 should also require the administrator of the new VRSP to notify eligible employees of participation in the new VRSP.

Section 39 also provides that employers are to bear "all" the costs of transferring a VRSP. The CBA Section recommends that this be further defined to clarify whether it includes the administrative costs an employer might incur in making the transfer, and any costs the members might incur in the plan transfer (for example, market value adjustments, or transfer fees).

The CBA Section agrees with releasing employers from liability for the acts and omissions of the VRSP administrator (**section 40**). However, given the goal of encouraging greater pension coverage (in part by relieving employers of administrative duties and liabilities), section 40 should also state that where an employer has selected a registered VRSP administrator in accordance with the requirements of the act, the employer shall have no liability for the selection of the administrator.

In **section 43**, we understand that regulations would provide more specific rules on inducements an employer may accept from an administrator. The CBA Section supports legislation and regulations that clarify the intended prohibitions under section 43. The CBA Section also generally agrees with the policy of enhanced transparency and the desire for existing arrangements between employers and VRSP administrators to be disclosed where such disclosure relates to arrangements that may impact on the costs and funding of the VRSP or the decision to select a particular VRSP provider. The rules on inducements and the related disclosures should not be too broad and capture normal business practices and unrelated business arrangements.

VRSP administrators and employers should be able to freely enter into arrangements that provide another product or service on more favourable terms than would otherwise be offered, where the products or services are provided to or for the benefit of the employer's employees (who are the potential members of the VRSP). For example, it should be permissible for a VRSP administrator to offer to reduce the employee-paid premiums associated with the employer's group benefit plans as a result of the employer's agreement to participate in the administrator's VRSP.

Also, employers may have existing arrangements with an administrator unrelated to a VRSP or may determine efficiencies if it contracts with the administrator on some of its unrelated arrangements. Bundling of services should also not be prevented where the VRSP

administrator offers the employer beneficial terms for products or services that do not relate to the VRSP (e.g., group insurance policies).

D. Chapter IV – Contributions

Division I - Collection, Remittance, and Contribution Rates

Section 44 of the Bill states that plan members may set their contribution rate, while **section 45** of the PRPP Act indicates that the contribution rate is to be set by the plan administrator, who informs the plan members of the rate, and any increases. We recommend that the Bill and the PRPP Act be consistent.

Section 45 of the Bill states that plan members may change their contribution rate at any time, subject to certain restrictions, while plan members may only set their contribution rate at 0% under the PRPP Act. Again, we recommend that the Bill and the PRPP Act be consistent.

Section 45(1) of the Bill provides that plan members may, on the conditions determined by regulation, set their contribution rate at 0%. The CBA Section believes that the conditions enacted by regulation for this purpose should be consistent with those enacted under paragraph 76(1)(m) of the PRPP Act.

Sections 47 to 49 of the Bill only deal with contributions made by plan members who are employed by an employer. The CBA Section recommends that regulations be adopted prescribing rules for the remittance of contributions by plan members who are self-employed.

The obligation on plan administrators under **section 52** of the Bill to notify the *Régie* of any unremitted contributions exceeds the similar requirement on pension committees under section 51 of the SPPA by also requiring the administrator to notify the *Régie* of “the measures taken to ensure remittance”. Section 51 of the SPPA contains no such additional requirement. The CBA Section recommends that plan administrators should only be required to notify the *Régie* of unremitted contributions. We see no reason why VRSP administrators should have this additional obligation which pension committees do not have under the SPPA.

Division II - Locking in

Sections 53 and 54 of the Bill provide that plan administrators must maintain a locked-in account (to which the employer’s contributions, if any, are credited) and a non-locked-in

account (to which the member's contributions are credited) for each plan member, while subsection 47(1) of the PRPP Act states, as a general rule, that all contributions are locked-in. We recommend that the Bill and the PRPP Act be consistent, i.e. that all contributions be locked-in.

Division III - Refunds and Transfers

While the limited cases in which plan members may ask for a refund of all or part of their locked-in amounts are somewhat similar under the two regimes, they are not exactly the same. We recommend that the Bill and the PRPP Act be consistent.

Section 58 of the Bill is unclear. It states that plan members are entitled to a refund of all or part of their non-locked-in account at least once per 12-month period, and at any time in the limited situations specifically mentioned in section 57. Does this mean that the plan administrator may limit plan members' right to ask for a refund to once per 12-month period, except in the limited situations in section 57? If so, the CBA Section recommends that the wording of the Bill be clarified to reflect this meaning.

Division IV - Variable Payments

Section 59 provides that a member who has reached the age determined by regulation or the member's spouse as defined in section 62 may elect to receive variable payments from the funds in their accounts, on the conditions and within the time provided by regulation.

The CBA Section broadly supports the option to receive variable payments subject to clarifications as to the details concerning the mechanics of that option. The CBA Section also recommends that one significant clarification be added.

Section 59 of the Bill provides that a VRSP may give members the option to receive variable payments from the funds in their account starting from a "prescribed age", but does not require the VRSP to give that option. In keeping with the optional nature of section 59, the CBA Section supports defining "prescribed age" flexibly to maximize choices for employers and employees. Instead of fixing the "prescribing age" as, for instance, age 55, the CBA Section proposes that the regulations permit administrators to design and offer VRSPs that allow employers to choose the age at which variable payments may be available to their employees, or to design and offer VRSPs that do not permit variable payments until an age later than 55, such as 60 or

65. This flexibility can be done by making the prescribed age a minimum age of 55, rather than a fixed age. The Government may choose to define a maximum too, such as age 65 or 71. The CBA Section is of the view that requiring administrators to offer variable payments at a fixed age or not at all may discourage some administrators from offering variable payments.

Division V - Termination of Membership

Section 60 provides that members may, at any time, terminate their membership in the VRSP. The member must inform the plan administrator in writing or, if the employer collects employee contributions, the member must notify the employer so that any payment of contributions cease. Notification to only the employer creates an extra layer of administration, requiring the employer to transmit the employee's notification to the administrator. While it is logical for the employer to be notified of the employee's wish to terminate, to stop the deduction of contributions, the proposed approach could result in a delay between notice to the employer and transmission of the notice to the administrator. The CBA Section recommends that members be required to notify the employer and the administrator if they wish to terminate membership in the VRSP.

E. Chapter V - Death of Member

Section 63 provides that, on the death of a member "who was not receiving variable payments", his or her spouse (or if the member has no spouse, his or her successors) are entitled to a benefit equal to the balance in the member's accounts, including interest accrued until the date of payment or transfer of the amount to a pension plan determined by regulation and chosen by the member, provided the fiscal rules so allow. The CBA Section is of the view that the situation where the member was receiving variable payments at the time of death needs to be clarified.

F. Chapter VI - Transfer of Benefits Between Spouses

No comments.

G. Chapter VII - Termination and Winding Up

Section 75 of the Bill should be amended to avoid any ambiguity about the entity that chooses the VRSP to which the funds will be transferred. The words "will be transferred to the voluntary retirement savings plan indicated by the administrator" in the first paragraph of section 75 may suggest that the plan administrator is the person who chooses the new VRSP,

which is clearly not the case under the second paragraph of section 75. In addition, the CBA Section recommends a prescribed form for purposes of the notice under section 75.

The CBA Section believes that **section 76** of the Bill should not require plan administrators to prove that it was impossible for them to act within the relevant time to obtain an extension from the *Régie*. The SPPA has no similar requirement, and the *Régie* should be able to grant an extension solely on the basis that it is in the interests of the plan members.

H. Chapter VIII - Obligation to Inform

Section 84, in particular paragraphs (2) and (3), lists triggering events in the life of a plan member where an administrator must provide additional information. The legislation should clarify that it is only on receiving notice of the triggering event that the administrator must act.

I. Chapter IX - Functions and Powers of the Régie

J. Chapter X - Functions and Powers of the Autorité des Marchés Financiers

K. Chapter XI - Functions and Powers of the Commission des Normes du Travail

The *Régie* will have an important role to play in overseeing the practical application of the Act. An important issue to consider is whether the *Régie* is practically capable of undertaking this new administrative mandate. The *Régie* already has many statutory obligations, such as those derived from the SPPA.

The *Régie* will oversee much of the system put in place by the Bill, while the AMF will be responsible for licence registration and licensing oversight. Additionally, the *Commission des normes du travail* (CNT) will oversee the element relating to the number of employees with uninterrupted service in a company per **sections 102 to 103** of the Bill.

It is important that these different and very separate administrative organizations have an integrated system whereby information collected by each can be shared with all. For example, the number of employees employed by an employer to be surveyed by the CNT will have an integral relation to the licence required of that employer. At the very least, the organizations could share and access a single digital database. Also of importance would be the requirement that one organization notify another of mutually relevant information. An example of where information sharing would be essential is where the AMF has suspended a licence (section

29(1)) and the *Régie* has the option to assume provisional administration of all or part of the plan or to entrust it to the person or body it designates (section 96(5)). It is expected that all information sharing be consistent with protecting the personal information of plan participants.

Under **section 90** of the Bill, for the purposes of an inspection regarding a plan, an inspector appointed by the *Régie* may, at any reasonable time, enter any premises to find a document relating to a plan, examine the document and take an extract or make a copy. This section must conform with the protection against unreasonable search and seizure in s. 8 of the *Canadian Charter of Rights and Freedoms* and s. 24.1 of Québec's *Charter of Rights and Freedoms*.

In **section 96 (2)** of the Bill, section 187 of the SPPA is not incorporated into the Bill. There is therefore no power for the *Régie* to dismiss a person or body whose administration or conduct is questioned and disqualify them as provided in section 187 of the SPPA. That person or body would, under the SPPA, also have an opportunity to present observations. We understand that this may be because the Bill is purposed on expediency and efficiency, and that a procedure under section 187 of the SPPA may be lengthy or costly for the *Régie* and for the plan itself.

L. Chapter XII - Proceedings

Sections 104 and 105 of the Bill contain no statutory ability to contest a decision made by the CNT, as there is to contest a decision or order of the *Régie* or the AMF.

M. Chapter XIII - Regulations

The CBA Section suggests that, to conform to section 84(3) and to the French version of section 106(26), the English version of **section 106(26)** should omit the phrase “to the members” that follows “a plan administrator must provide the statements”.

N. Chapter XIV – Penal Provisions

Under **section 107(5)**, an employer that fails to remit contributions is liable of a maximum fine of \$75,000. This may be a strong penalty, considering that other offences listed in section 107 are of a more serious order. We suggest that failure to remit contributions may be better suited as an offence under section 108(1).

O. Chapter XV – Miscellaneous Provisions

Section 113 allows the *Régie* and the AMF to enter into an agreement with the federal government or another provincial government to delegate some of its authority under this Bill to another administrator or to limit the authority of the Bill where there is similar legislation. The CBA recommends that section 113(2)(2) be clarified since it is not clear what is being contemplated.

More generally, this raises potential jurisdictional problems. How are employees in jurisdictions other than Québec to be treated where the employer has made a Québec governed VRSP available to its employees when the other jurisdiction does not have similar legislation?

P. Chapter XVI – Amending Provisions

No comments.

Q. Chapter XVII – Transitional and Final Provisions

The coming into force of the Bill on January 1, 2013 in **section 123** is imminent. The CBA Section recommends a reasonable delay, so those affected by the Bill such as plan administrators and employers and employees have the time necessary to comply with the obligations created under the Bill.

Employers with five eligible employees or more would have an additional year to comply with their obligations. This will assist employers with the administrative and cost burdens to comply with the many requirements of the Bill. This also allows more time for plan administrators to be up and running, so employers have multiple administrators to choose from.

II. CONCLUSION

We trust that our comments and recommendations will assist the Québec government in its important work. The CBA Section would be pleased to provide further information or to respond to any questions at your convenience.