Bill C-25
Pooled Registered Pension Plans 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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TABLE OF CONTENTS

Bill C-25
Pooled Registered Pension Plans Act

I. INTRODUCTION 1

II. FRAMEWORK 1

III. CONTENT 2

IV. DRAFTING 7

V. SUMMARY OF PRIMARY RECOMMENDATIONS 11

VI. CONCLUSION 13

Bill C-25
Pooled Registered Pension Plans Act

I. INTRODUCTION

The Canadian Bar Association's National Pensions and Benefits Law Section (CBA Section) is pleased to provide comments on Bill C-25, the *Pooled Registered Pension Plans Act* (the Bill). The CBA Section comprises lawyers from across Canada who practise 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 the government's intent in introducing pooled registered pension plans (PRPPs) 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 currently do not participate in a registered pension plan. While the CBA Section supports those objectives, we believe that in the absence of changes to the Bill's proposed framework, it will not achieve those laudable goals.

The CBA Section's concerns and recommendations on the Bill are organized under the following headings: Framework, Content, and Drafting.

II. FRAMEWORK

The CBA Section has made comments and recommendations on the substance and general framework of the Bill, as it was being developed, as well as on the related tax rules.[1]

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[1] Canadian Bar Association, *Pooled Registered Pension Plans*, April 2011 at: http://www.cba.org/CBA/submissions/pdf/11-22-eng.pdf; Canadian Bar Association, *Tax Rules for Pooled Registered Pension Plans,* August 2011 at: http://www.cba.org/CBA/submissions/PDF/11-39-eng.pdf; and Canadian Bar Association, *Submission on Legislative Proposals Relating to Pooled Registered Pension Plans*, February 21, 2012 at: French: http://www.cba.org/ABC/memoires/2012fr/12_11.aspx English: http://www.cba.org/CBA/submissions/2012eng/12-11.aspx.

The CBA Section has four general concerns with the Bill's proposed framework:

- PRPPs as contemplated by the Bill do not appear to be a type of traditional pension plan, but rather appear to be a new savings-plan vehicle analogous to Group RRSPs. As such, PRPPs may not provide adequate retirement income.

- PRPPs should strive for provincial harmonization to achieve the government's desired effect of offering simple, low-cost plans. Having to accommodate for differing provincial treatments increases costs and could prevent eligible administrators from offering a single PRPP across the country.

- The Bill should specifically allow associations of professionals and other self-employed individuals to act as plan sponsors.

- The Bill requires PRPP administrators to act as trustees, which will give rise to a fiduciary duty on their part. The CBA Section questions how that duty will be reconciled with the administrator's ability to offer a commercial service. For example, in setting the level of fees and expenses charged by the administrator, can the administrator charge fees that generate a profit or does the fiduciary duty require the administrator to run the PRPP on a cost recovery basis?

III. CONTENT

The CBA Section has particular concerns with the content of some provisions in the Bill.

One of the government's objectives is to ensure simplicity of the PRPP product, a factor that leads to lower cost. The more complexities added to the product, the potentially more expensive it could become. Section 22(1), as drafted, could be interpreted to require that PRPP's be run through a trust structure.

Canadian pension plans are typically run either through a trust structure, or an insurance contract. For potential PRPP administrators currently operating in a trust environment, any requirement for a trust should have no impact. However, for potential PRPP administrators not currently operating in a trust environment (for example, the life and health sector which runs plans under insurance contracts), any requirement that a PRPP be run through a trust could add an extra layer of complexity and, potentially, additional cost. Life and health insurers are not permitted to act as

trustees, under section 466 of the federal *Insurance Companies Act*.[2] These providers might have to "outsource" the PRPP to captive trust companies or third party trust companies, with the added expense and complexity that the PRPP seeks to avoid.

If the requirement for a trust arises from a concern about the standard of care borne by the administrator, a clear, encompassing standard of care is already set out in section 22(2) of the Bill. It appears to obviate the need to impose an additional "trust" duty on potential administrators not currently operating in a trust environment.

Under section 31, "trust" protection already exists for employee funds in the hands of the employer. Once those funds come under the control of a licensed, professional administrator, the standard of care described in section 22(2) is more than sufficient to protect the employees' interests. The mandatory use of a trust structure appears unnecessary.

If a trust structure is mandatory, it raises questions about the nature of the product being sold to employers and the self-employed, and how this may impact its distribution. If the product comprises a trust or an interest in a trust, it may be classed as a "security," which would require securities licensing. Presumably, not all potential PRPP administrators have securities licensed distribution channels, which could affect the "reach" of the product in the marketplace. Wide reach is one of the government's stated objectives.

The CBA Section recommends that section 22(1) be reworded to permit a PRPP to be offered either pursuant to a trust or an insurance contract. This would capture both accepted methods of offering a pension, simultaneously ensure wide distribution to employers, and help to contain product costs.

Section 41 requires the employer to provide certain notices to the class of employees for whom the employer has elected to offer PRPP participation. In particular, section 41(1) requires the employer to notify of its intention to enter into a contract with a PRPP administrator. Section 41(2), however, requires either the employer or the administrator to notify each employee in the class of their membership in the PRPP, as determined by the parties and set out in the contract between the employer and administrator. This provision, as drafted, creates the possibility for potentially duplicative and inconsistent communication among members of a PRPP.

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[2] *Insurance Companies Act*, S.C. 1991, c.47.

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 providing written communications on the PRPP to eligible employees. 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 PRPP.

Section 41(2) requires that employees be notified of their right to terminate their membership in the PRPP by notifying the employer within 60 days of the notice (as permitted by section 41(5)). 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 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 terminate membership in the PRPP.

Section 42 of the Bill allows an employee to object to participating in a PRPP on religious grounds. If the employee decides to object, they must notify their employer. In our view, the provision is not required for PRPPs because the Bill already contains other means by which an employee can opt out of the PRPP, without the need to give a specific reason.

In addition, if an employer is notified by an employee that they object to participating on religious grounds, subsection 42(2) requires the employer to take any measures necessary to ensure that the employee does not become a member of the PRPP or, if currently a member, to ensure that the employee's membership is terminated. The CBA Section notes that subsection 42(2) goes beyond what is required under section 15(4) of the *Pension Benefits Standards Act* (PBSA)[3] which permits, but does not require, an employer to allow employees to opt out of a registered pension plan for religious reasons. We believe it would be more efficient to require the employee to give notice to both the employer and the administrator. It should not be the employer's duty alone to ensure that the employee's membership is terminated, but it should also be the responsibility of the administrator.

Section 43 deals with the employer electing a new PRPP and the consequential transfer of assets. It places the responsibility on the employer for transferring the assets of the former plan. Rather, this

[3] *Pension Benefits Standards Act, 1985*, R.S.C., 1985, c.32 (2nd Supp.).

should be a responsibility of both the employer and the two PRPP administrators. The CBA Section recommends amending section 43 to specify that if an employer enters into a new contract with a PRPP administrator, the contract must require the administrator to accept the assets of the existing employee accounts from the predecessor PRPP. Section 43 should also require the administrator of the new PRPP to notify the eligible class of employees of participation in the PRPP.

Section 45 conflicts with section 29, which requires the contract between the employer and the administrator to specify employee and any employer contributions. Section 45 provides that members' contribution rates and any rate increases are to be set by the administrator and the administrator must inform the members of those contribution rates and any increases. It does not require an amendment to the contract with the employer prior to any contribution increases, nor does it require the administrator to provide the employer advance notice of any increases. If contribution rates are in the agreement with employers, administrators should not be permitted to increase contribution rates without first amending the contracts.

This is particularly important in unionized workplaces, where unions may require the contribution rates to be specified in the collective agreement with the employer and, if so, those rates could not be amended without negotiation and the consent of the employer. In addition, employers should be given notice of any increases in employee contributions prior to their coming into effect. Employers must have time to adjust their payroll systems, enabling the changes in payroll deductions and the timely remittances of increased contributions.

In addition, the Bill does not provide guidance on an employer's obligations for notice to the administrator of employee deaths or terminations. While this may be captured under the general requirement to provide information to the administrator, the Bill or the regulations should set out the time frame for the information to be provided. The Bill does not provide rules governing an employer's termination of participation in a PRPP, other than to establish that the Superintendent must be informed by the administrator and that the members' portability rights will be triggered. The Bill or the regulations should specify what is required of the employer if they elect to terminate. Alternatively, the Bill or regulations could require that the employer's obligations be set out in the contract between the employer and the administrator.

Section 45(2) is also inconsistent with other provisions in the Bill. It permits an employee to set a contribution rate of 0%, on notice to the administrator. While further details will be in the regulations, this provision should require the employee to notify both the administrator and the employer, ensuring that no deductions will occur following the effective date of the 0% rate.

Sections 61 and 62 appear to mirror the termination and winding-up provisions of the PBSA. However, in the CBA Section's view, the differences between PRPPs and registered pension plans are such that the approach to termination and winding-up in the Bill ought to be substantially different from that in the PBSA.

Termination and winding-up of a registered pension plan will occur when the sponsoring employer ceases business operations, ceases to have employees, and decides to terminate the plan for whatever business reason or at the Superintendent's discretion because the employer failed to comply with the PBSA.

In contrast, the Bill may create PRPPs in which the administrator is not required to be an employer or be related to the employer. Under this scheme, termination and winding-up rules should be less important. The CBA Section believes that, if an administrator of a PRPP decides to cease administering it or if circumstances dictate that they must cease administering it, termination and winding-up of the PRPP should not be the preferred outcome.

The CBA Section recommends that the Bill be amended to permit administrators to assign their PRPPs, including their contracts with employers, to successor administrators, subject to regulations and the Superintendent's approval. The Bill should also include provisions to facilitate the merger of assigned PRPPs with other PRPPs already operated by the successor administrators. Mergers of PRPPs should also be expressly permitted where two administrators are party to a corporate amalgamation or become related parties as a result of a corporate transaction.

That said, the CBA Section recommends retaining sections 61 and 62 for those extraordinary circumstances in which termination and winding-up will occur. The recommended additions to the Bill are necessary because they will be relied on more frequently, and with better outcomes in almost all cases. In addition, the recommended additions would ease the cost and complexity of operating PRPPs, to the benefit of members, employers and administrators.

Section 21 provides that, on the administrator's insolvency, the Superintendent may order PRPPs operated by that administrator to be transferred to an "entity that is designated by the Superintendent." Consistent with the comments above, the CBA Section believes that, in these cases, the Bill should permit the Superintendent to order the insolvent administrator to take steps to transfer the PRPP to a successor administrator. The references to designated entities should be replaced by references to a successor administrator.

Section 70 provides a safe-harbour for any person acting under the Bill. The CBA Section believes that it goes too far by granting protection to persons who act "in the belief that they are doing so under this Act." This imparts far too much subjectivity and uncertainty. The CBA Section recommends that such statutory protection be limited to those persons who are strictly in compliance with the Act.

IV. DRAFTING

The CBA Section has noted a number of drafting issues throughout the Bill. To make the law accessible to all, clarity, certainty and ease of comprehension are important characteristics of any bill. The drafting issues are grouped under four themes: (1) Lack of Clarity; (2) Missing Details; (3) Regulations Required; and (4) Unintended Consequences.

Lack of Clarity

The use of negatives in section 4 makes it difficult to follow and understand. We believe it would be easier to follow if the section was drafted in the affirmative.

It appears that the Bill, as drafted, is intended to apply to members who are: (i) employees of those employers whose work, undertaking or business is included in the definition of "included employment" in subsection 4(4) of the PBSA and who participate in a PRPP under the Bill; (ii) the self-employed in the Yukon, Northwest Territories or Nunavut; and (iii) all people who are employed in included employment in the Yukon, Northwest Territories and Nunavut, regardless of their employer's choice to participate in the plan.

The current language of section 4 appears to create a gap for some employees. For example, it appears that individuals cannot participate in a PRPP if they work in included employment for an included employer who chooses not to participate in a PRPP. If they are employees whose employment falls within federal jurisdiction, any provincial legislation will not apply to them. The CBA Section recommends that the intent of this provision be clarified in the Bill.

The use of negatives in paragraph 12(1)(a) also makes it difficult to access. We understand it to mean that pension plans in which the employer is required to contribute under the plan are excluded from the application of the Bill (these fall under the PBSA). The Bill appears to contemplate that PRPPs would not have mandatory employer contributions although it would remain open to an employer to choose to contribute on behalf of its employees. If that is the intent, we suggest drafting in the affirmative which is easier to follow than negatives and exclusions.

Section 27 needs clarification. The intent appears to be to limit an employer's options to specific retirement vehicles (where the employer has decided to provide retirement savings for employees) without mandating that employers provide PRPPs for their employees. It should clearly state that employers are not mandated to provide PRPPs if they do not provide other retirement savings vehicles.

Section 44 is unclear. It provides that a person who has not become a member of a PRPP under sections 39 or 40 of the Bill may terminate their membership by notifying the administrator. The CBA Section believes that this is intended to capture self-employed people who would have a direct relationship with an administrator, as opposed to through a traditional employer. If that is the case, the Bill should say so more clearly. In fact, any differences, such as termination of membership or contribution monitoring that must be accommodated in the Bill, should be addressed by adding a definition of the self-employed, along with appropriate language to accommodate their particular circumstances. This would avoid any confusion as to how the Bill should operate in relation to the self-employed.

Missing Details

Section 29 of the Bill prescribes the elements that must be included in the contract between an employer and an administrator, such as the quantum of employee contributions and of any employer contributions, 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 PBSA, which prescribes monthly contribution remittances.

The CBA Section agrees with releasing employers from liability for the acts and omissions of the PRPP administrator (section 30 of the Bill). However, given the government's goal of encouraging greater pension coverage (in part by relieving employers of administrative duties and liabilities), the CBA Section believes that section 30 should also state that where an employer has selected a registered PRPP administrator, in accordance with the requirements of section 14, the employer shall have no liability for the selection of the administrator.

The reference to "any other amounts required to be remitted to the administrator" in section 31 is vague. The Bill currently requires only employee contributions or any employer contributions to be remitted to an administrator. If other potential fees or payments are required, this should be set out in the Bill or it should be clear that additional fees or payments will be prescribed by regulation.

Under section 69(3), the Superintendent may direct an administrator to pay the fees and expenses of persons retained to conduct an investigation. This appears to be punitive in nature. If that is the intent, it should specify the criteria and circumstances the Superintendent must consider when making a direction.

Regulations Required

Section 18, although clear about situations involving a typical employer, raises questions about whether the same provisions need to apply to the self-employed who will make remittances and look out for their own interests. This should be clarified in regulations under paragraph 76(1)(*k*).

The prohibitions and inducements referred to in section 24 need clarification through the regulations, which the Bill seems to contemplate in paragraph 76(1)(*i*). However, normal business practices might be seen as an "inducement" and be swept up in the prohibition.

Section 26 specifies that a PRPP must be provided at a "low cost." The CBA Section believes that the phrase "low cost" must be defined in the Bill. Paragraph 76(1)(j) contemplates clarification in the regulations: "… establishing criteria for determining whether a pooled registered pension plan is low-cost for the purposes of section 26." The CBA Section recommends that this be a "principles based" regulatory description, rather than a mandated number, as the latter would likely require amendments as the economy and business environment shift.

Section 28 is unclear. Will regulations be enacted to prescribe the allowable classes of employees? For consistency with the PBSA, the CBA Section recommends against such regulations. Employers should be permitted to define classes of employees as they exist in their workforces, based on the unique nature and characteristics of such classes.

The Bill, in particular section 57, is silent on decision-making tools which should be available to assist participants in their investment decisions. While the Canadian Association of Pension Supervisory Authority's *Guidelines for Capital Accumulation Plans*[4] provides some guidance on tools that should be provided to CAP members, the CBA Section recommends that decision-making tools be provided by regulation.

[4] Canadian Association of Pension Supervisory Authorities, *Guidelines for Capital Accumulation Plans*, May 28, 2004, at: http://www.capsa-acor.org/en/init/cap_accumulation/Guideline%20Number%203.pdf

Unintentional Consequences

Section 3 states that the purpose of the Bill is to provide a legal framework for the establishment and administration of a type of pension plan that is accessible to employees and self-employed persons. It is intended to fill the gaps in the Canadian retirement income system using a simplified approach which limits PRPP contributions by using RRSP limits for all members. However, this approach will be of concern to an individual who qualifies as an Indian (aboriginal person)under the *Indian Act.*[5]

Aboriginal persons are subject to the same tax rules as any other Canadian resident, unless their income is eligible for the tax exemption under section 87 of the *Indian Act.* This exemption applies to the employment income, and other income falling within the definition of earned income, of an aboriginal person situated on a reserve or considered to be situated on a reserve. If an aboriginal person earns exempt income, no RRSP contribution room is created with respect to that income. Contributions to a PRPP for that individual will generate penalties under Part X.1 of the *Income Tax Act.* An aboriginal person earning only exempt income could not participate in a PRPP, but can participate in registered pension plans.

The government may want to address this concern by creating specific PRPP legislation for aboriginal persons who earn only exempt income, or by modifying the earned income definition in its application to aboriginal persons and their participation in PRPPs.

The English version of section 11(1) only permits corporations to be licensed as an administrator. This is in contrast to the broader French wording, which permits licensing of a "*personne morale*". The English word "corporation" would, by definition, exclude participation of other entities that currently administer pension plans as administrators, for example, trusts, statutory corporations, or partnerships. A broader English term such as "entity," "legal entity" or "legal person" would capture these other entities.

Finally, many provisions in the Bill mirror the equivalent provisions of the PBSA. In some instances, only a word or the punctuation has been changed. The government may want to match the language of the PBSA more closely for consistency. For example, section 75(2) of the Bill provides a defense not found in the PBSA if "the person establishes that he or she exercised due diligence to prevent the commission of the offence," and in paragraph 75(1)(c) of the Bill, the word "knowingly" appears before "prevents or obstructs, or attempts to prevent or obstruct, another

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5 *Indian Act*, R.S.C., 1985, c. I-5.

person from doing anything that the other person is authorized to do …" and yet that word is not included in the PBSA.

V. SUMMARY OF PRIMARY RECOMMENDATIONS

1. **Section 22(1) should be reworded to permit a PRPP to be offered pursuant to either a trust or an insurance contract.**

2. **Sections 41(1) and (2) should be amended to provide that if an employer enters into a contract with a PRPP administrator, only the administrator should be responsible for communicating with eligible employees regarding the PRPP. Subsection 41(4) should be amended to require employers to provide the relevant information about new employees to the administrator, and the administrator to notify new employees. This would enable consistent and effective communications with all members of a PRPP.**

3. **The CBA Section recommends amending section 42 to require members to notify the employer and the administrator if they wish to terminate membership in the PRPP, but without having to provide the employer with a reason for the termination.**

4. **Section 43 should specify that if an employer enters into a new contract with a PRPP administrator, the contract must require the administrator to accept the assets of the existing employee accounts from the predecessor PRPP. It should also require the administrator of the new PRPP to notify the eligible class of employees of participation in the PRPP.**

5. **Section 45 should be amended to require that where employee contribution rates are set out in a contract, prior to any changes being made to those rates by the administrator, the contract must be amended or, in the case of unionized workplaces, the contribution rates cannot be changed in the collective agreement without negotiation and the consent of the employer.**

6. **The Bill should set out the employer's obligations to notify the administrator as to employee deaths and terminations. Either the Bill or the regulations should establish timeframes for such notice.**

7. **The Bill or regulations should specify the employer's obligations if they decide to terminate the PRPP or, alternatively, the Bill or regulations could require the obligations to be provided in the contract between the employer and administrator.**

8. **Section 45(2) should specify that if an employee sets a contribution rate of 0%, they must notify the administrator and the employer, thereby ensuring that no deductions will be made after the effective date.**

9. **The CBA Section recommends retaining sections 61 and 62, but only for those extraordinary circumstances in which termination and winding-up will occur. In all other circumstances, administrators should be permitted to assign their PRPPs, including their contracts with employers, to successor administrators, subject to regulations and the Superintendent's approval. Mergers of assigned PRPPs with other PRPPs already operated by the successor administrators should**

be expressly permitted, as well as mergers of PRPPs where two administrators are party to a corporate amalgamation or become related parties as a result of a corporate transaction.

10. **The additional protection offered by section 70 imparts too much subjectivity and uncertainty and should be limited to those persons who are strictly in compliance with the Act.**

11. **The CBA Section recommends that the intent of section 4 be clarified in the Bill.**

12. **If the intent of section 27 is to provide employers with a choice as to whether to provide PRPPs for their employees, it should state it more clearly.**

13. **The frequency of remittances by employees and employers should be prescribed by regulation, pursuant to section 29 of the Bill, to be consistent with the administration of registered pension plans under the *Pension Benefits Standards Act*.**

14. **In addition to releasing the employer from liability for the acts and omissions of the PRPP administrator, section 30 should also state that, if an employer has chosen a registered PRPP administrator in accordance with section 14, the employer shall not be held liable for that choice.**

15. **Section 69(3) appears to be punitive in nature. If that is the intent it should specify the criteria and circumstances the Superintendent must consider when making a direction.**

16. **The prohibitions and inducements in section 24 need clarification to ensure that normal business practices are not considered as an "inducement" and included in the prohibition.**

17. **The phrase "low cost" in section 26 must be defined in the Bill, and further clarification in the regulations establishing criteria to determine whether a PRPP is low-cost should be a "principles based" regulatory description, rather than a mandated number, as the latter would likely require amendments as the economy and business environment shift.**

18. **The CBA Section recommends against regulations under section 28 that would prescribe the allowable classes of employees. Employers should be permitted to define classes of employees as they exist in their workforces, based on the unique nature and characteristics of such classes.**

19. **The CBA Section recommends that decision-making tools to assist participants in investment decisions be provided by regulation.**

20. **Consideration should be given to creating specific PRPP legislation for aboriginal persons who earn only exempt income, or modifying the earned income definition in its application to aboriginal persons and their participation in PRPPs.**

21. **The English version of section 11(1) uses the word "corporation" which is narrower than the French version which uses the term "personne morale." Entities other than corporations should be permitted to be administrators. Section 11(1) should be**

amended to include other "legal persons" or "legal entities," such as trusts, statutory corporations and partnerships.

22. **The CBA Section recommends a comparison of certain provisions in the Bill with similar provisions in the PBSA and changes to the Bill for purposes of consistency.**

VI. CONCLUSION

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