



THE CANADIAN  
BAR ASSOCIATION  

---

L'ASSOCIATION DU  
BARREAU CANADIEN

## **Prince Edward Island Consultation Bill 41 *Pension Benefits Act***

**NATIONAL PENSIONS AND BENEFITS LAW SECTION  
CANADIAN BAR ASSOCIATION**

**August 2012**

## **PREFACE**

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, Québec 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.

# TABLE OF CONTENTS

## Prince Edward Island Consultation Bill 41 *Pension Benefits Act*

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II.</b>	<b>SUBMISSIONS ON SPECIFIC ISSUES .....</b>	<b>1</b>
	A. Jointly Sponsored Pension Plans (JSPP) .....	1
	B. Target Benefit Plans ("TBP") .....	2
	C. Eligibility and Immediate Vesting .....	2
	D. Locking-In .....	2
	E. Pension Benefits .....	3
	F. Registration and Plan Administration .....	4
	G. Investment .....	4
	H. Records Retention and Disclosure of Information .....	5
	I. Valuation Reports .....	6
	J. Advisory Committee .....	6
	K. Appeal Process and Enforcement .....	7
	L. Partial Wind-Ups .....	7
	M. Asset Transfers .....	8
	N. Funding .....	8
	O. Surplus and Contribution Holidays .....	8
	P. Refund of Overpayments .....	9
	Q. Distressed Plans .....	9
	R. Letter of Credit Funding .....	9
<b>III.</b>	<b>CONCLUSION .....</b>	<b>9</b>



# **Prince Edward Island Consultation Bill 41 *Pension Benefits Act***

## **I. INTRODUCTION**

The National Pensions and Benefits Law Section of the Canadian Bar Association (the CBA Section) is pleased to comment on Bill 41 – *Pension Benefits Act* (Prince Edward Island), introduced in May 2012. The CBA Section consists of members involved in pensions and benefits law across the country, including counsel to pension and benefits administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The CBA Section responded to the province's consultation on Bill 30 – *Pension Benefits Act* and provided our views in January 2011. The CBA Section acknowledges the efforts of Prince Edward Island in addressing the issues raised in our 2011 Submission. We welcome the opportunity to continue to participate in Prince Edward Island's important work on pension reform.

The CBA Section agrees with the approach of modeling the Act on the new Nova Scotia *Pension Benefits Act*, Bill 96 (NS Act) which received Royal Assent in December 2011. The NS Act incorporates many pension standards in other Canadian jurisdictions. By taking this approach, Prince Edward Island has taken an important step towards harmonization which is fully supported by the CBA Section.

## **II. SUBMISSIONS ON SPECIFIC ISSUES**

### **A. Jointly Sponsored Pension Plans (JSPP)**

The CBA Section acknowledges Prince Edward Island's efforts in promoting flexibility in pension plan design by introducing the JSPP and in adopting our recommendation in the 2011 Submission in defining a JSPP. The provisions in the Act regarding member contributions and winding up JSPPs reflect harmonization with the NS Act.

We reiterate our recommendation in our 2011 Submission that the Act shall authorize the body which governs a JSPP and sets contribution levels to determine how it will respond to a situation where plan liabilities exceed plan assets and to determine the use of surplus.

We recognize that additional rules and criteria will be prescribed for JSPPs and the CBA Section looks forward to an opportunity to comment on the forthcoming regulations.

## **B. Target Benefit Plans ("TBP")**

The CBA Section supports the introduction of TBPs which, we believe, will promote flexibility in plan design welcome by employers and employees.

The provisions regarding TBPs reflect harmonization with the NS Act. However, we note that our recommendations in the 2011 Submission on their availability, on joint governance and clear member communication of target benefits have not been incorporated. We recognize that there will be additional rules and criteria prescribed for TBPs and we submit that our recommendations be incorporated.

## **C. Eligibility and Immediate Vesting**

The CBA Section supports the eligibility and immediate vesting provisions in the Act. Immediate vesting has been adopted in the NS Act and several other Canadian provinces and this approach (instead of the original proposal of a 2-year vesting threshold) reflect harmonization with these jurisdictions.

Immediate vesting may likely increase the cost of maintaining and administering a pension plan but the impact is alleviated by the permissive eligibility provision and the small pension unlocking.

## **D. Locking-In**

The CBA Section supports the locking-in rule with exceptions in limited circumstances.

Legislative clarification on locking-in is critical in Prince Edward Island. Currently, there is confusion and uncertainty because of the lack of legislation governing pension plans, particularly where some financial institutions request customers to sign forms used in other provinces which contain locking-in provisions.

Our 2011 Submission recommended 3 exceptions to the general locking-in rules: small pension commutation, unlocking for shortened life expectancy and unlocking for financial hardship.

The CBA Section supports the small pension commutation provisions and the unlocking provisions for shortened life expectancy in the Act. We believe that it is appropriate to include unlocking provisions for financial hardship modeled on the corresponding provisions in the NS Act.

We also recommend that unlocking by former members who have become non-resident of Canada similar to the provisions in some other Canadian jurisdictions (e.g., the federal pension legislation) be permitted.

## **E. Pension Benefits**

- a) The CBA Section supports the provisions regarding normal retirement age, early retirement age, postponed retirement and phased retirement which are consistent with the NS Act and those in some other Canadian provinces.
- b) The CBA Section also supports the 50% rule and the related portability provisions.
- c) We generally support the provisions on joint and survivor pension and the pre-retirement death benefit provisions. We note that spousal waiver, court order or a domestic agreement (disentitling the spouse to such benefits) is required even if the spouse is living separate and apart from the member at the relevant time in order to disentitle the spouse to such benefit. We support this requirement which is consistent with the approach in the NS Act. This requirement is helpful in assisting plan administrators in determining spousal entitlement to death benefits.
- d) The Act provides for division of pension or pension benefit on marriage breakdown but it does not seem to provide for an immediate transfer of pension or pension benefit in these circumstances. The CBA Section supports the inclusion of provisions which permit immediate transfer. We note that additional rules will be prescribed by regulations but we are of the view that the permissive provision for immediate transfer should be set out in the Act.

- e) The CBA Section notes that the Act neither provides for mandatory grow-in benefits nor mentions grow-in benefits.

We reiterate our previous comment in the 2011 Submission that, to avoid unnecessary litigation, rules should be developed to clarify when a plan is considered to provide grow-in benefits and how a plan may be amended to remove or clarify grow-in provisions, during and after the transition period.

- f) The CBA Section acknowledges Prince Edward Island's efforts in confirming that ancillary benefits are "accrued" when the related eligibility requirements are met and any plan amendments relating to "accrued" ancillary benefits are subject to the general provisions regarding void amendments. We also note that our concerns regarding the 5-year notice period has been addressed. As mentioned in the 2011 Submission, the CBA Section members representing employees and unions recommend a different approach. They recommend that amendments should only affect benefits on a "go forward" basis and that the reduction and elimination of ancillary benefits when a member has met a significant part of eligibility criteria should not be permitted. They recommend that the Quebec approach be adopted.

The CBA Section reiterates our recommendation that the treatment of indexing provisions be clarified. Indexing is not listed as an ancillary benefit. Currently, there is conflicting case law on the ability to amend indexing provisions.

## **F. Registration and Plan Administration**

The CBA Section agrees with the approach taken in the Act, which is consistent with the NS Act, regarding plan administration including the requirement or prior notice of all pension plan amendments to members.

## **G. Investment**

The CBA Section believes that Prince Edward Island's regulations governing pension fund investment should be harmonized with Nova Scotia. For harmonization purposes it is desirable to incorporate the investment rules of Schedule III of the federal *Pension Benefit Standards Act* in Prince Edward Island's legislation (although we support the removal of the quantitative limits).



During the 1990's, pension investment regulation across Canada shifted from lists of permitted investments to a prudent investment approach with a few specific rules. The prudent investment approach is currently reflected in s. 32(1) of the Prince Edward Island Act.

This approach gives pension plans considerable flexibility to adapt their investment strategies to evolving financial markets. New financial instruments have arisen and their use by pension funds has increasingly been accepted as prudent. With the rapid development of these changes, the flexibility of the prudent investment approach has been particularly valuable.

The CBA Section recommends continuing to require the prudent investment standard as the principal rule for pension fund investment, and that pension plan administrators prepare and maintain a written statement of investment policies and procedures.

## **H. Records Retention and Disclosure of Information**

The CBA Section agrees with having clear requirements for records retention and providing broad rights of access to employees and their representatives. The Act provides broad rights of access both to the files of the Superintendent and also the files of the administrator. These rights of access should be limited only to respect the privacy rights of individual plan members. We do not believe that simultaneously providing all filed information to all members (regardless of whether members are interested in the information) will result in meaningful communication. Instead, the focus should remain on ensuring that the annual statement to members contains essential information. For example, the annual statement should be required to set out the funded status of a defined benefit pension plan. The CBA Section recommends that Prince Edward Island follow the requirement proposed in draft Nova Scotia regulations requiring annual statements to contain this information when applicable. Annual statements could also be required to refer to information relating to access rights of members under the Act.

The CBA Section agrees with the permission of electronic records.

The CBA Section also agrees with the requirement to provide a contribution summary to a trustee to facilitate the monitoring of contribution remittance.

## **I. Valuation Reports**

The CBA Section agrees with the approach in the Act, which is consistent with the NS Act, allowing the Superintendent of Pensions to require a new valuation report and specify methods and assumptions for its preparation.

## **J. Advisory Committee**

The CBA Section agrees with the provisions of the Act governing advisory committees, which are consistent with the NS Act, including participation rights for retirees. However, it is critical that the creation of advisory committees does not conflate the responsibilities of the sponsor and the administrator. The administrator has a fiduciary responsibility to act in the best interests of plan beneficiaries and to administer the terms of the plan as filed with the regulator. The legal responsibilities of advisory committees should be clearly identified in the legislation. In particular, administrators should retain the overall responsibility for member communications, with advisory committees being entitled to access to these communications, subject to privacy limitations concerning individual information.

Creating advisory committees should not result in those committees assuming liability without any decision-making power. Any recommended change should ensure that plan administrator responsibilities continue with the help of an advisory committee better equipped to fulfill its advisory functions. Where the administrator is a joint board or committee, an advisory committee would appear to be an unnecessary cost.

Advisory committees should be entitled to have reasonable access to professional advisors and the costs associated with consulting such advisors should be paid from the fund. It should be clarified though who will determine whether professional advice should be sought and whether such costs may be paid from the fund. The plan administrator has the overall fiduciary duty to the members, and should be required to assess and determine whether a particular request and cost are reasonable.

There are also implications for the independence of the advisory committee. We believe it would be inappropriate for the Superintendent to rely on the agreement or decisions of advisory committees in making regulatory decisions with respect to the plan.

Advisory committee members will need access to further training and the Department of Environment, Labour and Justice could be part of such training. Rules concerning advisory committees should address training and the payment of reasonable training costs out of the fund.

## **K. Appeal Process and Enforcement**

While the CBA Section would prefer that appeals from an order of the Superintendent be heard by an administrative tribunal with expertise in pension matters, it acknowledges that there is no appropriate tribunal in Prince Edward Island and therefore it is appropriate that appeals be made to the Supreme Court.

The CBA Section also agrees with the penalties for offences. They are consistent with those in the NS Act.

## **L. Partial Wind-Ups**

The CBA Section agrees with Prince Edward Island's approach in excluding partial wind-ups in the Act. Although the NS Act and the New Brunswick pension legislation still provide for partial wind-ups, we believe that following the approach of the recent amendments to the Ontario *Pension Benefits Act* is appropriate given the significant litigation over partial wind-ups in other jurisdictions, the uncertainty for employers about when a partial wind-up will be ordered and the delays and expenses involved in carrying out partial wind-ups. However, some members of the CBA Section are concerned with the elimination of partial wind-ups without some trade-offs, such as grow-in benefits, for terminated employees.

We note that a definition of "partial wind-up" remains as subsection 1(gg) and this should be removed. As well, section 92(1) enumerates the circumstances under which the Superintendent may order a wind-up. Some of the enumerated circumstances appear to be excessively broad for a full wind-up. We refer to paragraphs (d), (e) and (f). We note that this part of the Act is derived from the NS Act which permits partial windups. We recommend changes to this section of the Act to restrict the circumstances in which the Superintendent may order a wind-up to those that are appropriate for a full wind-up. We note that paragraph (h) will still allow the Lieutenant Governor in Council to prescribe additional circumstances, if appropriate.

## **M. Asset Transfers**

The provisions in the Act regarding asset transfers reflect harmonization with the NS Act and the CBA Section thus recommends that those provisions remain as drafted.

We recognize that many of the details regarding asset transfers will be prescribed, and the CBA Section looks forward to an opportunity to comment on the forthcoming regulations.

## **N. Funding**

Solvency funding requirement in respect of a defined benefit pension plan is one of the major issues in pension reform consultations undertaken in recent years. We recognize the need for minimum statutory solvency funding requirements to protect the pension benefits of plan members while, at the same time, the benefit of allowing certain funding flexibility to the employer.

The specific funding requirements will be set out in the regulations, which are yet to be released. We would encourage consultation on the regulations. We offer the following general comments in the event that they may be of assistance in the preparation of regulations. We encourage a move to a ten-year amortization period for solvency deficiency, with appropriate member consent or member objection mechanism. This will help reduce the volatility of contributions that many employers have found to be burdensome. Potential risk arising from this flexibility to employers can be balanced by imposing a 5% collar that will prevent any use of surplus of an ongoing plan unless assets exceed 105% of liabilities. The imposition of a 5% collar before plan surplus can be utilized is consistent with the approach adopted or proposed by some of the other Canadian jurisdictions (e.g., Manitoba, Ontario, federal). The requirement of a collar will ensure benefit security for plan members.

## **O. Surplus and Contribution Holidays**

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, or ownership issues. 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.

## **P. Refund of Overpayments**

An employer should be encouraged to contribute more than the minimum amount required under the regulations. The Act requires that there be Superintendent approval before a reimbursement of an overpayment is made to an employer. The CBA Section does not object to this requirement for payment of an actual reimbursement.

However, the more common scenario is that in the event of an overpayment, an employer will seek a credit against future contributions. The ability to do this is ordinarily addressed in the regulations. The CBA Section recommends that the regulations provide that an employer that is willing to make excess contributions be able to benefit from those excess contributions during the intra-valuation period and is not forced to wait until the next valuation is completed before it can apply the credit towards required contributions.

## **Q. Distressed Plans**

The CBA Section supports the provisions enabling the Superintendent to provide the necessary consent contemplated under the provisions of the federal *Companies' Creditors Arrangement Act*, and the *Bankruptcy and Insolvency Act*.

## **R. Letter of Credit Funding**

We support the ability of an employer to make use of properly structured letters of credit to fund solvency contributions. A properly structured letter of credit provides the same security for members as actual contributions, but allows an employer the flexibility to determine whether to use its capital for solvency contributions into the pension fund or to deploy the capital elsewhere in its business. We support the imposition of the suggested cap of 15% of solvency liabilities on the amount of letters of credit.

## **III. CONCLUSION**

The CBA Section believes that it is important for Prince Edward Island to adopt legislation concerning pension plans, as it is the only Canadian province that does not have such legislation. The CBA Section supports the 3-year transition period and public consultation on the draft regulations.

We trust that our comments will assist Prince Edward Island in its work. We would be pleased to respond to any questions and to provide further information on any of the items addressed in this submission.