THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

Draft *Pension Benefits Regulations* Under Nova Scotia *Pension Benefits Act*

NATIONAL PENSIONS AND BENEFITS 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 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 Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Pensions and Benefits Law Section of the Canadian Bar Association (the CBA Section) is pleased to comment on Nova Scotia's Department of Labour and Advanced Education (the Department) proposed Draft Pensions Benefits Regulations, under the new *Pension Benefits Act* (Draft Regulations), issued on December 7, 2011.[1] The CBA Section consists of members involved in pensions and benefits law 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 participated in the review undertaken by the Nova Scotia Pension Review Panel and responded to the position paper in November 2008. The CBA Section also responded to the Department's Discussion Paper on Pensions in June 2010.[2] We welcome the opportunity to continue to participate in Nova Scotia's important work on pension reform.

The CBA supports harmonization of pension laws across Canada. Harmonization has also been generally supported by pension reform commissions in Alberta and British Columbia, and Ontario.[3] In 2010, the CBA urged federal, provincial and territorial governments to support and promote the harmonization of pension legislation and regulation across Canada, because:

- Pension regulation is multi-jurisdictional;
- Lack of harmony results in duplicative or unnecessary regulatory burden and cost, increased administrative costs for pension plan sponsors and unequal treatment of pension plan members in different jurisdictions; and

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1 *Pension Benefits Act*, SNS 2011 c. 41 (PBA)

2 Nova Scotia Department of Labour & Workforce Development, *Discussion Paper on Pensions,* June 2010*.*

3 See, *Getting our Acts Together – Pension Reform in Alberta and British Columbia*, Report of the Joint Expert Panel on Pension Standards (see: http://www.finance.alberta.ca/publications/pensions/pdf/2008_1125_jepps_final_report.pdf) ; and *A Fine Balance*, Report of the Ontario Expert Commission on Pensions, 2008,(see:. http://www.fin.gov.on.ca/en/consultations/pension/report/Pensions_Report_Eng_web.pdf).

- Harmonized laws encourage broader pension coverage and enable efficient delivery of pension benefits to plan members, advancing the objective of providing for Canadians in retirement.[4]

National initiatives are underway to harmonize pension standards legislation across Canada, including a proposed framework agreement by the Canadian Association of Pension Supervisory Authorities (CAPSA).

The CBA Section acknowledges the efforts of the Department to promote a harmonized pension regulatory system within Canada, by largely adopting the Ontario pension regulatory wording. Our experience to date with the Ontario pension reforms has informed our comments and recommendations on certain parts of the Draft Regulations.

The following discussion identifies and comments on issues raised by the Draft Regulations.

II. JOINTLY SPONSORED PENSION PLANS

The CBA Section acknowledges the efforts of the Department to promote flexibility in pension plan design by introducing the jointly sponsored pension plan (JSPP), a plan co-sponsored and co-managed by the employer and employees. However, we have the following comments on the draft funding rules that will apply to JSPPs.

A. 80% Funding Threshold

The CBA Section recommends that the solvency funding exemption under the regulations extended to Specified Multi Employer Pension Plans (SMEPPs) should be available to JSPPs. SMEPPs and JSPPs share characteristics such as joint governance and risk sharing. However, the Draft Regulations provide that JSPPs must be funded on a solvency basis to a threshold of 80% of liabilities. In order to promote flexibility in funding these plans and to properly recognize the similarities between JSPPs and SMEPPs, we recommend that this 80% threshold be eliminated and JSPPs be exempt from the solvency funding requirements under the regulations (as Ontario has done with its JSPPs).

The proposed 80% funding threshold could also place an enormous burden on the active members of a JSPP to fund the members' portion of a solvency deficiency in which the liabilities

[4] Canadian Bar Association, Resolution 10-01-M (adopted by CBA Council at its 2010 Mid-Winter Meeting).

for inactive members represent a substantial portion. The 80% solvency funding threshold would promote inequity among former and current plan members while the JSPP is ongoing. This requirement may render the adoption of JSPPs less likely, which would be regrettable.

In summary, for the JSPP to be a viable option for Nova Scotia employers and employees, the regulations must exempt these plans from solvency funding (as Ontario has done for its JSPPs). Employers and active plan members should not be required to make up any deficit in the plan. Otherwise, JSPPs will not work because of the funding obstacles and inequality among former and current plan members created by the draft funding rules.

B. Benefit Security Alternatives

The 80% solvency funding threshold is intended to, among other things, provide long term security for JSPP plan members. For the reasons addressed above, JSPPs should be exempt from solvency funding. Instead, we urge the Department to consider other measures to address the security of members' benefits in these plans. These measures would include shortening the amortization period for funding going concern deficits in these plans or imposing restrictions on the going concern assumptions used in assessing the funding of JSPPs. These alternative methods of enhancing benefit security would be preferable to the solvency funding requirement.

C. Letters of Credit

As an alternative, if the Department considers it appropriate to maintain the 80% solvency funding threshold, the CBA Section encourages the Department to permit letters of credit to be available to JSPPs, with the consent of the sponsors, to assist in managing and securing the solvency funding obligations for these plans.

D. JSPP Election

Section 7 of the Draft Regulations requires the plan administrator to elect that a pension plan is a JSPP. This election should be made by the sponsors of the JSPP, as the design of a pension plan is within the discretion of the plan sponsors, not the plan administrator. This election by the sponsors of the JSPP is also consistent with section 98 of the PBA,[5] which requires the sponsors of a JSPP to elect as to whether grow-in benefits will be provided under the plan.

5 Subsection 98(1) of the PBA provides in part: "The employers...and the members...may elect...to exclude the plan and its members from the [*grow in provision*]". The administrator does not have the power to make the election.

III. MULTI-EMPLOYER PENSION PLANS

The CBA Section supports the Department's recognition that multi-employer pension plans (MEPPs) have distinct and unique funding concerns. Allowing certain MEPPs to be exempt from solvency funding requirements is a proper recognition of the target nature of the benefits provided under MEPPs.

The Draft Regulations appear to be based on the current Ontario Regulations which provide temporary solvency funding relief for specified Ontario multi-employer pension plans (SOMEPP). The SOMEPP Regulations provide temporary solvency funding relief and Ontario has already recognized issues with the temporary Regulations which will have to be remedied in any permanent Regulations.

The Draft Regulations extend solvency funding relief only to MEPPs that meet the criteria to become a SMEPP in subsection 9(1) of the Draft Regulations. These criteria are based largely on the SOMEPP Regulations which themselves were based on the criteria in the *Income Tax Act Regulations* for SMEPPs under that Act. The CBA Section believes that two elements of the criteria should be reviewed.

First, the criterion under clause 9(1)3. of the Draft Regulations states that "all or substantially all of the employers who make contributions to the plan are persons who are not exempt from tax under Part I of the *Income Tax Act* (Canada)." Accordingly, all or substantially all of the employers participating in a MEPP cannot be tax exempt entities. There is no substantive reason why this must be the case. Whether an employer is a tax-exempt entity or a tax-paying entity should not make a difference in how the plan operates and whether the plan may be entitled to solvency funding relief. In fact, Ontario has removed this criterion in its new definition of "target benefits" in the recent amendments to the Ontario *Pension Benefits Act*.

Second, the criterion in clause 9(1)4. of the Draft Regulations that "all employers make contributions to the plan pursuant to one or more collective agreements," creates an unnecessary level of uncertainty for plans which may not have any or only some contribution rates set out in typical collective agreements. MEPPs may have contribution rates set out in other agreements, such as participation agreements. What is important is the negotiated nature of the contribution rates, not the type of agreement in which those rates are set. It should be sufficient for contributions to be fixed in an agreement binding on the participating employers. To ensure that members are adequately represented in the governance of the plan, requirements should be added to ensure appropriate representation of plan members on the board of trustees, as well as imposing thorough reporting requirements on the board of trustees.

IV. PRIOR YEAR CREDIT BALANCE

The Draft Regulations follow Ontario's general regulation[6] (the Ontario General Regulation) to its *Pension Benefits Act.* Prior Year Credit Balance is defined in the Draft Regulations as the amount determined in accordance with subsection 14(10). The formula in subsection 14(10) of the Draft Regulations is consistent with the Ontario General Regulation, which furthers harmonization. Subsection 12(10) allows an employer to apply a prior year credit balance determined under subsection 14(10) to reduce payments required under clauses 12(4)(*b*), (*c*) and (*e*), which is also consistent with the Ontario General Regulation.

The Financial Services Commission of Ontario (FSCO) has treated subsection 4(3) of the Ontario General Regulation (the equivalent to subsection 12(10) of the Draft Regulations) as describing the only situation where an employer can take credit for the fact that it has contributed more than the minimum required under the regulations during a prior year. As a result, FSCO will not permit an employer to draw on excess contributions made in a prior year unless those excess contributions are quantified in an actuarial valuation filed with FSCO.

Consider the example where an employer has filed a valuation that is sufficient for three years under subsection 17(2). It might make excess contributions in any of the three years covered by that valuation but, according to the position taken by FSCO, it would not be able to apply any of those excess contributions towards contributions required in the current year until the three year period is over and it has obtained a new valuation which reports those excess contributions and a prior year credit balance.

An employer should not be discouraged from contributing more than the minimum amount required under the regulations. The CBA Section recommends that the Draft Regulations permit an employer that is willing to make excess contributions to benefit from those

[6] R.R.O., Regulation 909

contributions during the intra-valuation period and not be forced to wait until the next valuation is completed before it can apply the credit towards required contributions.

V. SOLVENCY FUNDING OF ESCALATION ADJUSTMENTS

The Draft Regulations require solvency funding of escalation adjustments (e.g. indexation) for future accruals on a go forward basis. This is done by defining "solvency liabilities" in subsection 2(1) as only excluding any escalation adjustment in relation to the pension benefits "accrued before [the effective date of the Draft Regulations]."

The definition of "solvency liabilities" in the Ontario Regulations excludes any escalated adjustment, without any limitation on the period of accrual. Subsection 11(1) of the Ontario Regulations also provides that the estimated future costs of escalated adjustments may be excluded from funding requirements.

Further, the requirement to fund escalation adjustments will increase the cost of escalation adjustments. This would provide a further disincentive for plan sponsors to include escalation adjustments, such as indexation, in pension plans. For those plan sponsors that offer indexation, there will be an incentive to remove that benefit from the pension plans.

Escalation adjustments should be excluded from solvency liabilities and therefore solvency funding requirements. For the purposes of harmonization and consistency, we recommend that the Draft Regulations follow the current Nova Scotia rule and continue to be harmonized with the Ontario Regulations with respect to the funding of escalation adjustments.

VI. DRAFTING ISSUES

This section of the submission notes minor drafting issues:

1. The use of the words "clause" and "subclause" is inconsistent. For example, the definition of "actuarial gain," refers to "subclauses (i), (ii) or (iii)", but the definition of "actuarial loss," refers to "clause (i), (ii) or (iii)";
2. Where sections are cross-referenced, sometimes the word "Section" is capitalized and sometimes it is not (see, for example, subsection 17(2) where the reference to Section 19 is capitalized and subsection 16(3) where the reference to sections 14 and 15 is not);
3. In the definition of "actuarial loss," the numbers (i), (ii) and (iii) are repeated twice (instead of continuing to (iv), (v) and (vi));

4. The definition of "solvency liabilities" refers to clause 17(9)(*d*), which refers back to "solvency liabilities." It may be preferable to draft "solvency liabilities" as follows:

    a. "solvency liabilities" (in relation to a report) means the liabilities of a plan determined as if the plan had been wound up on the valuation date of the report, but excluding the following liabilities: [...]

5. There is no definition for "special allowance". The Ontario Regulations include a useful definition, which should be added to give greater clarity to the use of this phrase in the permitted exclusions from the definition of solvency liabilities:

    "special allowance" means a bridging benefit that is adjusted according to the income of the former member resulting from employment of the former member subsequent to termination.

6. In subsection 7(8), the reference to "a report to which this section applies," may be rephrased as "a report under section 11, 16 or 17";
7. In subsection 7(9), insert the word "and" at the end of clause (*c*);
8. In clause 7(10)(*b*), the last subclause should be (iv) (not "(i)");
9. In subsection 8(1), the clause references should be (*a*) and (*b*) (not (*c*) and (*d*));
10. The reference in 9(1)7. to "subsection 24(4)(*a*)" should be "clause 24(4)(*a*)" to be consistent;
11. In subsection 10(6), insert the word "and" at the end of clause (*c*);
12. Subsection 11(3) refers to "under this Section". Either this phrase should be moved to follow the words "A pension plan must not be amended" or deleted (as the amortization period referred to is not in this Section);
13. In subsection 12(7), insert the word "and" at the end of clause (*b*);
14. In subsection 13(2), insert the word "and" at the end of clause (*a*);
15. In subclause 14(1)(*a*)(ii), insert the word "was" between "liability" and "determined";
16. Subsections 15(7), (8) and (9) seem to carry forward the temporary solvency rules currently found in section 6A of the Regulation, but the conditions for notice to the members and the possibility of member objections are not carried forward;
17. At the end of subsection 16(2) there should be a "." (not a ";");
18. In subsection 16(10), insert the word "and" at the end of clause (*c*);
19. In subsection 17(5) there is a reference to "subsection 108" of the Act. This reference should be changed to section 108;
20. In clause 17(8)(*e*), there is a "." after the words "section 14" that should not be there;

21. Clause 17(8)(*g*) should be broken into 2 clauses as follows:

    (*g*) where the plan provides for an escalation adjustment, whether and to what extent....before [the effective date of these regulations];

    (*h*) where the plan provides for an escalation adjustment, the means by which,

    (i).....

    (ii)....

    in relation to the pension benefits accruing under the plan after [the effective date of these regulations];

22. In subsection 17(8):
    a. insert the word "and" at the end of clause (*h*);
    b. at the end of clause (*i*), insert a "." instead of the ";";

23. In subsection 19(1), the reference to 11(1) should be subsection (or refer to section 11). Accordingly, it should be re-worded as follows: "The reports and certificates referred to in subsection 11(1) and sections 16, and 17...";

24. The list in subsection 25(2) should conform to the format used for similar lists (i.e., semi-colons at the end of each clause and the word "and" at the end of clause (*d*));

25. Clause 27(*v*) refers to subsection 55 – unclear what is the correct cross-reference; and

26. The list in subsection 28(1) should conform to the format used for similar lists (i.e., semi-colons at the end of each clause, etc.).

VII. CONCLUSION

The CBA National Pensions and Benefits Law Section trusts our comments will assist the Department 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 or otherwise in connection with the review.