THE CANADIAN BAR ASSOCIATION
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Special consultations on the report Entitled Innovating for a Sustainable Retirement System (D'Amours Report)

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 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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Special consultations on the report entitled Innovating for a Sustainable Retirement System (D'Amours Report)

INTRODUCTION

The National Pensions and Benefits Law Section of the Canadian Bar Association (CBA Section) is pleased to have the opportunity to comment on the report released on April 17th by an expert committee chaired by Alban D'Amours (the "D'Amours Report"). 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.

We are pleased to be able to contribute to the important task Québec has taken on in the area of pension plan reform.

GENERAL COMMENTS

The CBA Section cannot but applaud the government's initiative to mandate experts to study the future of our pension plans and Québec's retirement system, thus stimulating reflection on some very important issues.

We understand that, originally, the expert committee's mandate was to look at the defined benefit plans overseen by the Régie des rentes du Québec (the "Régie") but that later this mandate was broadened to include a more global analysis of the future of Québec's pension system and the formulation of appropriate recommendations.

That being said, 15 of the 21 recommendations in the report released last April 17th deal with the defined benefit plans overseen by the Régie. Meanwhile, the expert committee's mandate did not include the pension plans of Québec's civil service, which are overseen by the Commission administrative des régimes de retraite et d'assurances ("CARRA").

The CBA Section believes that experts should also take an in-depth look at the civil service pension plans. As mentioned in the D'Amours Report, some 560,000 Québec civil servants are members of one of those plans, which represents close to 41% of all Québec workers who are members of a defined benefit plan.

Meanwhile, the CBA Section is concerned about the fate of the 2,411,000 workers who have no pension plan at all, either defined contribution or defined benefit.

A. Voluntary Retirement Savings Plans (VRSPs)

Although the CBA Section supports the introduction of compulsory VRSPs, there will be no incentives for employers to contribute to them.

We have previously formulated certain concerns about how to achieve the objectives of Bill 80 (*An Act respecting voluntary retirement savings plans*), which was tabled in the 2nd session of the 39th legislature. The CBA Section will be examining Bill 39, which was introduced in the National Assembly on May 8th, and will be pleased to present its comments, if any, on that new VRSP bill.

B. Target Benefit Plans

The CBA Section agrees with the expert committee's comment that new retirement plan models, such as target benefit plans, could meet the needs of employers and employees, with risk being shared between employers and employees. The CBA Section believes that the current close scrutiny of the future of Québec's retirement system should include the introduction of target benefit plans, for they make it possible to offer a flexible retirement plan that can be adapted to the economic fluctuations of the market, the sponsor and the members. As well, innovative plan models could encourage some employers to set up new plans.

In addition to the foregoing, the CBA Section would like to submit the following comments.

I. LONGEVITY PENSION

The CBA Section notes that, unlike Recommendation 14, which proposes a formal mechanism to enable the parties to the retirement plan to agree on certain restructurings, Recommendation 1 (creation of a longevity pension) does not propose such a formal mechanism in connection with the institution of the longevity plan. The CBA Section also wonders about the

impact of instituting this pension in situations where the defined contribution pension plan or group RRSP offered by a private-sector employer is negotiated with a certified association and integrated in the collective agreement. In many cases, the contributions are clearly stipulated in the collective agreement. Accordingly, it might not be possible to implement the solutions proposed by the expert committee at page 129 of the D'Amours Report without the collective agreement being amended.

We would add that the longevity pension could potentially reduce the Guaranteed Income Supplement ("GIS") received by low-income workers. Since the workers must contribute to the longevity pension fund (which is not the case with the GIS, at least not directly) those workers would be penalized.

II. RESTRUCTURING PROCESS

The *Supplemental Pension Plans Act* ("SPPA") currently allows an employer to modify a plan so as to reduce the commitments thereunder, but only in respect of future service, unless it obtains the individual consent of each member involved. This individual consent must even be obtained in a unionized environment, where the union usually has the authority to bind its members. Such constraints limit the employer's power to restructure its plan, even when it is in a deficit situation or where the company's survival is at issue.

The expert committee has proposed that those constraints be relaxed for a period of five years so the parties can reduce certain commitments retroactively without the need to obtain the consent of each member involved. According to the expert committee, this period would allow the "reformulation of vested rights" for a limited period.

Global economic conditions and the resulting slowdown that have prevailed for several years, along with major demographic changes, demand that we, as a society, reflect on the extent and legal scope of vested rights. Québec and Canadian courts having on numerous occasions recognized the principle of vested rights in an employment context, Québec's lawmakers should be cautious in devising any restructuring programs that would affect vested rights, in particular to avoid legal grey areas that could result in litigation between employers and unions or employees.

Furthermore, the CBA Section submits the following regarding the recommendation to "reformulate vested rights,", which should take place in a bargaining context:

1. The restructuring process should be carefully designed so that it cannot be invalidated, inter alia, due to interference in labour relations (the right to bargain being protected by the right of association under the *Charter*).
2. The process should be properly supervised so that it does not result in needless labour conflict.
3. The employer's right to unilaterally reduce indexation, if maintained further to the study proposed above, could result in some injustice where plans provide for such indexation, since plans that are otherwise generous but do not provide for indexation will not be impacted by the measure.
4. The vast majority of private non-unionized plans have no indexation; the coercion mechanism will therefore have no effect on those groups.

III. NEW SO-CALLED "ENHANCED FUNDING" RULE

The CBA Section wonders about the treatment of the letters of credit that have been provided by some employers in accordance with, in particular, section 42.1 SPPA. What will happen to those letters of credit, in view of the expert committee's recommendation that the solvency rule no longer be used to define the funding of plans and determine the required contributions? Would an employer's right to use one or more letters of credit be modified to have it apply in the context of the new so-called "enhanced funding" rule? The CBA Section believes that the letter of credit situation should also be taken into account when considering the future of Québec's retirement system.

IV. GREATER COST-SHARING LATITUDE FOR PARTNERS

The CBA Section understands that in order to not systematically transfer the costs associated with pension plan deficits to new workers, the expert committee recommends that the SPPA be amended to allow the cost of some deficits to be shared amongst all members, including retirees. However, the expert committee does not mention whether that cost-sharing might be imposed on retirees or whether there should first be an objection procedure, like the one described in Recommendation 14. Given the potential impact of such cost-sharing on retirees, the CBA Section believes that the rules of the game should be clear on this issue.

V. INCREASE THE FLEXIBILITY OF OUR RETIREMENT SYSTEM

The D'Amours Report advocates greater flexibility for the legal framework, but does not propose to alleviate the complexity and administrative burden associated with defined benefit plans, which affect smaller defined benefit plans more particularly. For instance, the D'Amours Report proposed imposing a funding policy and risk-quantification assessment. Other documentation is also added, such as a benefits policy, an annuity purchasing policy (where applicable) and an amendment to the internal by-law to stipulate the terms of transfer between the asset account and the retiree account. The CBA Section is concerned about the impact that an even more onerous and constraining "administrative burden" might have on plans, and their maintenance and promotion.

VI. PAYOUT OF LOCKED-IN AMOUNTS

The CBA Section supports the idea of greater accessibility and flexibility for locked-in amounts.

In the spirit of the D'Amours Report and having regard to the proposed government plans, such as the longevity pension, retirement savings vehicles must adapt in order to facilitate their overall integration. Thus, a quicker payout of locked-in amounts as of age 60 would help to level out the income of an individual who decides to postpone his or her Quebec Pension Plan and Old Age Security benefits. An accelerated payout would be especially desirable where an individual has access to another source of income in the event his personal savings run out as he or she gets older. The policy of a payout at a younger age harmonizes with the new approach advocated in the D'Amours Report and fits in well with the longevity pension.

Also, retirees are now living longer, but many of them are also living with a disability due to a serious illness. Payouts similar to the life income fund paid out of a defined contribution plan would allow greater flexibility to deal with such life events.

VII. CONVERSION AGE

The mandatory age for converting a registered retirement savings plan could be pushed back from age 71 to 75. This would be an incentive for postponing retirement. Let us emphasize that Canadian and Québec tax laws would have to be harmonized with the recommendations of

the D'Amours Report and that postponement of the age from 71 to 75 would impose an additional tax expenditure.

VIII. ANNUITIES PURCHASED FROM AN INSURER

Currently, the SPPA limits the means that can be used to manage the risks related to retirees by not permitting, for example, the transfer of full responsibility for the payment of pensions by purchasing annuities in service from an insurer while the plan is in existence. The CBA Section supports the recommendation in the D'Amours Report which proposes the possibility of a complete release from the retirees' risk by paying the pensions through a purchase from an insurer. The pensions thus purchased should be fully guaranteed by Assuris, up to the limits set by Assuris for individual pensions. This is a way to manage pension plan maturity and transfer the risks related to those members (longevity, investment, indexing, etc.).

IX. MULTI-EMPLOYER PLANS

The D'Amours Report recommends permitting payment of the rights of "orphans" in multi-employer plans in proportion to the plan's degree of solvency, but does not specify how to determine the degree of solvency applicable to the payment (for example, would it be the one that applies now, or would it be the one that applied when the employer of the "orphan" withdrew from the plan?). The CBA Section believes that thought should be given to this.

Moreover, the CBA Section believes that the situation of employers who joined a multi-employer plan before the Québec law changes to require payment of the debt to the plan when the employer withdraws needs further thought. In the case of multi-jurisdictional multi-employer plans, Québec employers participating in such plans find themselves in a different situation than employers that have no Québec employees. The CBA Section recommends that the government take a look at the situation of such multi-employer plans and consider revisiting the obligation to pay the debt to the plan when the employer withdraws.

X. MULTI-JURISDICTIONAL PLANS

The CBA Section submits that thought should be given to multi-jurisdictional plans when new measures are implemented.

The CBA Section believes that the Québec government should not give up on initiatives that will benefit the retirement system as a whole just because Québec members would have different rights than members in other provinces, or members who are subject to the *Pension Benefits Standards Act, 1985*. However, when it implements new innovative measures, the government should consider the difficult position of employers with multi-jurisdictional plans and their plan administrators (e.g., transfer values, coordination with the longevity pension, reduction of rights). Finally, let us add that the Multi-Jurisdictional Agreement might need to be revised in order to simplify the administration of such plans further to the implementation of the recommendations of the D'Amours Report.

XI. SEPARATE ACCOUNTS

The CBA Section supports this recommendation. However, it should be properly framed in the law so as to avoid grey areas. For example, what happens in the event of a merger with a plan that does not have separate accounts? Or, if a retiree is rehired and once again participates in the plan, would one part be in the asset account and another part in the retiree account?

XII. OTHER COMMENTS

A. Death benefits

The CBA Section thinks it would be appropriate, as part of this thought process, to review death benefits in light of the reality of today's couples and families; for instance by leaving it to the member to choose who the beneficiaries will be, even if he or she has a spouse. One might also question whether the survivor's pension, as it now exists, still has its place in a pension plan.

B. Complexity

The new retirement system will mean that many Québec workers will have to make or modify certain elections related to the planning of their financial security after retirement. It will be necessary to ensure that people properly understand their options so they can make informed decisions. The CBA Section recommends organizing educational sessions and making explanatory documentation available.

C. Agreements with other levels of government or organizations

Some of the recommendations that the expert committee made will require, in particular, discussions between the Régie and the Canadian Institute of Actuaries before they can be implemented. For example, the new transfer value will necessitate such discussions. The same applies to the fiscal impact of certain measures, like the longevity pension. This raises the general issue of federal government support, which will be needed to implement a number of the recommendations in the D'Amours Report.