THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

February 21, 2018

Via email: pensions@gov.mb.ca

Ms. Linda Buchanan, Acting Superintendent of Pensions
Office of the Superintendent – Pension Commission
Room 1004 – 401 York Avenue
Winnipeg, Manitoba R3C 0P8

Dear Ms. Buchanan:

Re: Consultation on *The Pension Benefits Act* Review

The Canadian Bar Association (CBA) Pensions and Benefits Section (CBA Section) is pleased to comment on the Pension Commission of Manitoba's review of *The Pension Benefits Act* (PBA), particularly the discussion questions in the January 2018 Consultation Paper (the Consultation Paper) and the recommendations of the Pension Commission (the Recommendations). Our comments focus on Parts 3, 4, 5 and 8 of the Consultation Paper.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section contributes to national policy, reviews developing pensions and benefits legislation and promotes harmonization. Our members are involved in all aspects of pensions and benefits law, including counsel who advise pension and benefit plan administrators, pension committees, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

We note that the Manitoba Bar Association Family Law and Insolvency Law Sections are also commenting, under separate cover, on the Consultation Paper and the Recommendations of the Pension Commission. The Family Law Section focuses on Part 7 of the Consultation Paper, and the Insolvency Law Section on Parts 4 and 5 as they relate to bankruptcy and insolvency matters.

Guiding principles

The CBA Section encourages the following guiding principles in federal and provincial pension reform initiatives. Our comments on the Consultation Paper are informed by this perspective.

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Harmonization

All stakeholders benefit from an efficient and effective pension regulatory system in Canada and harmonizing pension legislation is key to facilitating that system. The CBA Section has long advocated for harmonization of pension legislation across Canada[1].

Retirement Income Security

The CBA Section believes that promoting retirement income security is an important function of government.[2] We continue to urge governments to support and promote reasonable measures to increase the funding and security of pension benefits, with appropriate consideration of the impact of those measures on pension plan sponsors, pension plan members, pension plan committees, and other stakeholders.

New plan designs

Q1: Should Manitoba develop a regulatory framework for a new target benefit or shared risk pension plan design?

The CBA Section has long advocated for increased pension coverage in Canada[3], in part through new and innovative plan designs, including target benefit plans. In general, the CBA Section supports more options being available to employers in terms of pension plan design, with the desire that employers will establish or continue to provide pension plans for their employees. However, members of the CBA Section have differing views on target benefit or shared risk plans.

On the one hand, target benefit or shared risk plans reduce benefit security and shift risk onto plan members. On the other hand, a target benefit or shared risk plan model may be more desirable and provide greater retirement income security and adequacy relative to the defined contribution plan and existing defined benefit (DB) plan models that have been terminated with insufficient assets to provide for the benefits in the plan. The target benefit or shared risk plan model offers greater predictability of both benefits and contributions than other plan models, pooling of longevity and investment risks, and flexibility of plan design to enhance sustainability. Moreover, the target benefit plan generally provides an acceptable middle ground in truly strained financial circumstances where the DB plan is in jeopardy of being eliminated.

While the CBA Section generally supports the development of new plan designs, given these differing views, it is not possible to commend unequivocal support for a particular structure and application of a target benefit regulatory framework.

Q2: If so, should a target benefit or shared risk pension plan framework be developed?

As target benefit and shared risk plan models encompass the benefits and drawbacks identified above, the CBA Section does not have a view as to which model should be developed.

Q3: Should the new plan design be available to both single employer and multi-employer plans, and both private sector and public sector plans?

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1 See for example, Canadian Bar Association, Resolution 10-01-M Harmonization of Pension Laws (February 13, 2010), available online (http://ow.ly/7pco30gHA9Z).

2 See Canadian Bar Association, Resolution 10-02-M Funding and Security of Pension Benefits (February 13, 2010), available online.

3 See Canadian Bar Association, Resolution 10-03-A Pension Coverage (August 17, 2013), available online.

Despite the variety of forms of target benefit or shared risk plan provisions in pension standards statutes across Canada, a lack of consensus remains among pension professionals as to whether they are desirable or beneficial in the single employer or public plan context. DB plans remain prevalent, particularly in the public sector. When it comes to administering a diverse multi-employer plan, particularly one where employees can move between units or employers, many CBA Section members recognize the utility of a hybrid model. These same members also recognize that in many instances target benefit plan legislation is acknowledging a form of pension plan that already exists (e.g. multi-unit pension plans/collectively bargained multi-employer pension plans/negotiated cost pension plans).

Q4: Should the new plan design be restricted to unionized environments?

Manitoba already offers Multi-Unit Pension Plans (MUPPs) which operate similarly to target benefit or shared risk plans in circumstances where a collective agreement exists.

Some CBA Section members see advantages to the availability of target benefit or shared risk plans in unionized workplaces, particularly in circumstances where the status quo is a DB plan and the employer seeks to replace it with a different plan model. These advantages, however, are not as pronounced with the existence of MUPPs, except to the extent that conversion to a target benefit plan structure reduces the risk of future benefit reductions by removing the requirement for a MUPP to fund for solvency and permitting commuted values to be paid out on a going-concern basis. If negotiation of the implementation of a target benefit or shared risk plan is required by the applicable legislation, the plan members can at least be assured a voice in the process through their union. With the appropriate level of disclosure and information, members will have a real opportunity to understand and appreciate, and to have input into changes that are being suggested.

Some CBA Section members are of the view that a bargaining agent with resources and bargaining strength will ensure that the members' interests are paramount in determining whether a target benefit plan is put in place, as well as the design and level of funding of any such plan. This will greatly impact the delivery of a secure and adequate retirement income benefit.

Other CBA Section members believe that target benefit plans should be open to non-unionized employees and workplaces and could be valuable in the non-unionized context. Expanding the new plan design to include single and multi-employer plans in both the private and public sectors where no collective agreement exists would allow more employers and plan beneficiaries access to the benefits described in our response to Question 1. Issues faced by DB plans in unionized workplaces also apply to non-unionized workplaces. Issues of negotiation, disclosure, resources, and informed consent would need to be addressed in the context of a target benefit plan in the non-unionized workplace through mechanisms other than the bargaining agent.

Q5: Should conversion to the new plan design be permitted for future benefit accruals only?

Thus far, in the short evolution of target benefit and shared risk plans in Canada, the availability of conversion of defined benefits, and especially the conversion of accrued benefits, is highly controversial and has been the subject of many challenges, including constitutional ones. A model has yet to be proposed or implemented that is free from opposition or potential for challenge. This potential is elevated where there is a possibility of converting accrued benefits, making them subject to possible reduction.

In the view of some members of the CBA Section, the ability to convert earned benefits from a guaranteed benefit to one that is contingent on external factors is unsupportable. It is inconsistent with one of the purposes of pension standards legislation – protecting accrued benefits. The hallmark of DB plan benefits is the sanctity of the promise and pension standards legislation has long been its protector, not permitting those earned benefits to be reduced, and providing that amendments with the effect of reducing accrued benefits are void. Moreover, accrued defined benefits have already been paid for by the members and pensioners through their work – the members have delivered their end of the bargain. It is objectionable to reduce compensation already agreed on and for which services were rendered.

Other members of the CBA Section believe that, with informed consent and proper safeguards, and in certain circumstances, the conversion of accrued benefit to target benefits should be permitted. In some cases, these arrangements have been the only option to maintain the DB structure while ensuring that the plan is not underfunded in the long term, and that benefits are paid according to the funds available. However, the bar for converting accrued defined benefits must be set very high.

Converting an MUPP is a special circumstance and raises fewer of the concerns above; given the similarity of how MUPPs and target benefit/ shared risk plans operate. MUPPs would need to be able to convert all benefits to target benefits (including accrued benefits, which for MUPPs are already subject to possible reduction under existing legislation) to effectively make use of the relief from solvency funding that would presumably form part of new target benefit plan rules.

Q6: If conversion of existing benefits is permitted, should union or member consent be required?

While the bar would need to be very high to permit conversion of accrued benefits, CBA Section members who support permitting conversion believe that, if the legislative goal is to facilitate conversion in ways other than by unilateral action of a DB plan sponsor, then informed consent where members choose to convert their own accrued benefits should be sufficient to allow conversion to proceed. Unanimous consent would not be required. Where active members are represented by a union, the union could consent on behalf of the active members. For retirees and non-unionized employees, consent could be obtained individually. The CBA Section also suggests that any requirement to obtain consent from active members and retirees with significant accrued benefits be polled separately from those without.

Again, however, the unique nature of MUPPs is that they already operate like a target benefit plan. The CBA Section expects that union consent for the conversion should be sufficient in this circumstance. This would accord with the requirements under British Columbia legislation for conversion of this type of plan to a target benefit plan.

Solvency deficiency funding rules

Q7: Are any of the options reasonable and practical in a Manitoba context?

Q8: If so, which option or combination of options would be most effective in balancing the different interests of plan sponsors, unions, members and retirees?

The CBA Section does not take a position on policy issues in the Consultation Paper or the Recommendations but advocates three values in considering potential changes to the funding model in Manitoba:

1. Sustainability – robustness with respect to changing economic conditions;

2. Clarity – legislative guidance on entitlements to and uses of plan funds; and

3. Harmonization – alignment with rules in provinces that have already undergone solvency funding reform.

When weighing the proposed funding models and Options 1 through 4 in the Consultation Paper, the interests of Manitoba pension stakeholders would be well served by promoting the above three values as much as possible in the circumstances.

Sustainability

As noted in the Consultation Paper, solvency funding relief has been introduced on a periodic basis since the 2007-2008 market downturn. Long term interest rates have since been chronically low, weakening plans' solvency positions. Responses to date for specific plans or classes of plans have been made on an ad-hoc and reactive basis, in Manitoba and in other Canadian jurisdictions.

A new solvency funding framework (if any) must be designed to be manageable in the long term, and fair and equitable to all stakeholders in all economic environments. There should be sufficient flexibility in the solvency funding regime to provide the necessary counterbalances to economic shifts. The CBA Section suggests a more unified and consistent funding framework. In our view, this would contribute to significant progress in meeting the goal of sustainability through promoting predictability of future funding requirements and could also address the concerns of contribution volatility.

If changes to the solvency deficiency funding rules are made, the transitional measures that will apply to bridge pension plans from the current regime to the new model also require consideration.

Clarity

With any changes proposed to the current solvency funding framework, greater clarity is needed on the potential uses of and entitlement to the funds (including, but not limited to, any other methods of funding or addressing plans in a deficiency position, such as the proposed solvency reserve accounts or the existing letter of credit provisions).

Harmonization

We highlight the need for and the inherent fairness in having rules across Canadian jurisdictions that are as harmonized as possible, particularly on funding. The Consultation Paper notes recent reforms to solvency funding have been markedly different across different Canadian jurisdictions:

- The approach in Alberta and British Columbia preserves solvency funding requirements, but provides for solvency reserve accounts to allow withdrawal of funds if certain conditions are met.
- Québec, on the other hand, has recently eliminated the requirement for solvency funding for most ongoing plans altogether, albeit with the corollary introduction of a new stabilization provision as well as accompanying changes to the rules governing portability and surplus rights.
- Ontario has announced that it will essentially eliminate the solvency funding requirement for defined benefit plans provided the plans maintain at least an 85% funding ratio, similar to the Recommendations. This will be coupled with a new requirement to establish a funding reserve within the plan and a shortened amortization period for funding a shortfall.

Should Manitoba's rules deviate from these approaches it would further exacerbate this patchwork of funding rules.

The Canadian Association of Pension Supervisory Authorities is working towards a new agreement for 2018 that is intended to harmonize, among other things, funding rules for multi-jurisdictional plans. Adopting a distinct solvency funding framework that applies for Manitoba-registered plans would complicate the implementation of an agreement.

As noted above, the CBA Section does not take a position on the policy issues. However, the status quo option (Option 4) with a continued *ad hoc* response to solvency funding relief requests is the approach least likely to manage the challenges of pension plan funding that is flexible and predictable.

Q9: If a regulatory framework based on option 1 is developed, which approach or combination of approaches described under option 1 should be considered?

Q10: If the 100% solvency threshold is reduced to require partial funding, is a threshold of 85% appropriate? If not, what should the threshold be?

The CBA Section does not take a position on the appropriateness of a particular solvency threshold. The Recommendations adopt an 85% threshold, consistent with the recent Ontario reforms, which would achieve harmony in that regard. However, Ontario, unlike Manitoba, does give pension beneficiaries the security of the Pension Benefits Guarantee Fund and benefit enhancements relating to statutory grow-in requirements in section 74 of the Ontario *Pension Benefits Act.* These factors need to be considered in determining a solvency threshold that is appropriate in Manitoba. A review of the solvency funded status of the 78 Manitoba DB registered pension plans may also be an appropriate step in determining a solvency threshold in order that the reforms respond to concerns of Manitoba's current DB plans in the current economic environment.

Q11: Are there any other reforms to the funding framework that should be considered?

Reform of the funding framework may also engage a review of how contribution holidays, ongoing surplus withdrawals, and benefit improvement funding are to be addressed. For example, the recent Ontario consultation on funding reform considered these issues as part of the overall balancing of the interests of pension stakeholders. The reforms would also need to account for exceptions for certain classes of plans including any new plan designs that are adopted.

Many DB plan sponsors consider purchasing annuities as part of a de-risking strategy, an option which clearly benefits the associated member by transferring the pension obligation to a licensed annuity provider. However, under the current legislation and case law, DB plan sponsors are left with a residual liability to those members, notwithstanding the annuity purchased. There is also uncertainty between annuitants and remaining plan beneficiaries if a plan is ultimately wound-up in an underfunded position. The CBA Section supports giving a statutory release from liability for administrators or sponsors who purchase an annuity for a benefit entitlement payable under a DB provision of a registered pension plan and providing guidelines for funding annuity purchases and the status of annuitants following the purchase.

British Columbia already provides a statutory release of this nature: section 89.1 of the British Columbia *Pension Benefits Standards Act*, along with section 83 of the associated regulations gives guidance on this issue and is a possible precedent. The Ontario *Pension Benefits Act* has also recently been amended to add a new section 43.1 to facilitate buy-out annuity purchases and provide more certainty on the rights and obligations of members/annuitants and administrators. A harmonized approach whereby plans with members across different jurisdictions can achieve a Canada-wide de-risking approach would be welcome.

The CBA Section also recommends that any statutory amendment allowing for a release from liability apply to annuities purchased in the past that meet the requirements of the legislation. Some plan sponsors may not be aware of the potential residual liability notwithstanding the purchase of an annuity. Further, the policy rationale for encouraging annuity purchases going forward also applies to the annuities purchased in the past.

Locking-in provisions and access to locked-in pension funds

Q12: Should Manitoba develop a regulatory framework to permit locked-in funds to be accessed due to financial hardship? If so, under what conditions?

Q13: Should other reforms to the locking-in provisions in the PBA be considered?

From a harmonization perspective, the CBA Section supports unlocking options consistent with other jurisdictions as referred to in the Consultation Paper.

Clarification/legislative gaps

Q20: Should the provisions setting out when an individual ceases to be an active member of a DB Plan be amended to provide that a member can choose to suspend membership and contributions at normal retirement age (normally age 65) while remaining employed, and upon subsequent commencement of a pension, receive the actuarially increased value of the pension accrued to age 65?

In general, the CBA Section supports measures that give pension plan members flexibility around retirement planning. Such a change would be consistent with the ability to delay commencement of Canada Pension Plan (CPP) in exchange for an increase in the amount of the monthly CPP payment. Any delayed payment and actuarial increase would of course need to be made in accordance with the *Income Tax Act* and relevant Canada Revenue Agency policy.

Q21: Should the provision setting out entitlement to ancillary benefits be amended to clarify when an ancillary benefit is vested and must be included in the calculation of commuted values?

Section 21.1(2) of the PBA provides that plan members are not vested in an ancillary benefit for the purposes of calculating a monthly pension or commuted value until they meet all the requirements under the pension plan necessary to exercise the right to receive the benefit. This wording is consistent with pension legislation in other jurisdictions, including British Columbia and Alberta, and appears to recognize that decisions about plan design are decisions to be made by the plan sponsor. The CBA Section finds section 21.1(2) clear, but notes that it may be useful, for further clarity, to add that an ancillary benefit in respect of a member cannot be reduced to the extent that the member has met all of the requirements in the plan text necessary to exercise the right to receive such ancillary benefit (with exception for MUPPs and target benefit plans, as applicable). In addition, we note that the British Columbia and Alberta legislation requires the plan text to establish the basis on which the payment of ancillary benefits is to be made (whether on the basis of age, years of plan membership, or other factors consented to by the Superintendent).

Q22: Should the pension committee requirements be amended to clarify that if there is no inactive member in the plan, or no inactive member willing to be on a pension committee, the inactive member position can remain vacant?

The PBA now states that where a plan is to be administered by a pension committee the plan must provide for the appointment or election of at least one voting member of the committee by the non-active members (as opposed to inactive members). However, several plans in Manitoba do not have any non-active members in the plan. These committees are either not in compliance with the PBA or with their plan with respect to the voting members of the committee.

The CBA Section supports amendments to clarify that where a plan is to be administered by a pension committee and there are not any non-active members in the plan, or any non-active members willing to be appointed or elected to the pension committee, the non-active members will not be required to appoint or elect at least one voting member of the pension committee.

The CBA Section presumes that the change would apply similarly to the requirements for the composition of a board of trustees of a MUPP under section 26.1(4) of the PBA.

The CBA Section appreciates the opportunity to provide our perspectives on your Consultation. We trust that our comments are helpful and would be pleased to provide any further clarification.

Yours truly,

(*Original letter signed by Gillian Carter for Elizabeth Brown*)

Elizabeth Brown
Chair, CBA Pensions and Benefits Law Section