



Novembre 20, 2020

Via email: andrew.nicholson@fcnb.ca, secretary@fcnb.ca

Andrew Nicholson
Director, Unclaimed Properties
Financial and Consumer Services Commission
85 Charlotte Street., Suite 300
Saint John, NB E2L 2J2

Dear Mr. Nicholson:

Re: Proposed Rules under the Unclaimed *Property Act*

The Canadian Bar Association Pensions and Benefits Law Section (CBA Section) is pleased to comment on the Financial and Consumer Services Commission's proposed rules UP-001 - *Unclaimed Property - General* (General Rule) and UP-002 *Unclaimed Property - Fees* made under the *Unclaimed Property Act* of New Brunswick. The proposed rules establish a framework to implement New Brunswick's statutory unclaimed property regime.

The CBA is a national association of over 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 plan administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefit consultants, and investment managers and advisors.

The CBA has long advocated for governments to create funds for unclaimed entitlements and to establish internet-based tools to help former pension plan members and other beneficiaries search for unclaimed entitlements¹. As such, we applaud the new legislation and this consultation.

Harmonization

In our view, harmonization is of the utmost importance for reform on unclaimed entitlements harmonization². Harmonization helps diminish unnecessary regulatory burden and lessens administrative costs, especially for multi-jurisdictional plans. Ultimately, a harmonized approach to pension sector reforms supports efficiency in pension administration, reduces regional inequities and encourages broader pension coverage.

¹ [Protecting Unclaimed Pension Monies](#): Canadian Bar Association Resolution 13-01-M.

² [Harmonization of Pension Laws](#): Canadian Bar Association Resolution 10-01-M.

Three provinces - British Columbia, Alberta, and Quebec - have enacted legislation addressing unclaimed entitlements. In addition, consultations on a regime for unclaimed property have recently been undertaken in the federal jurisdiction and Manitoba. As such, New Brunswick has the opportunity to harmonize its rules, to the greatest extent possible, with those of other jurisdictions.

Extending Proposed Regime to Ongoing Pension Plans

The CBA Section applauds that the proposed General Rule recognizes the unclaimed entitlements under pension plans that have been wound-up. However, under the General Rule, unclaimed entitlements in ongoing pension plans are not eligible to be transferred to the unclaimed property fund. We recommend that, in addition to entitlements in a wound-up pension plan, unclaimed entitlements from ongoing pension plans be made eligible for transfer to the unclaimed property fund, at the option of the plan administrator.

In ongoing plans, unclaimed pensions entitlements arise when members, having reached the age when benefits must be paid under the terms of the plan or pursuant to applicable legislation, do not claim their benefits and, despite reasonable search efforts, cannot be located by the plan administrator.

In these situations, plan administrators are confronted with significant challenges. A constant concern is that if benefits remain unclaimed, plan administrators are unable to comply with the federal *Income Tax Act* (ITA) requirement that benefits from a registered pension plan must begin to be paid no later than the end of the year in which the beneficiary attains age 71. In addition, unclaimed entitlements impose administrative burdens on the administrators of ongoing pension plans, such as the ongoing requirement to conduct periodic searches, the cost of which can sometimes outstrip the value of the unclaimed pension entitlement.

Expanding the unclaimed property regime to support unclaimed entitlements from ongoing pension plans will also benefit former members and beneficiaries, who are often unaware of the unclaimed pension entitlement. Further, while owners of unclaimed entitlements are generally best positioned to contact the plan administrator in respect of such amounts, they may face difficulties contacting the administrator if the situation of the plan or the plan sponsor has changed since the entitlement to the benefit first arose. In these cases, it is clearly easier for the owners of unclaimed entitlements or their beneficiaries to search the database of the unclaimed property fund rather than track down the plan administrator.

This is the approach taken in Alberta and Quebec's legislation. In Alberta, plan administrators may, for ongoing plans, and must, for terminated plans, transfer the unclaimed entitlements of missing members to Alberta's unclaimed property registry. In Quebec, plan administrators must transfer unclaimed entitlements to Revenue Quebec within three years following the due date of payment, regardless of whether the plan is ongoing or terminated. Of the provinces with statutory unclaimed property regimes, British Columbia is the only one where the transfer of unclaimed entitlements from ongoing pension plans is unavailable.

The CBA Section encourages New Brunswick to foster cross-jurisdictional harmonization and lessen administrative burden by adopting the flexibility of the Alberta approach by permitting administrators of ongoing pension plans to transfer unclaimed entitlements to the unclaimed property fund, in addition to requiring them to transfer unclaimed entitlements from wound-up plans.

When do Entitlements Become Unclaimed Property?

British Columbia, Alberta and Quebec all prescribe different time periods for pension benefits to be deemed unclaimed or otherwise capable of being transferred to the jurisdiction's unclaimed property agency. These periods range from as short as 90 days in Alberta (provided efforts are undertaken to show that a member is indeed missing), to five years in British Columbia.

In our view, the 3-year period in the proposed General Rule is too long for unclaimed entitlements to be held in wound-up plans before they can be transferred to the unclaimed property fund. Of primary concern is that if unpaid amounts remain in a plan after it is wound-up, then the *Pension Benefits Act* of New Brunswick (*PBA*) will require the plan to remain open and the administrator will continue to be obliged to oversee the remaining funds and search for missing members in order to fulfill its fiduciary duties. Rather than only presuming unclaimed entitlements in wound-up plans to be unclaimed property three years after the Superintendent of Pensions approves the wind-up report, we recommend that the General Rule be revised to allow the administrator of such a plan to presume unclaimed entitlements to be unclaimed property (and therefore, transferrable to the unclaimed property fund) as soon as the administrator has conducted a reasonable search and is satisfied that the former members and beneficiaries to whom those unclaimed entitlements relate are unlocatable.

To be clear, the CBA Section agrees with the 3-year timeline after which property must be transferred from a wound-up plan, but strongly encourages the Commission to allow the administrators of such plans the option of transferring amounts earlier than that if they reasonably believe a former member or beneficiary to be missing.

Due to the 90-days that the *PBA* gives members and beneficiaries to make pension benefit elections on wind-up, we recommend that the General Rule be revised so that unclaimed entitlements on wind-up are presumed to be unclaimed property not earlier than 90 days after the plan administrator has attempted to administer such elections, provided that the plan administrator has also conducted a reasonable search for the former member or beneficiary and is satisfied that they are unlocatable.

We encourage the Commission to similarly revise the General Rule so that unclaimed entitlements from ongoing plans may be presumed to be unclaimed property as soon as the administrator has conducted a reasonable search for the former member or beneficiary and believes them to be unlocatable. However, to minimize ongoing administrative burdens and to build compliance with the *ITA* into the unclaimed property regime, unclaimed entitlements from ongoing plans should be presumed unclaimed at the earlier of 3 years from the last date of contact with the former member or beneficiary and 90 days prior to December 31 of the year in which the former member or beneficiary attains age 71.

While we believe this approach would improve the wind-up process in all circumstances, the benefits would be especially apparent in the bankruptcy and insolvency context, as organizations would not be burdened by lingering fiduciary obligations owed to unlocatable members. For an ongoing plan, the improvements are laid out in the section above. For an ongoing plan and a wind-up, this approach will assist former members and beneficiaries gain access to their benefits, because it would allow plan administrators to remit unclaimed entitlements to the unclaimed property fund sooner, and would alleviate the need for former members and beneficiaries to work through any changes undergone by the pension plan or plan sponsor.

In our view, adopting a shorter period before which unclaimed entitlements are presumed to be unclaimed property would enhance cross-jurisdictional harmonization (especially with Alberta), significantly reduce ongoing administration costs incurred by both wound-up and ongoing plans,

make it easier for former members and beneficiaries to access their entitlements, and allow administrators of ongoing plans to comply with the requirements of the *ITA*.

We appreciate the opportunity to comment on the proposed rules. We trust our comments are helpful and would be pleased to offer further clarification.

Yours truly,

(original letter signed by Marc-André O'Rourke for Jeff Sommers)

Jeff Sommers
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