THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

# Nova Scotia Pension Review Panel: Position Paper

**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 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.

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# Nova Scotia Pension Review Panel: Position Paper

## I. INTRODUCTION

The Canadian Bar Association's National Pensions and Benefits Law Section (CBA Section) is pleased to respond to the Nova Scotia Pension Review Panel's Position Paper[1]. The CBA Section is comprised of lawyers from across Canada who practice in the pensions and benefits area. Since pension regulation is inherently multi-jurisdictional, one of the objectives of the CBA Section is to contribute to the harmonization of pension laws across Canada.

## II. SPECIFIC COMMENTS

We have used the numbering system from the position paper to organize our specific comments. Our comments reflect a consensus of the CBA Section on most of the issues raised in the position paper. In a few areas where that has not been possible, we have distinguished between the views of our members who frequently act for employees, retirees and trade union sponsored plans (Employee/Union members) and those who more frequently act for plan sponsors, employers and administrators (Sponsor/Administrator members).

### 2.2 Goals of Pension Legislation and Regulation

The goals of pension legislation should be clear, and the CBA Section supports an explicit statement of those goals in the legislation. The statement would also serve as an interpretive aid. We suggest that goal 1(b) be clarified as to when benefits may be reduced, such as in the adjustable contribution/benefit (ACB) plans described in section 3.1.1. We also suggest that goal 3 be revised to refer to "all aspects of pension plan administration other than information pertaining to individual members". While we support the concept of transparency concerning plan administration issues (excluding information pertaining to individual members for privacy reasons), we caution that the reference to all aspects of

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[1] Report released on October 17, 2008.

pension plans could be interpreted so broadly as to include plan design information, including discussions of future possible plan amendments.

### 3.1.1 Adjustable Contribution/Benefit Plans

We agree that the legislation should promote flexibility in plan design, to enable plan sponsors and employee groups to select an appropriate plan design for a particular workforce.

**Promotion of Defined Benefit (DB) Plans**

The CBA Section agrees that government should take steps to promote defined benefit plans, and that promotion should be supported by appropriate legislation and regulation.

**Defined Contribution (DC) - Employee Investment Choices Disbursement Options**

We agree that the plan administrator should determine the investment options offered to employees. We support the following features for DC Plans:

1. Automatic enrolment with opting out, which would maximize possible membership
2. Allow part time employees to be members, where full time employees have a defined benefit plan
3. Ability to transfer account balances of terminated members out of the plan
4. Ability to offer Life Income Fund (LIF) payments, such as periodic payments or an annuity payment from the plan
5. Rules governing a default fund or default options, to ensure that members who fail to actively manage their accounts are properly protected and to clearly establish the obligations of the plan administrator
6. Rules governing investment choices, to control the number of investment choices and the type of investments offered to members
7. Rules for the content of periodic benefit statements to add clarity of disclosure to plan members regarding their investment choices and account balances. Also requiring annual benefit statements to contain an estimate of the retirement income that could be provided by a member's account balance at the plan's normal retirement age would help DC pension plan members to determine if they are saving enough to achieve their retirement income goals.

In our view, new legislative provisions should address what information, education and advice members should be entitled to receive. In addition to the information currently prescribed in the Act, we suggest that provisions be added to establish specific information that must be disclosed to members when a new DC plan is set up and when a new member joins. New rules should also prescribe requirements for continuing disclosure to active members regarding how the plan works and how the investment choices under the plan may be exercised. The purpose would be to establish clear rules designed to ensure that members receive sufficient information and that all participants – the employer, service providers and members – clearly understand the extent of their rights and obligations.

### 3.2 Province-Wide Plan

The CBA Section supports the recommendation for a provincial plan given its potential to offer private employers a simple and cost-efficient alternative to the administrative burden of developing and maintaining a stand-alone pension plan. We agree with the Panel that the complexity, risk and legal obligations confronting plan sponsors is an impediment to private employers establishing pension plans. In our view, a provincial plan must not only increase cost efficiency by pooling administrative and investment resources, but also insulate participating employers from potential litigation by providing standardized reporting, investment selection and administration for all those participating in the plan. Participation should be voluntary, rather than based on an opt-out approach. Flexibility in design and contribution levels will also be important.

### 3.3 Funding on Accrued Benefit Basis with Eight Year Amortization

The CBA Section agrees that a goal of pension legislation should be to maximize the likelihood that pension promises are met by prescribing appropriate minimum funding requirements.

However, it is of paramount importance that pension legislation provides uniform funding standards in all Canadian jurisdictions. While some jurisdictions have chosen to exempt certain benefits from solvency valuations (such as Ontario with respect to indexation), funding standards are currently uniform in both federal and provincial legislation. Such

standards require valuations on both an ongoing and a solvency basis and impose amortization of funding deficits over fifteen years and solvency deficits over five years.

We do not support the recommendations to do away with solvency valuations, impose a uniform amortization period of eight years and mitigate volatility through the five percent “collar”, as they represent a significant departure from uniformity. We note that time has not permitted a thorough discussion of the more technical aspects of this recommendation, in particular the mechanism and assumptions outlined in appendix b to the position paper.

### 3.4 Grow-In Benefits

Employee/Union members of the CBA Section do not agree with eliminating grow-in benefits. They generally view such benefits as providing important protections to plan members.

On the other hand, Sponsor/Administrator members of the CBA Section believe that eliminating mandatory grow-in benefits:

- is consistent with the proposal to eliminate partial wind-ups
- is a step toward the harmonization of pension benefits across the country; and
- by eliminating a financial burden on plan sponsors in a time of increasing solvency deficits, may encourage the retention of defined benefit plans.

The CBA Section agrees with the general proposition that benefits should be funded to make it more likely that pension promises will be kept and expectations met. This proposition should apply equally to grow-in benefits if they are retained in specific plans.

### 3.5 Partial Wind-Up

The CBA Section agrees with the requirement that the employer must fund any deficit in the event of an employee terminating employment, whether this is a single termination or group termination.

The Sponsor/Administrator members of the CBA Section support the proposal to eliminate the concept of partial wind-up in pension plan legislation. They also note that the Panel appears to suggest that a departing employee will be entitled to full commuted value on termination, even if the Plan is in deficit. While likely not material if involving only one individual employee, if there is a group termination from an underfunded plan and all terminating employees receive their full commuted value, the benefit security for remaining employees may be significantly impaired. The Sponsor/Administrator members suggest that payments to departing employees be limited to reflect the level of funding in the plan at the time of termination, and further payments be dependent on future contributions being made so that benefit security for remaining employees is maintained.

On the other hand, Employee/Union members of the CBA Section oppose the proposal to eliminate the concept of partial wind-up in pension plan legislation. They believe that partial wind-ups provide important protections to members, similar to grow-in benefits.

### 3.6 Unlocking

We support continued locking-in (subject to the present exceptions for considerably shortened life expectancy and economic hardship) to ensure that pension benefits that accumulate on a tax deferred basis are used for their present public policy objective of providing a retirement income. The Panel proposes providing full unlocking at age sixty for members of DC plans, while retaining the current regime for DB plans. We are concerned that this differential treatment could encourage the further decline of DB plans. It is also contrary to the Panel's stated goal of not favouring one form of pension over others. One of the "non-contentious principles for common pension standards" in the recently released *Report on CAPSA's Work on Regulatory Principles for a Model Pension Law*[2] is that all amounts, whether in the plan or transferred out, must be locked-in to provide a pension on retirement (with various stated exceptions similar to those currently in place). We are concerned that adopting the unlocking proposals would decrease harmonization amongst jurisdictions.

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[2] North York, ON: Canadian Association of Pension Supervisory Authorities, October 31, 2008.

## 3.7 Governance

Requiring a governance plan is reasonable, but we disagree with the requirement that the plan must be filed. Requiring review by the Superintendent would only be beneficial if the resources and expertise are available for expeditious review and comment on governance plans. In most jurisdictions, a Statement of Investment Policies and Procedures must be prepared, but no longer need to be filed. We suggest a similar approach for governance plans. Governance plans should be included in the list of documents and information under the *Nova Scotia Pension Benefits Act* (PBA) that must be disclosed to a member or member's representative on request.

The Panel also suggests that the governance plan should meet "generally accepted practice in the Pension Industry" but does not then recommend any specific standards through legislation or otherwise. Without specific standards, the suggested requirement is likely to only result in uncertainty and lack of clarity.

The Panel proposes that approved changes to the governance model be automatically approved by the Superintendent unless "significant abnormalities exist". Again, the meaning of "significant abnormalities" is unclear. This will also result in uncertainty for plan administrators and the regulator.

The Panel recommends that failure to follow a filed governance plan should be deemed evidence of a lack of prudence under the Act. We expect the result is likely to be very general and very brief governance plans. As such, this proposal would be contrary to the public policy objective in requiring governance plans. Questions about whether the prudence standard under the Act has been satisfied should be left to the courts after considering all relevant evidence.

### 3.7.1 Advisory Committees

The commentary in section 3.7.1 seems to 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 proposed legal responsibilities for the enhanced advisory committees are unclear and should be clarified in the legislation. The Panel's recommendation on advisory committees should not result in those committees assuming liability without any decision making power. Thorough consideration should be given to the potential costs and conflicts of interest associated with the proposal to pay costs from the fund and to have access to plan professional advisors. Any change should ensure that existing plan administrator responsibilities continue with the help of an advisory committee better equipped to address advisory functions. Where the administrator is a joint board or committee, an advisory committee would appear to be an unnecessary cost.

The Panel has not recommended making advisory committees mandatory, which is reasonable. At the same time, it would be appropriate to remove existing barriers to the establishment of advisory committees.

The Panel has recommended that advisory committees be entitled to reasonable access to professional advisors and that the associated costs be paid from the fund. We agree with these recommendations. It should be clarified though who will determine whether professional advice should be sought and whether the costs may be paid from the fund. As the plan administrator has the overall fiduciary duty to the members, the plan administrator should be required to assess and determine whether a particular request and cost is reasonable. Recourse may be had to the Superintendent in the event of any dispute.

There are also implications for the independence of the advisory committee. It does not appear that the Panel proposes access to professional advisors independent of the plan administrator and the plan sponsor. In our view, it would be inappropriate for the Superintendent to rely on the agreement of or decisions of advisory committees in making regulatory decisions with respect to the plan, as the Panel suggests.

The Panel says that the liability of the plan sponsor could be reduced in certain circumstances as a result of an advisory committee. For example, it suggests that having the advisory committee approve the investment options for a DC plan could reduce the sponsor's liability. This proposal raises the question of the potential liability of the members

of the advisory committee. Measures should be put in place to address the potential liability for members of the advisory committees.

The Panel has suggested that sponsors would benefit from advisory committees since they would not have to send certain information to individual employees. Issues of cost, administrative support and privacy are not addressed. We suggest that administrators should retain the overall responsibility for member communications, with advisory committees being entitled access to these communications, subject to privacy limitations concerning individual information.

We agree that members of advisory committees will need orientation and ongoing training and that the Nova Scotia Department of Labour and Workforce Development should be part of such training. Rules concerning advisory committees should address training and the payment of reasonable training costs out of the fund.

### 3.8 Regulator/Appeals

The Position Paper states that it is inappropriate for the Superintendent to review her own decisions and we agree. Employee/Union members of the CBA Section strongly agree with the Panel's recommendation that appeals be heard by the Nova Scotia Labour Relations Board (LRB). Pension disputes are grounded in employment and labour relations matters and a board familiar with these issues is appropriate. Those appointed to the LRB should have specialized knowledge of pension matters and additional resources should be made available for this to occur.

On the other hand, Sponsor/Administrator members of the Section suggest that it is more appropriate for appeals to be heard by the Nova Scotia Utility and Review Board (URB).

Appeals from decisions of the pension regulators are made to third party tribunals in British Columbia, Manitoba, New Brunswick, Ontario and Quebec.

Only one of these provinces – New Brunswick – adjudicates pension appeals before a labour board. In that province, the Labour and Employment Board is a unified board which, unlike

the Nova Scotia LRB, is responsible for adjudicating matters under several pieces of legislation, including the *Industrial Relations Act*, *Public Service Labour Relations Act*, *Employment Standards Act*, *Pension Benefits Act*, *Human Rights Act* and *Fisheries Bargaining Act*.

In Quebec, appeals are considered by the Administrative Tribunal of Quebec (ATQ), which was amalgamated from five administrative tribunals. The ATQ considers appeals in all government matters and adjudicates matters under four divisions: Social Affairs; Immovable Property; Territory and Environment; and Economic Affairs.

In the remaining provinces with third party tribunals, appeals are considered by a tribunal focused specifically on financial services or pension issues.

A unified board could allow the appellate tribunal to have more resources and develop more expertise, particularly with respect to financial matters. There would be the potential for increased access to staff and funding, and additional experience in adjudicating complex issues involving multiple and diverse parties. In Nova Scotia, the most similar amalgamated board is the URB, which was initially to combine four boards:

- Board of Commissioners of Public Utilities
- Nova Scotia Municipal Board
- Expropriations Compensation Board
- Nova Scotia Tax Review Board

The Sponsor/Administrator members of the Section believe that the URB has greater expertise and resources to adjudicate pension issues than the LRB. The issues before the Superintendent of Pensions are more similar to matters normally before the URB than the LRB. For example,

- Pension regulator decisions usually involve more financial and tax issues than labour relations issues.

- Hearings of pension matters could involve multiple diverse parties. In addition to employers and unions, pension hearings could also involve trustees, plan members, retirees and financial institutions.
- Hearings would require consideration of expert opinion such as actuaries.

### 3.9 Harmonization

The CBA Section supports harmonization of pension laws across Canada, as we believe the result would be a reduction of duplicative or unnecessary regulatory burdens. To be effective, harmonization efforts like those recommended by the Panel must be reciprocated by other jurisdictions. A stipulation under Nova Scotia law that the pension laws of another jurisdiction be applied to provincially regulated Nova Scotia employees would only be effective if the other jurisdiction also agreed that the application of its laws would be extended to these Nova Scotia employees.

Harmonization will likely only be obtained through the Canadian Association of Pension Supervisory Authorities (CAPSA). CAPSA released a consultation document on October 21, 2008[3] setting out a proposed framework for greater harmonization of pension laws in Canada. The CAPSA consultation document does not propose harmonization in the manner suggested by the Panel. The CBA Section plans to participate in the CAPSA consultation, and recommends that the Panel urge the Nova Scotia government to support the harmonization initiatives of CAPSA, rather than proceeding unilaterally.

### 3.11 Phased Retirement

The CBA Section agrees with the Panel’s recommendation that the *Pension Benefits Act* should permit, but not require, phased retirement.

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3 *Proposed Agreement Respecting Multi-Jurisdictional Pension Plans* (North York, ON: Canadian Association of Pension Supervisory Authorities, October 21, 2008).

## 3.12 Vesting

The CBA Section disagrees with the requirement for immediate vesting. The current vesting rules are adequate and immediate vesting is unnecessary. Extensive actuarial calculations and paperwork are required whenever a vested employee in a defined benefit plan terminates membership. Given that employee turnover in the first two years of employment is often high, immediate vesting could result in greatly increased administrative costs and further drive employers away from defined benefit plans. The Panel's independent research pointed out that employers typically view pension plans as "a tool for attracting and retaining employees". The immediate vesting requirement could have the effect of taking away one of the ways that employers can attempt to retain new employees. Quebec is currently the only jurisdiction in Canada that requires immediate vesting.

## 3.13 Classes of Employees

We recommend maintaining a list of acceptable classes of employees, as this provides some certainty as to the permitted types of classes. In addition to an enumerated list, we agree that the employer should be permitted to designate additional classes of employees, subject to collective bargaining agreements and human rights standards. This approach would likely minimize the need for oversight by the Superintendent.

## 3.14 Access to Information

We agree with providing broad rights of access to information for employees and their representatives. The PBA already provides broad rights of access to the files of the Superintendent and of the administrator. Such 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 the members are interested in the information) will result in meaningful communication to the members. Instead, we recommend that the Panel's recommendations focus on ensuring that the annual statement to members contains all essential information. For example, the annual statement should be required to set out the funded status of a DB Plan. Currently, annual statements in Nova Scotia are not required to obtain this information. Annual statements could also be required to refer to the information access rights of members under the PBA.

## III. CONCLUSION

The CBA Section trusts that our comments will assist the Panel in its work. We have been limited by time constraints from responding thoroughly to every issue raised, but would be pleased to respond to any questions and to provide further information regarding any of the items addressed in this submission or otherwise in connection with the review.