



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

INFLUENCE. LEADERSHIP. PROTECTION.

August 27, 2015

Via email: pensions@fin.gc.ca; K.Sorenson@fin.gc.ca

The Honourable Kevin Sorenson, P.C., M.P.
Minister of State [Finance]
Finance Canada
90 Elgin Street
Ottawa, ON K1A 0G5

Dear Minister Sorenson:

Re: Multilateral Agreement Respecting Pooled Registered Pension Plans

I am writing on behalf of the Canadian Bar Association's Pensions and Benefits Law Section (CBA Section) in response to the consultation on the proposed multilateral agreement (Proposed Agreement) respecting Pooled Registered Pension Plans (PRPPs).

The Canadian Bar Association is a national association of 36,000 lawyers, Québec notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers from across Canada who practise in the pensions and benefits area of law, including counsel to benefit administrators, employers, unions, employees and employee groups, trust and insurance companies, pension and benefits consultants, investment managers and advisors.

We support properly structured PRPPs as a low-cost retirement savings option for Canadians, particularly the self-employed and employees of small and medium-sized businesses.

The CBA Section believes that legislative and regulatory harmonization is essential for PRPPs to achieve their intended goal. We have advocated for harmonization and, in mid-2014, wrote to provincial governments to encourage them to harmonize their legislation with the federal act. Among other things, we believe that there should be one supervisory authority to oversee all aspects of PRPP regulation by means of delegation through a multi-jurisdiction agreement. This is of particular relevance to multi-jurisdictional PRPPs.

The CBA Section commends Finance Canada for introducing the Proposed Agreement as a mechanism for achieving regulatory harmonization of PRPPs across Canada and appreciates the opportunity to share our views.

General Comments

The CBA Section supports the concept of a multilateral agreement that would permit consistent and uniform supervision of multi-jurisdictional PRPPs. It could also reduce the possibility of inequities in the treatment and regulation of PRPPs and PRPP administrators across jurisdictions. The delegation of powers from one PRPP supervisory authority to another promotes regulatory harmonization while facilitating administration of a PRPP where it is offered in more than one jurisdiction.

Limiting the number of regulating entities that a PRPP administrator must deal with for a multi-jurisdictional PRPP would ease administration and allow lower administrative costs. It would encourage eligible PRPP administrators to offer a single PRPP across multiple jurisdictions, as opposed to different PRPPs in different jurisdictions (with ensuing increased costs).

According to the media release, the purpose of the Proposed Agreement is to ensure that plan administrators across Canada only need to deal with one supervisor, namely the Office of the Superintendent of Financial Institutions (OSFI), for administrator licensing, plan registration and ongoing plan supervision, and to remove the need to pay multiple licensing and registration fees in several provinces, resulting in lower costs and removing "red tape".

We support the objectives of the Proposed Agreement, and recommend that it be expanded to better achieve these objectives.

The Proposed Agreement provides that an administrator holding a federal PRPP administrator licence is exempt from the requirement to obtain a licence under applicable provincial PRPP legislation in the provinces that are parties to the Proposed Agreement. It also provides that an administrator with an administrator licence in respect of a Voluntary Retirement Savings Plan (VRSP) is not required to obtain a federal PRPP administrator licence. The Proposed Agreement does not grant any exemption or automatically grant an administrator licence or a simplified application process in the following situations:

- (a) An entity that has obtained a provincial PRPP administrator licence and wants to offer PRPP(s) in other provinces.
- (b) An entity that has obtained a VRSP administrator licence and wants to offer PRPP(s) in other provinces or vice versa.
- (c) An entity that has obtained a provincial PRPP administrator licence and wants to offer a federal PRPP.
- (d) An entity that has obtained a provincial PRPP licence and wants to offer a federal PRPP.

Without expanding the Proposed Agreement to include these examples, it is not truly multilateral.

In addition, the Proposed Agreement allows the provinces identified in Schedule A (Alberta, British Columbia, Nova Scotia, Saskatchewan), and to a certain extent Québec, to be signatories. Section 16 sets out a mechanism for other provinces to become parties to the Proposed Agreement in the future. While we support allowing provinces to subsequently become parties to the Proposed Agreement, the limited application of the Proposed Agreement may not provide enough incentive for other provinces to join.

The CBA Section is also concerned that the Proposed Agreement will be beneficial to PRPP administrators, but will create issues relating to conflict of laws, as well as complexity in the application of PRPPs, that will negatively impact Canadians who participate in PRPPs.

The Proposed Agreement is also limited in how it relates to the registration of PRPPs and VRSPs. The Proposed Agreement does not provide much benefit for registration except for a PRPP registered with OSFI and also used as a provincial PRPP in the provinces which are parties to the Proposed Agreement. There is no exemption from registration for a federally registered PRPP which is also used as a VRSP or for a provincially registered PRPP which is also used as a federal PRPP or a VRSP.

In Québec, the Proposed Agreement would have limited application with VRSPs. The consultation published in the July 15, 2015 edition of the *Gazette officielle du Québec* states that the *Autorité des marchés financiers* (AMF) agrees to be bound only by Parts I, II, VI and VII of the Proposed Agreement. It also appears from subsections 2(1), 2(2), and 6(1) and sections 9 to 11 of the Proposed Agreement as well as Schedules A and C that some of the most important provisions will not apply to VRSPs. A federally licensed administrator that registers a PRPP under federal PRPP legislation would not be exempted from the requirement to register the plan under the VRSP legislation and vice-versa. In addition, if a plan is registered as both a VRSP and a federal PRPP, the supervisory authority would not only be OSFI given that the AMF and the *Régie des rentes du Québec* (Régie), the regulator of VRSPs, is not bound by Part IV (Supervision) of the Proposed Agreement. While the Proposed Agreement would create a legal framework to exempt federal PRPP and VRSP administrators from certain formalities related to licensing, not recognizing plan registration between OSFI and the Régie means that the Proposed Agreement is of limited use in Québec. Although the VRSP legislation is different from the federal PRPP legislation, we do not believe that the difference should be an obstacle to recognition. Simplicity is one of the main features of VRSPs and PRPPs and we believe that it would be preferable to treat VRSPs in the same way as provincial PRPPs.

The CBA Section has also identified certain practical and legal conceptual issues.

It is not clear who will sign on behalf of the provinces (e.g., the regulators of PRPPs/VRSPs or the provincial government). The Proposed Agreement will only be useful if there is federal and provincial buy-in and the appropriate government ministries or agencies become parties to it. A number of considerations should be taken into account including: enabling the appropriate entities to sign the Proposed Agreement; the identity of the signatory may have an impact on the binding effect of the Proposed Agreement on the province (e.g., will a regulator-signatory bind the province); and the complexity of the internal approval process of a province to become a party may vary depending on the signatory (e.g., regulator versus provincial government).

The impact of the federal bilingualism requirements on provincial PRPPs also needs to be canvassed.

Comments on Specific Sections of the Proposed Agreement

Part I – Definitions and Application

The intention and meaning of subsection 2(3) is not clear. We suggest that the subsection should read "This Agreement does not apply in respect of a PRPP that applies to individuals in respect of whom the federal PRPP Act prohibits from becoming members of the PRPP."

Subsection 2(6) states that where the Proposed Agreement conflicts with the federal PRPP legislation or provincial PRPP legislation, the Proposed Agreement prevails. We do not believe there is a legal basis for a contractual arrangement to override a conflicting statutory provision. In addition, the VRSP legislation should also be included so that the Proposed Agreement will also prevail over the VRSP legislation on a subject for which the AMF is bound when there is a conflict.

The media release indicates that the Proposed Agreement is intended to cover those provinces with PRPP legislation similar to the federal PRPP legislation. However, this is not expressly stated in the Proposed Agreement. This may be unnecessary as the federal and provincial governments might have determined similarity in compiling Schedule A, and section 16 provides a mechanism for adding other provinces with the unanimous consent of the parties to the Proposed Agreement (and similarity of the PRPP legislation with the federal PRPP legislation will likely be a key consideration in granting unanimous consent).

We also have some drafting recommendations:

- (a) The reference to members of a VRSP in subsection 2(1) is unnecessary as VRSPs are already excluded.
- (b) Subsection 2(4) should be amended to reflect that the Proposed Agreement does not apply to a PRPP that is only registered federally, in addition to a PRPP that is only registered provincially.
- (c) Subsection 2(5) should be amended to include VRSP and provincial PRPPs, in addition to "a" (not "the") federally-regulated PRPP.

Part II – Licences

Subsections 3(1) and 3(4) may create some confusion with interpretation. Subsection 3(1) refers to a "province that is party to this Agreement" while subsection 3(4) refers to a "province". An inference could be drawn that the absence of "party to this Agreement" is deliberate and intended to have meaning. There are two possible ways to construe this difference in language: the right to dual licensing is available only to a province which is not a party to the Proposed Agreement, or alternatively, the right is available to any province regardless of whether it is a party to the Proposed Agreement.

Keeping in mind that the purpose of the Proposed Agreement is to create a harmonized regulatory scheme with a singular supervisory body, it begs the question whether a province should forgo the right to issue a PRPP administrator licence to an entity that has obtained the federal PRPP administrator licence or should it retain the power to engage in licensing.

Section 5 requires the AMF to notify OSFI "as soon as practicable" when it has suspended or revoked a VRSP administrator licence. "As soon as practicable" is not clear or defined, and is not qualified by "reasonable", making it a fairly open requirement. Sections 3 and 4 exempt a corporation with a VRSP administrator licence issued by the AMF from licensing requirements under all other provinces that are parties to the Proposed Agreement and under the federal PRPP legislation, a more definitive time-frame for notifying OFSI is desirable. How will the AMF know whether a VRSP administrator licensed by the AMF also administers a federal PRPP without a federal PRPP administrator licence? We assume that the VRSP administrator licence (or application) will include a continued disclosure requirement for that purpose.

Part III – Plan Registration

Our comments on "in each province that is a party to the agreement" in subsection 6(1) versus "province" in subsection 6(3) are the same as for Section 3 above.

Our comments on section 7 are the same as those on section 5.

Part IV – Supervision

Subsection 6(4), in conjunction with section 8, grants OSFI supervision and supervisory authority for all federally-registered PRPPs. This includes a provincial PRPP that is exempted from registration with the province by virtue of the Proposed Agreement.

It is less clear who has supervisory authority for VRSPs that are also registered under the federal PRPP legislation pursuant to the Proposed Agreement. Subsection 6(4) and section 8 do not expressly exclude VRSPs that are also federally registered PRPPs as in other parts of the Proposed Agreement. Section 2 provides that the AMF does not agree to be bound by Parts III or IV of the Proposed Agreement which grants supervisory authority. This exclusion does not cover the *Régie* which has regulatory authority over the administration of VRSPs, and has not been clearly carried over into the operative part of the Proposed Agreement. Rather, subsection 2(2) states that the Proposed Agreement applies to VRSPs "only to the extent set out herein".

We recommend the Proposed Agreement clarify which entity has supervisory authority over VRSPs that are also federal PRPPs registered under the federal PRPP legislation.

Part V – Applicable Law

The approach in sections 10 and 11 carves out several matters (in Schedule C) to be governed by the provincial PRPP legislation where a member is employed or self-employed, or if the member is not currently employed or self-employed, where the member was last employed or self-employed and contributed to that PRPP. We recommend minimizing the matters in Schedule C to streamline the administration of a multi-jurisdictional PRPP. In particular, it is unclear what the rationale for including fund transfers, withdrawals and payments is in Schedule C.

Section 10 provides that the Proposed Agreement overrides contrary provisions in the provincial PRPP legislation. We have the same concern as outlined in Part I.

Part VI – Relations Between Parties and Supervisory Authorities

Part VI imposes direct contractual obligations on the supervisory authorities. There may be legal conceptual issues on the enforceability and binding effect on the supervisory authorities if they are legal entities separate from the signatories or parties to the Proposed Agreement.

We question the rationale for the survival provision in section 13. By virtue of section 13, the obligations imposed by section 12 continue despite the termination of the Proposed Agreement or the withdrawal of a province from it. Continuing the obligations in these circumstances may not be appropriate.

In addition, the mandatory disclosure requirement "on a timely basis" of policy developments and a summary of "intended" legislative amendments may not be appropriate or feasible.

Part VII – Execution, Amendments to, Withdrawal From and Coming Into Force of Agreement

Section 18 requires either six months' (a province) or 18 months' (Canada) notice to be given by a withdrawing party. This does not present any conceptual concerns, however, we recommend that the practicality of the notice period be closely examined to ensure that it allows sufficient time for the transfer of supervisory responsibilities.

This part does not deal with the administrator licences and PRPP regulations in connection with the withdrawal. Theoretically, an administrator will need to apply for an administrator licence from, and register the PRPP in the withdrawing province. The CBA Section recommends that a workable transition arrangement (including a grace period) be included in the Proposed Agreement.

We appreciate the opportunity to comment on the Proposed Agreement and would be pleased to further assist Finance Canada in the development of PRPPs.

Yours truly,

(original letter signed by Noah Arshinoff for Lyne Duhaime)

Lyne Duhaime
Chair, CBA Pensions and Benefits Law Section