



THE CANADIAN
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Unlocking Pension Funds Consultation

**NATIONAL PENSIONS AND BENEFITS LAW SECTION
CANADIAN BAR ASSOCIATION**

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PREFACE

The Canadian Bar Association is a national association representing 38,000 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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Unlocking Pension Funds Consultation

I. INTRODUCTION

The Canadian Bar Association National Pensions and Benefits Law Section (CBA Section) is pleased to participate in the consultation on unlocking pension funds initiated by the Department of Government Services of Newfoundland and Labrador (Provincial Government). The CBA Section is comprised of lawyers from across Canada who practice in the pensions and benefits area.

II. GENERAL COMMENTS

A. Harmonization

One of the primary objectives of the CBA Section is to contribute to the harmonization of pension laws across Canada. Harmonizing pension laws would reduce duplicative or unnecessary regulatory burdens.

On October 31, 2008 the Canadian Association of Pension Supervisory Authorities (CAPSA) released a report called *Work on Regulatory Principles for a Model Pension Law* (Model Pension Law Report).¹ It sets out the principles for a model pension law to promote greater harmonization of pension laws in Canada. Harmonization has also been generally supported in reports from three provincial pension reform commissions.²

B. Locking-in

“Locking-in” refers to rules that require accumulated pension benefits to be maintained for retirement, consistent with current public policy objectives. Permitting substantial

¹ *Work on Regulatory Principles for a Model Pension Law* (North York, ON: Canadian Association of Pension Supervisory Authorities, October 31, 2008).

² See, *Getting our Acts Together – Pension Reform in Alberta and British Columbia*, Report of the Joint Expert Panel on Pension Standards; *Promises to Keep*, Report of the Nova Scotia Pension Review Panel; and *A Fine Balance*, Report of the Ontario Expert Commission on Pensions.

unlocking would undermine the principal objective of private pension plans, which is to provide income to meet the needs of employees when they retire. As a general proposition, we support continued locking-in to ensure that pension benefits that accumulate on a tax deferred basis are used for providing retirement income.

At a recent meeting, Canadian Premiers described the issue of how private and public retirement plans can meet the needs of Canadians as “urgent” and called for a national summit on retirement income.³ While there are increasing concerns about the adequacy of retirement income, there has also been some movement across the country towards easing the locking-in rules.⁴ Especially during a recession, members and former members of a pension plan often want access to their accumulated savings. Allowing lump sum payments from pension funds can increase liquidity without immediate cost to governments. To many people, locking-in may seem paternalistic. On the other hand, many individuals do not prepare adequately for retirement. There is a large public investment in encouraging saving for retirement through both tax incentives and the pension regulatory system.

CAPSA’s Model Pension Law Report was released in October 2008,⁵ after extensive consultation in which CAPSA met with over 300 stakeholders and received over 70 written submissions in response to its consultation paper on the topic. The Model Pension Law Report seeks to balance protecting pension plan members’ rights and benefits with simplifying regulatory requirements for pension plans across Canada by recommending common pension standards. The proposed model law principles are divided into three categories; non-contentious principles, principles requiring further development and contentious principles.

One of the non-contentious principles for common pension standards is that all amounts, whether in the plan or transferred out, must be locked-in to provide a pension on retirement.

³ Meeting of the Council of the Federation, held in Regina Saskatchewan, August 6, 2009.

⁴ For a current overview of locking-in rules across Canada, see chart in *Summary of Pension Legislation* (Standard Life Canada, January 1, 2009) : <http://www.proteusperformance.com/downloads/pension-legislation-summary-2009.pdf>

⁵ *Supra*, note 1.

This is subject though to various stated exceptions similar to those currently in place or described below.

Some provincial pension reform commissions have also addressed unlocking. The following recommendations were made in *Getting our Acts Together – Pension Reform in Alberta and British Columbia*, Report of the Joint Expert Panel on Pension Standards (ABC Report) with respect to all pension plans and *Promises to Keep*, Report of the Nova Scotia Pension Review Panel (NS Report) with respect to defined contribution plans:

- Pension funds should remain locked-in as long as the individual is an active member of the plan.
- Whether a plan allows unlocking should be optional.
- If a plan permits unlocking, at or after termination of employment, individuals who are at least age 50 should be permitted, on a one-time basis, to unlock either 25 or 50%.
- If the plan is silent on unlocking, the default should be 50% unlocking at age 50 or over.

The ABC Report recommended that financial hardship unlocking should follow the current Alberta requirements. The NS Report recommended that the financial hardship unlocking option should be removed for defined benefit pension plans, with no other changes.

III. ANSWERS TO SPECIFIC QUESTIONS RAISED

1. Should the Provincial Government maintain its existing locking-in legislation for funds accumulated in a registered pension plan? Why or why not?

As the province's legislation currently prohibits release of funds accumulated in a registered pension plan prior to retirement, this question suggests that consideration is being given to a change to allow pension plan members to unlock some portion of their pension funds while active members of the plan. The CBA Section's position, consistent with that adopted in the ABC and NS Report, is that pension funds should remain locked-in during and after the period that the individual is an active member of the plan.⁶ This is also consistent with the non-contentious principles for common pension standards from the Model Pension Law Report.

⁶ This position is set out in greater detail later in this submission.

The ABC Report noted that the purpose of pension plans is to provide secure income in retirement. Tax deferral for pension contributions is one measure intended to promote that purpose, and locking-in funds is another. In our view, this protection should be maintained during active membership in the pension plan, and subsequently.⁷ Allowing funds to be unlocked would reduce the financial security available for retirement and possibly limit options available to employees when their employment ends.

Although the CBA Section supports continued locking-in (subject to specific exceptions enumerated below), if broader amendments are considered, we recommend that the Provincial Government seek to harmonize its legislation with other Canadian jurisdictions, particularly in the Atlantic Provinces.

2. Should the Provincial Government eliminate locking-in requirements altogether on money that is accumulated in a registered pension plan where an individual leaves the plan before retirement? Why or why not?

We support continued locking-in, subject to the exceptions discussed elsewhere in this submission,⁸ 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 to plan members. We see no need for the Provincial Government to allow partial unlocking for members who leave a plan prior to retirement.

3. Should the Provincial Government provide for only a portion of funds, such as 25 per cent or 50 per cent, that is accumulated in a registered pension plan to be unlocked where an individual leaves the plan before retirement? If so, why and how much should be unlocked?

A review of pension legislation in the various jurisdictions across Canada shows no clear consensus on how partial unlocking should be treated. Many jurisdictions do not allow partial unlocking at all, while others allow a one-time withdrawal of 25%, 50% or even 100%.⁹

⁷ *Ibid.*

⁸ See discussion *infra* at 5-8.

⁹ See *supra*, note 3.

The Model Pension Law Report is intended to recommend best regulatory practices. One of the non-contentious principles CAPSA recommended there was that “Any amounts transferred from the plan on plan termination or termination of active membership must be locked-in to provide a pension on retirement.” The CBA Section supports that recommendation and the current provisions of the *Pension Benefits Act (1997)* that require all funds transferred from a pension plan to remain locked-in.

However, if the Provincial Government decides to allow for some portion of funds to be unlocked, we would recommend that the maximum allowed be no more than 25%. This would ensure that the bulk of a member’s pension benefit is used to provide an income stream at retirement.

4. Should the Provincial Government allow for all, or a portion, of funds that are accumulated in a registered plan to be unlocked only where there is financial hardship determined through a needs assessment? If so, why and who should do the needs assessment and who should pay to have the assessment done? If not, why not?

While the CBA Section is generally supportive of locking-in, we do recognize the need for flexibility in certain circumstances, such as in cases of financial hardship. Financial hardship unlocking currently exists in Alberta, Ontario and Nova Scotia and for federally registered pension plans with respect to locked-in accounts only (Locked-In Retirement Accounts (LIRAs), Locked-In Retirement Income Funds (LRIFs), and Life Income Funds (LIFs)). Additionally, the ABC Report recommended that financial hardship unlocking be added to British Columbia's regime for locked-in accounts. No Canadian jurisdiction currently allows unlocking of pension funds for reasons of financial hardship directly from a pension plan.

All jurisdictions that allow financial hardship unlocking incorporate some sort of needs assessment. Nova Scotia, for example, allows for unlocking of some or all of an individual's pension funds:

- (i) where the individual is at risk of defaulting on his mortgage or being evicted,
- (ii) where the individual has medical expenses not covered by insurance, and
- (iii) where the individual expects to earn less than \$18,520 in the following 12 months.

Similar requirements exist under the Ontario and Alberta regimes, however, they allow for some unlocking where the individual is expected to earn less than \$30,866.67 and \$27,000 respectively in the following 12 months. The federal jurisdiction provides for a sliding scale for unlocking where expected income for the following year is less than \$34,725.

With respect to processing applications, only Nova Scotia currently charges a fee (\$104.96). Ontario had a fee but instituted a waiver in April 1, 2009.

With respect to processing applications, only the federal jurisdiction provides that the relevant financial institution is to process all applications. The other three jurisdictions provide that the relevant regulator process applications, except for Ontario which allows individuals to apply to either the regulator or the relevant financial institution.

The CBA Section is generally supportive of a regime for financial hardship unlocking from locked-in accounts similar to regimes that exist in Nova Scotia, Ontario, Alberta, and federally. The CBA Section would not support a regime that allowed unlocking of pension funds at any point directly from the pension plan itself, as it would be too onerous and complex for plan sponsors.

Given the nature of the application and personal information involved, it is appropriate that the pension regulator process such applications. In our view, individuals should not be charged for processing financial hardship unlocking applications. If a fee is charged, it should be minimal.

5. Should the Provincial Government permit unlocking of pension funds only after a plan member has reached a certain age, such as 50 or 55? If so, what should be the age and why?

The CBA Section does not support age restrictions for members who wish to unlock as a result of shortened life expectancy, financial hardship or because their pension benefit is less than a certain amount (“small pensions amount”). In those cases, eligible members have already justified why they should be permitted to unlock their pension funds. An age restriction might actually negate the intent of the unlocking exception in the first place, and counteract public policy reasons for allowing unlocking in those specific circumstances.

If the decision is made to permit partial unlocking for all members, then we would support a minimum age requirement in those circumstances. We suggest that the minimum age should coincide with the member's early retirement date, which the *Pension Benefits Act* (1997) characterizes as age 55 or an earlier date permitted by the plan. A minimum age requirement will increase the likelihood that members will use the funds for retirement purposes in keeping with the primary intent of pension plans, while still allowing members flexibility to use the unlocked amounts as they see fit.

6. Should the Provincial Government allow for all, or a portion of funds that are accumulated in a registered plan to be unlocked under conditions or criteria beyond financial hardship? If so, why and which conditions or criteria should be applied?

Currently, the pension benefits standards legislation in Newfoundland and Labrador contains the following exceptions to the locking-in rules.

- Shortened life expectancy - a member or former member who has a disability which is likely to considerably shorten his or her life span can receive a lump sum payment subject to spousal consent, if applicable.

All Canadian jurisdictions with pension legislation have a similar exception. We recommend that this exception be continued, in the interests of harmonization as well as for policy reasons.

- Small pensions - a lump sum payment may be made where the annual pension is less than 4% of Year's Maximum Pensionable Earnings (YMPE) or the commuted value is less than 10% of YMPE.

All Canadian jurisdictions have unlocking for small pensions, although the level at which the unlocking occurs varies. The current Newfoundland and Labrador provision is similar to the Nova Scotia provision, except that the Nova Scotia provision also permits unlocking if the total value of all assets in LIRAs, LIFs and defined contribution pension plans owned by the applicant is less than 40% of YMPE and the applicant is age 65 or older. New Brunswick permits unlocking if the pension's value is less than 40% of the YMPE divided by 1.06 for each year the age of the member precedes age 65. Given the costs of administering a small benefit and that 10% of current YMPE is less than \$5000 (so the impact on retirement income adequacy is minimal), we recommend increasing the small benefit level to 40% of YMPE if the applicant is age 65 or over. This level is similar to that currently used in New Brunswick and in Nova Scotia with respect to defined contribution benefits.

In addition to the locking-in exceptions already discussed, we recommend allowing former plan members who become non-residents of Canada to unlock their pension benefits. A number of jurisdictions already allow unlocking for non-residents and the Model Pension Law Report endorses non-residency status as an exception to its general locking-in recommendations. This would allow individuals who leave Canada to have their retirement savings held in the country where they choose to reside. The legislation in the jurisdictions that allow unlocking in such circumstances typically refers to becoming a non-resident for the purposes of the *Income Tax Act* (Canada). Most also impose a minimum of two years before a non-resident can apply to unlock, and require a spousal waiver.

IV. CONCLUSION

The CBA National Pensions and Benefits Law Section trusts that our comments will assist the Provincial Government in its work. We would be pleased to respond to any questions and to provide further information regarding the points addressed in this submission or otherwise in connection with the consultation.