

The Pension Benefits Act, 1992

Consultation Paper

Enforcement Tools and Other Potential Amendments

Consultation Period:

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Introduction

The Financial and Consumer Affairs Authority (FCAA) is responsible for the administration of *The Pension Benefits Act, 1992* (the PBA) and *The Pension Benefits Regulations, 1993* (the PBR). The Pensions Division of the FCAA undertakes regulatory and supervisory activities with respect to pension plans that are registered pursuant to the PBA.

The FCAA is considering recommending amendments to the PBA to the government and consulting interested parties and organizations on those potential amendments. The amendments may include provisions respecting the imposition of terms and conditions on approvals, consents and permissions, enhanced enforcement tools, the severance of parts of plan amendments for registration purposes, the cancellation of registration of plan amendments or parts of plan amendments, as well as other miscellaneous administrative amendments.

We would appreciate your feedback and comments on the topics discussed below.

Background

The PBA came into force in 1993. To continue to provide effective regulation the PBA requires modernization to reflect the tools and powers found in pension legislation in other jurisdictions across Canada as well as other regulatory legislation administered by the FCAA.

Modernization of pension standards legislation has been underway in various jurisdictions across Canada as best practices in regulatory approach are identified and evolve. No Canadian jurisdiction contains pension legislation in complete harmonization with any other jurisdiction, however, efforts have been made via amendments and the coming into force of new pension legislation to create modern and effective regulatory schemes with similar powers and obligations. Saskatchewan pension legislation has fallen behind some other Canadian jurisdictions in this regard.

Topics for Discussion

Terms and Conditions

Under Alberta's *Employment Pension Plans Act, 2012* (the Alberta Act) and British Columbia's *Pension Benefits Standards Act, 2012* (the British Columbia Act), the superintendent in those jurisdictions may impose conditions on any approval, authorization, extension, consent, or permission able to be given by the superintendent under the provincial pension legislation. Ontario's *Pension Benefits Act, 1990* (the Ontario Act) and Nova Scotia's *Pension Benefits Act, 2011* (the Nova Scotia Act) provide that the CEO or superintendent, respectively, may attach terms and conditions to approvals or consents pursuant to their Acts.

In Saskatchewan, Section 4 of the PBA sets out the superintendent's authority to extend any time limit imposed by a provision of the PBA, the PBR, or a direction of the superintendent pursuant to the PBA and allows the superintendent to impose terms and conditions on the extension that the superintendent deems fit.

The FCAA is considering recommending expanding this power to include the ability to place terms or conditions on approvals, consents and permissions given by the superintendent pursuant to the PBA or PBR. Examples of this could include the placement of a term or condition on a permission given by the superintendent under

s.24(2)(b) of the PBA to not include a standard plan provision in a plan or on, under s.13(3) of the PBA, an approval given by the superintendent to an administrator to charge a fee for the provision of certain matters to plan members.

Expanding the superintendent's authority to impose terms and conditions on other approvals, consents or permissions given pursuant to the PBA or PBR reduces the likelihood of the superintendent refusing to provide an approval, consent or permission due to a concern that could be addressed with a term or condition attached. For this reason, expanding the superintendent's authority to impose terms and conditions, as described here, would benefit plan administrators and plan sponsors by reducing the circumstances in which the superintendent would refuse to provide an approval, consent or permission requested by a plan administrator or sponsor pursuant to the PBA or PBR.

Question 1: Do you agree that the superintendent should have the authority to impose terms and conditions on approvals, consents, and permissions pursuant to the PBA as available in other Canadian jurisdictions?

Severance of Parts of Plan Amendments

In Saskatchewan, the PBA does not provide an express authority for the superintendent to sever part of an amendment which a plan administrator is seeking to register that would cause the plan to cease to comply with the PBA or PBR or which the superintendent is not satisfied would comply with the PBA while allowing the superintendent to register the part which does comply. The superintendent has taken the position that the superintendent has implied authority to sever part of an amendment in these circumstances.

Both the Alberta Act and the British Columbia Act provide that upon the filing by an administrator of an amendment to a pension plan the superintendent may sever from the amendment that portion of the amendment that does not comply with the Act or regulations and register the remaining portion of the amendment which does comply with the Act or regulations. In the Ontario Act and the Nova Scotia Act, upon an application by an administrator for the registration of an amendment to a pension plan, the CEO (in Ontario) or superintendent (in Nova Scotia) may refuse to register part of the amendment if the part of the amendment is void under the Act or if the pension plan, including that part of the amendment, would cease to comply with the Act or regulations. Notice in writing of the decision of the CEO or superintendent to sever and register only part of the amendment along with an opportunity to be heard where requested is required under each of the referenced Acts. Each Act also includes the ability to appeal the decision to the specified court.

The ability to sever part of a plan amendment and register only those parts of the proposed amendment that the superintendent is satisfied complies with the PBA allows the superintendent to issue the plan administrator a notice of registration of the parts of the amendment that comply with the PBA where the superintendent would otherwise be unable to register any aspect of the plan amendment. This benefits plan administrators and plan sponsors by avoiding a refusal to register the amendment in its entirety only because one or more parts of the amendment, no matter how minor, would not comply with the PBA in the superintendent's opinion.

An amendment to the PBA to provide the superintendent with the express authority to sever part of a plan amendment and register the remainder would clarify the authority of the superintendent to do so under the PBA. Clarifying the authority of the superintendent to sever part of a plan amendment in these circumstances would remove uncertainty and reduce the potential for litigation where the superintendent orders part of a plan amendment severed.

Sections 22 and 23 of the PBA set out current notice requirements, opportunity for reconsideration upon the plan administrator's objection and appeal options for decisions of the superintendent as to registrations of plans and plan amendments.

Question 2: Do you agree that the superintendent should be able to sever a part of an amendment that does not comply with the PBA or PBR and register the part of an amendment that does comply?

Cancellation of the Registration of Plan Amendments

Section 21 of the PBA provides that the superintendent may cancel the registration of a plan that does not comply with the PBA. Sections 22 and 23 of the PBA set out current notice requirements, opportunity for a reconsideration upon the plan administrator's objection and appeal options for decisions of the superintendent in respect of the cancellation of registration of plans.

The Alberta Act and the British Columbia Act provide that the superintendent has the authority to revoke the registration of an amendment to a plan text document if the amendment does not comply with the Act or regulations. The authority of the superintendent to revoke the registration of an amendment to a plan text document is subject to an opportunity to be heard and an appeal.

The Ontario Act allows the CEO to revoke the registration of a pension plan, an amendment or part of an amendment that does not comply with the Act or the regulations. The revocation of the registration operates to terminate the amendment as of the date specified by the CEO. The authority of the CEO to revoke the registration of a pension plan, an amendment or part of an amendment is subject to an opportunity to be heard and an appeal to a tribunal.

As the PBA currently does not authorize the superintendent to cancel the registration of a plan amendment or part of a plan amendment, the only option available to the superintendent where a registered plan amendment or part of a plan amendment does not comply with the PBA is to cancel the registration of the entire plan. The cancellation of the registration of a plan leads to the plan being wound up. An amendment to the PBA to authorize the superintendent to cancel the registration of a plan amendment or part of a plan amendment that does not comply with the PBA would avoid the need to cancel the registration of the entirety of a plan solely due to the non-compliance with the PBA of a plan amendment or part of a plan amendment.

Question 3: Do you agree that the superintendent should have the authority to cancel the registration of a plan amendment or part of a plan amendment that does not comply with the PBA?

Reversal of Transactions

The Alberta Act and the British Columbia Act provide their respective superintendents with the express power to direct an administrator to reverse any transactions completed based on the assumption that an amendment filed with the superintendent would be registered or remain registered where the amendment has been refused or revoked. The sections found in the Alberta Act and the British Columbia Act are identical and read as follows:

Transactions may be reversed

24 If an amendment to the plan text document of a pension plan has been filed for registration and the superintendent notifies the administrator of the plan in writing that the registration of the amendment has been refused or revoked, the superintendent may

- (a) direct that all or part of the refusal or revocation has retroactive effect, and
- (b) direct the administrator to reverse any transactions that were based on the assumption that the amendment would be registered or remain registered, as the case may be.

In Saskatchewan, the PBA is silent as to whether the superintendent has the authority to order the reversal of transactions, which were completed based on the assumption that a plan amendment would remain registered, where the superintendent is not satisfied that a plan amendment complies with the PBA and the superintendent cancels the registration of the plan amendment.

An amendment to the PBA to provide an express power to order a reversal of transactions in these circumstances would clarify the authority of the superintendent under the PBA. Clarifying this authority of the superintendent to order a reversal of transactions where the registration of a plan amendment is cancelled would remove uncertainty and reduce the potential for litigation where the superintendent cancels the registration of a plan amendment and orders transactions completed based on the assumption that the plan amendment would remain registered be reversed.

Question 4: Do you agree that the superintendent should be able to reverse transactions which were completed based on an assumption that an amendment to a pension plan would remain registered?

Enforcement Tools under the PBA

The enforcement tools currently available to the superintendent in Saskatchewan under the PBA are blunt instruments which do not provide the flexibility and responsiveness to most effectively regulate non-compliant behaviour in the modern pension regulatory system.

Currently under the PBA, the superintendent's enforcement powers include the authority to:

- under section 8, apply to the Court of King's Bench for an order compelling a person to comply with the PBA, the PBR or a direction of the superintendent;
- under section 21, cancel the registration of a pension plan;
- under section 51, terminate a pension plan; and
- under section 70, commence prosecution proceedings.

The current tools require going through lengthy court processes or the extreme step of terminating pension plans altogether and do not allow the superintendent to respond efficiently and effectively to non-compliance with the PBA. The current enforcement tools under the PBA also do not reflect the enforcement tools provided by pension legislation to superintendents across the country.

The Alberta Act, the British Columbia Act, and the Ontario Act provide the superintendent, or CEO in Ontario, with the following tools not currently found in the PBA:

- the power to issue orders of compliance with their respective Act and regulations;
- the power to impose administrative penalties where a person has contravened the Act or regulations; and
- the power to make a costs order to recover investigation costs.

Procedural fairness including reasonable notice of intention to impose, an opportunity to be heard and reasons are required in Alberta, British Columbia and Ontario when using these enforcement tools. Statutory appeals are also available.

Many other regulatory Acts administered by the FCAA contain provisions providing the superintendent or other statutory decision-maker with the power to issue compliance orders, impose administrative penalties and make costs orders with procedural fairness built into each Act. These are standard enforcement powers in Saskatchewan legislation.

Question 5: What enforcement tools should be added to the PBA?

Compliance Orders

A compliance order is an order issued pursuant to statutory authority to require a person to comply where that person is not in compliance with an Act or regulations. Compliance orders are issued by officials with expertise in the legislation involved and allow for timely and inexpensive regulatory action.

Pension regulators in Alberta, British Columbia, Manitoba, Ontario, Nova Scotia, and New Brunswick all have the statutory authority to impose compliance orders under their respective Acts.

In the Alberta Act and the British Columbia Act the respective superintendents are provided the authority to issue compliance orders where the superintendent is of the opinion that:

- the plan documents of a plan do not comply with the Act or regulations;
- the pension administrator has acted, is acting or will act in breach of the Act or regulations;
- the plan is not being administered in accordance with the Act, regulations, or plan documents; or
- any person with responsibilities under the Act is doing or is about to do anything, in respect of a pension plan, that is contrary to safe and sound pension practices.

These compliance orders may direct:

- any person to cease or refrain from committing the act or pursuing the course of conduct that constitutes non-compliance; or
- any person to perform such acts, including payment or repayment of money, that the superintendent is of the opinion is necessary to remedy a situation.

To be an appropriate addition to a regulatory framework, compliance orders must be applied fairly and impartially and be subject to procedural fairness provisions. Under the Alberta Act and the British Columbia Act, a notice of decision must be provided to the person subject to the compliance order. The person subject to the

order is able to provide a notice of objection within 30 days of receiving the notice which triggers a reconsideration of the superintendent's decision. An appeal of the reconsideration to the specified Tribunal is provided under the Alberta Act and the British Columbia Act.

The FCAA oversees other regulatory legislation in which statutory authority to impose compliance orders is found. Procedural fairness including notice, an opportunity to be heard and reasons is required under these Acts.

Question 6: Do you agree that the superintendent should have the authority to impose compliance orders where a person is not complying with the PBA, the PBR or the plan documents? Do you agree that the superintendent should have the authority to impose compliance orders where a person's activities or neglect to undertake activities with respect to a plan are contrary to safe and sound pension practices?

Administrative Penalties

Administrative Penalties are a common mechanism for enforcing compliance with regulatory legislation. An administrative penalty is payable when a regulator, rather than a court, determines that a breach of the regulatory legislation has occurred. Administrative penalties provide a flexible and responsive regulatory structure where the delay and cost of court proceedings are avoided and decisions are made by officials with specific expertise in respect of the subject matter of the legislation involved.

Pension regulators in Alberta, British Columbia, Manitoba, and Ontario all have statutory authority to impose administrative penalties and their respective Acts provide procedural protections to ensure that the process for determination of the administrative penalty is fair and seen to be fair.

In Alberta and British Columbia, the maximum administrative penalty able to be imposed under their respective Acts are \$250,000 in the case of a corporation or administrator and \$50,000 in the case of an individual other than an administrator. These amounts are the maximum penalties able to be imposed under the Alberta Act and the British Columbia Act and many contraventions have specific penalties prescribed in the associated regulations.

Administrative penalties must be subject to procedural fairness provisions. Under the Alberta Act and the British Columbia Act, a notice of decision must be provided to the person subject to the administrative penalty. The person subject to the order is able provide a notice of objection within 30 days of receiving the notice which triggers a reconsideration of the superintendent's decision. An appeal of the reconsideration is provided under the Alberta Act and the British Columbia Act.

The FCAA currently oversees other regulatory legislation in which statutory authority to order administrative penalties is found.

Question 7: Do you agree that the superintendent should have the authority to impose administrative penalties where a person is not complying with the PBA, the PBR or the plan documents?

Special Penalties

Other legislation overseen by the FCAA provides for special penalties to be applied to those who default in filing required documentation on time as required by the legislation. These special penalty provisions typically provide that upon receipt of notice from the statutory decision-maker, the person shall immediately pay the penalty. The

penalty imposed is a debt due and recoverable by the Crown in right of Saskatchewan and may be recovered in any manner authorized by law.

Due to the fact that the determination of whether a person has failed to comply with filing requirements is straightforward and readily proven and involves relatively small penalty amounts, special penalty provisions are typically not subject to an opportunity to be heard. In addition, the superintendent is given the discretion to not demand payment of a special penalty where the superintendent is of the view that the imposition of a special penalty is not warranted in a particular circumstance. An example of this could include, where a filer has made reasonable efforts to complete a filing on time but was unable to comply with requirements due to an unforeseen event.

Currently under the PBA, the superintendent may proceed with a prosecution under the offence provisions for late filing. However, this is an unwieldy and resource heavy enforcement tool for enforcing simple compliance with filing deadlines. Prosecution, under the offence provision of the PBA, of plan administrators who fail to meet filing deadlines can be costly for plan administrators both in terms of time and legal costs and any fine imposed by the Court.

In Ontario, late filing penalties are prescribed in the pension regulations and average \$200 for the first day with an additional \$200 for each day the default continues.

Question 8: Do you agree that the superintendent should have the authority to impose special penalties on late filings as an efficient enforcement mechanism?

Costs

Pension legislation in Alberta, British Columbia, Ontario, and Nova Scotia allows for the superintendent (or CEO) to order a person to pay the costs or expenses of inspections or other such proceedings conducted under their respective pension legislation.

In the Alberta Act and the British Columbia Act, the superintendent may order the expenses of an inspection to be paid by the subject of the inspection where the inspection has resulted in a compliance order or administrative penalty being imposed.

In the Ontario Act and Nova Scotia Act, the CEO or superintendent may order any person to pay all or part of the costs of examination, investigation, or inquiry where the CEO or superintendent considers it fair and reasonable to do so.

In Saskatchewan, no such authority to recover costs in relation to an inspection or investigation under the PBA currently exists.

The FCAA is a self-funding organization. Fees collected under the PBA are intended to cover the FCAA's cost of administering the PBA. As the PBA does not currently provide the superintendent with the authority to impose costs orders, all fee payers under the PBA collectively fund the cost of the superintendent's inspections and investigations, whether or not they have been inspected or investigated. Adding the authority for the superintendent to impose a cost order against persons being inspected or investigated shifts the onus of funding the superintendent's costs of enforcing the PBA to those persons not complying with the PBA.

Question 9: Do you agree that the superintendent should have the authority to impose costs of proceedings where the superintendent is satisfied that the person who was the subject of the proceeding has not complied with a provision of the PBA?

Conclusion

If you have any comments regarding the topics and proposed provisions considered in this consultation document please provide them prior to **October 21, 2022** to:

Lauren Ellis, Legal Counsel
Financial and Consumer Affairs Authority of Saskatchewan, Legal Branch
601-1919 Saskatchewan Drive
Regina, SK S4P 4H2
E-mail : pensions@gov.sk.ca

Thank you in advance for your contributions.

PLEASE NOTE: The Freedom of Information and Protection of Privacy Act (the “FOIP Act”) applies to any submissions made to the Superintendent of Pensions (the “Superintendent”) in response to this consultation (the “Consultation”). As such, the information, including personal information, you provide to the Consultation is being collected for purposes relating to proposed amendments to *The Pension Benefits Act, 1992* (the “PBA”), and will be used or/and disclosed for that purpose and in accordance with the provisions of the FOIP Act and applicable provisions of the PBA.

PLEASE FURTHER NOTE: All submissions received from organizations in response to this Consultation will be considered public information and may be disclosed to any person or/and published on the website of the FCAA. The Superintendent will consider an individual showing an affiliation with an organization to have given their response on behalf of that organization. Responses from individuals who do not show an affiliation with an organization will not be considered public information. The Superintendent may also publish responses received from individuals. However, your personal information (such as name, email address, mailing address) will not be disclosed unless there is an exemption under the FOIP Act that allows for its disclosure. The Superintendent may use your provided contact information to follow up with you to clarify your responses.