



Joint Expert Panel on Pension Standards: Getting Our Acts Together

by **Clio Godkewitsch**

©2009 International Foundation of Employee Benefit Plans

The Ministers of Finance of Alberta and British Columbia appointed a joint expert panel to conduct a full and independent review of pension standards legislation in the two provinces in October 2007. In a report released November 28, 2008, the panel recommends changes that seek to strike a balance between encouraging the establishment and maintenance of pension plans in the workplace and engendering confidence in pension security among plan members. The panel's key recommendations are discussed in brief below.

Broader and Principle Based

The panel recommends that minimum pension standards should accommodate a wider variety of pension arrangements than currently contemplated and that these standards be tailored to the key characteristics of different kinds of pension plans. Further, the legislative framework ought to be based on principles, as opposed to rules only, to promote strength and flexibility in pension plans. The regulator should be equipped with broad discretion and resources to enforce the principles, including the discretion to approve a variety of pension arrangements. The regulator should have the power to review and require changes to plan governance and to impose penalties for failure to fulfill important ad-

ministrative duties and failure to provide necessary information for the regulator to discharge its oversight role.

One Act, One Regime

The panel proposes that the governments of the two provinces should adopt identical legislation and establish a joint policy advisory council and joint pension tribunal, with a view to promoting and harmonizing the now-separate regimes. The joint pension tribunal would hear appeals from regulators in both provinces, and the joint council would advise the governments on policy and administrative issues. A longer term goal would be to work toward the establishment of a joint pension regulator.

Governance

The panel's recommendations concerning pension plan governance include:

- Incorporating the Canadian Association of Pension Supervisory Authorities' governance guidelines into pension law in the two provinces
- Requiring every plan to have a governance policy that is disclosed to members
- Repealing current statutory quantitative limits on investments and making all investment decisions subject to the "prudent expert" standard, but maintaining statu-

tory limits on related party transactions

- Amending pension legislation to clarify that fiduciaries making investment decisions make those decisions in the best interests of the plan members and are permitted to take into account non-financial issues as they effect the risk and return of investment (e.g., environmental and social responsibility)
- Requiring individuals who have statutory fiduciary duties to have complete training programs
- Providing fiduciaries with a statutory defence to claims against them, if they can demonstrate that they have acted in the best interests of the plan beneficiaries, followed the governance guidelines and acted in good faith, on an informed basis, without conflict of interest.

Plan Surplus and Funding

The panel recommends that pension plan sponsors be permitted to make contributions in excess of normal costs to a separate "pension security" fund. After accounting for a reasonable margin, sponsors could withdraw excess funds over the amount required to fund any wind-up deficiency. Further, surplus withdrawals and contribution holidays are recommended to be spread over a five-

continued on page 9

continued from previous page

lifetime maximum of \$200,000 per person. The increased financial burden imposed on retirees is a limited expense, in the form of a raised annual deductible from \$25 per person to \$350 per person, or \$700 per family. The retirees achieved their primary goal of ensuring that each member received appropriate health care without being exposed to potentially catastrophic costs.

Second, the settlement enables an expeditious resolution of the dispute. Litigation would have continued for years due to the lengthy stages of the process. The settlement negotiations

proceeded comparatively quickly, with the parties having great control of the process and timing. An expeditious process was important to class members who are elderly and may have health problems, given that such members could have exceeded their lifetime cap of \$50,000 during the years of litigation, with no promise of compensation.

In addition to determining that the agreement met the test for court approval, Justice Lax emphasized in her reasons for judgment that a negotiated settlement was the favourable option in this case where a trial would require adjudication of two issues on which there is a dearth of precedents. First, the court

would be determining whether the rights to the benefits stipulated in the pre-March 1, 2007 plan had vested and thus whether the class members were legally entitled to restoration of the health benefits plan. Second, it would be for the judge to decide the appropriate means of remedying the harm flowing from a breach of health benefits plans and whether requiring that Labatt restore the full panoply of benefits was an available award. Accordingly, the outcome of the case was unpredictable and posed risks for both sides.

(Reference: *Smith v. Labatt Brewing Company Limited*, 2009 CanLII 595 (ON S.C.)) •

continued from page 5

year period with annual valuation updates to confirm that the plan continues to be in a surplus position.

The panel also recommends allowing plan sponsors to freeze existing pension plans so as to preserve existing entitlements to surplus and to start new plans that clearly set out terms and conditions over surplus entitlement. Where a plan has been converted from a defined benefit (DB) to a defined contribution (DC) plan leaving a DB legacy in the plan, surplus arising within the DB portion should be available for employer contribution holidays in the DC portion of the plan so long as the DB and DC components are part of the same trust.

The panel proposes that Alberta and British Columbia continue to allow letters of credit to cover solvency deficiencies and that the governments lobby the federal government to review its income tax limits for pension plans. Specifically, the panel recommends that the excess surplus limit be raised to 125% of plan liabilities. The panel also suggests the governments advocate to extend the super-priority for unpaid pension contributions in a bankruptcy to include special payments for sol-

veny deficiencies and unfunded liabilities. The panel also recommends that there be no pension guarantee fund in Alberta and British Columbia.

For “specified contribution target benefit plans,” the panel proposes new funding, disclosure and benefit rules. These are plans that are funded by fixed contributions, usually negotiated as part of collective agreements. Benefits are provided based on a formula and may exist for single or multiple employers. The panel recommends that funding in these plans be measured on a going-concern basis and that the plans not be required to demonstrate that they have no solvency deficiency. Such plans would be required to hold assets sufficient to protect against unfavourable events and to report the settlement status of the plan to the regulator and plan members. Finally, benefit enhancements would be restricted without an adequate funding cushion.

Enhancing Pension Coverage

The panel recommends that the provinces establish a new pension plan, operated as a nonprofit organization at arm’s length from government, that would be available to any employer, employees or self-employed

person at a reasonable cost. The establishment of a steering committee composed of pension experts is recommended to determine the feasibility of such a plan. Some recommended features include:

- A DC plan in which enrolment would be automatic for employers and employees, who could opt out if they do not want to participate, and an opt-in mechanism for self-employed workers
- That the plan be subject to the same regulation as all other registered pension plans
- That investment of plan assets be subject to the policy discretion of a board of governors, with administration and investment management competitively tendered.

The panel’s recommendations are far-reaching and address a number of live issues facing the pension community at large. Stakeholders were invited to provide feedback to the British Columbia Ministry of Finance and the Alberta Minister of Finance by March 2, 2009. Government response is anticipated.

(Reference: *Getting Our Acts Together: Pension Reform in Alberta and British Columbia*, Report of the Joint Expert Panel on Pension Standards.) •