

pensions and employee compensation bulletin

December 2008

Report of the Ontario Expert Commission on Pensions: Highlights and Analysis

The Ontario Government has released the final report of the Ontario Expert Commission on Pensions (the "Commission").

The Commission was established in November 2006 by the Ontario Minister of Finance to "examine the legislation that governs the funding of defined benefit plans in Ontario, the rules relating to pension deficits and surpluses, and other issues relating to the security, viability and sustainability of the pension system in Ontario." In 2007, the Commission held hearings across the province and received 53 written submissions from interested stakeholders. On November 20, 2008, the Commission issued its final report: "A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules" (the "Report"). The Report contains 142 recommendations for improving Ontario's pension system. Comments on the Report can be submitted to the Minister of Finance until February 27, 2009.

Highlights of the Report include recommendations for:

- Immediate vesting of all plan benefits;
- Extended funding periods for single employer pension plans with 95% or higher solvency funding;
- No mandatory surplus distribution on partial plan wind-up;
- Surplus distribution on full plan wind-up in accordance with plan documents, agreement or order of a new Pension Tribunal;
- Addition of express statutory provisions permitting contribution holidays in certain circumstances;
- Conversion from defined benefit to defined contribution with cross-subsidization in accordance with statutory provisions;
- No 30% investment rule for jointly governed plans with requisite investment making capacity;
- Assets relating to unlocated members to be paid to and held by Ontario Pension Agency;
- Establishment of Pension Advisory Committee for most plans;
- Establishment of Ontario Pension Regulator and Pension Champion; and
- Establishment of Pension Benefits Act ("PBA") as exclusive source of law.

Over the next several months, the McMillan Pensions and Employee Compensation Group will be issuing bulletins with focused analysis on some of the key recommendations in the Report. In this Bulletin, we examine the recommendation that the PBA be the exclusive source of pension law in Ontario and consider whether the related recommendations go far enough.

The Report: A New Code?

Sponsors and administrators of defined benefit plans in Ontario are no doubt aware of the confusing and complex system of pension rules and regulation that has developed over time. Gaps in the legislation and complex and ever-changing case law and regulatory policy have created an uncertain legal environment for plan sponsors and administrators. In an attempt to create a system that will offer more certainty, the Commission recommends codifying pension law so that the PBA becomes the exclusive source of pension law in Ontario. In addition, the Report includes a number of recommendations that, if made into law, would override recent case law or regulatory policy. These recommendations include:

New test for partial plan wind-ups

In 2008, the Ontario Divisional Court, in the *Hydro One* case, once again considered the question of when a partial wind-up could be ordered by the Superintendent of Financial Services (the “Superintendent”). This question has regularly been the subject of debate before the regulator and the courts. In an attempt to bring clarity to this area of pension law and to presumably reduce the number of partial wind-ups, the Commission recommends that partial wind-ups of single employer plans be ordered by the Superintendent only when 40% of the active members of the employer are terminated within a two-year period. While this recommendation is an improvement over the current vague and over encompassing rules, it falls short of the approach taken in Quebec where the concept of a partial wind-up was eliminated several years ago.

No mandatory distribution of surplus on partial wind-up

In 2004, the Supreme Court of Canada ruled that, based on the wording of the PBA, a plan sponsor is required to distribute surplus on the partial wind-up of a plan. Plan sponsors have been struggling with the practical implications of this requirement ever since. The Commission recommends that a plan sponsor not be required to distribute surplus on a partial wind-up. An amendment to the PBA to eliminate this requirement would be welcome news for plan sponsors.

Surplus sharing agreement to be binding on Superintendent

In 2008, the Superintendent refused to approve payment of surplus to Montreal Trust in accordance with a surplus sharing agreement entered into by Montreal Trust and Representatives of the surplus sharing group despite the fact that the agreement had been approved by the Ontario Superior Court of Justice and 84.3% of the members of the surplus sharing group. The Superintendent’s refusal to approve the agreement has been appealed by both parties.

The Commission recommends that surplus on plan wind-up be distributed in accordance with plan documents unless the parties agree, or the proposed Pension Tribunal rules, that the documents are not clear. In such a situation, the sponsor may then propose, to the union or individual members and retirees, a scheme for the distribution of surplus. The Commission recommends that any scheme approved by secret ballot or any surplus distribution agreement entered into between representative negotiators be final and binding on the Superintendent.

With these recommendations, the Commission continues to impose barriers on a plan sponsor’s access to surplus. However, the recommendations are a step in the right direction and would avoid the situation now facing Montreal Trust and the members of its surplus sharing group.

Contribution holidays in accordance with legislation

The right of a plan sponsor to take contribution holidays has been the subject of frequent litigation over the last 20 years and was most recently considered by the Supreme Court of Canada in November 2008 in the *Kerry (Canada)* case. See our [October 2007](#) and [March 2008](#) bulletins for a discussion of the *Kerry (Canada)* case. The Commission recommends that the circumstances in which plan sponsors can take contribution holidays be expressly stated in the PBA. Specifically, the Commission, without reference to the terms of the plan documents, recommends that a plan sponsor be entitled to reduce or omit its contributions to a plan in a year in which the plan is funded at 105% or more of its solvency liabilities. If, however, based on benchmarks to be developed by the regulator, the administrator knows or ought reasonably to know that the funding of the plan has fallen below 95%, the Commission recommends that the administrator be required to immediately advise the sponsor that it must resume contributions to the plan.

Will this recommendation, if implemented in the PBA, reduce or eliminate the litigation over contribution holidays? Maybe. A more definitive answer depends on the “benchmarks to be developed by the regulator.” If they are too vague or leave too much discretion to the administrator, litigation will likely continue to arise.

A Cautionary Note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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What's Next?

Will the PBA become the exclusive source of pension law in Ontario? Will pension litigation disappear? Unlikely.

Legislative reform is a slow and time consuming process, particularly in the area of pension law, where employer and employee groups often have diametrically opposed views on what the rules should be. New issues will undoubtedly continue to develop that were not considered by the Commission or addressed in the Report. And what about defined contribution plans? The mandate of the Commission focused on the maintenance and development of the defined benefit system, not defined contribution plans. The recommendations in the Report aimed at bringing certainty to the world of pensions are a step in the right direction but it remains to be seen whether they will lead to real change.

Next in this series:

A look at the recommendations on plan funding in the context of the current economy.

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