The Road Ahead – *2009 Perspective*

Blakes
CANADIAN LAWYERS

Pension & Employee Benefits Trends

There are many changes afoot in the Canadian legal environment for pension and employee benefits. The following will likely be significant in 2009:

1. Solvency Funding Relief for DB Plans

The federal government, as well as the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Nova Scotia have all introduced or announced options to relieve funding pressures on DB plans. The proposals vary by jurisdiction; however, all jurisdictions appear to be allowing aggregation of solvency deficiencies, use of updated actuarial tables and extension of the usual amortization period from five years to 10 years. The main point of departure is that some jurisdictions will require advance notice or consent of plan participants; others are providing an option between obtaining plan participant consent and using letter of credit security to fund the relief portion. Sponsors must not only consider the specified requirements and deadlines for applying for solvency relief, but also other legal obligations, such as changes to investment policies and trust agreements, and the broader plan and corporate governance issues that may carry fiduciary or contractual liability.

2. Financial Reporting Issues for DB Plan Sponsors

Addressing pension liabilities arising out of the second financial crisis in less than 10 years is increasing as corporations begin filing first quarter and annual financial statements. It may spike up again when triennial or more frequent actuarial valuation reports for the 2008 year-end are filed later this year. We have been assisting with restructurings in and outside of creditor protection arrangements. We have also been helping lenders, borrowers, reporting issuers and underwriters with due diligence, required disclosures, and compliance or negotiation of covenants relating to pension and benefit arrangements.

3. Supreme Court of Canada Decision in Nolan v. Kerry (Canada) Inc.

This case deals with two main issues – the extent to which expenses can be paid from a pension fund, and use of DB surplus in converted plans to take DC contribution holidays. A decision in the case is expected soon. It is possible the decision may be limited to its particular facts; however, employers are well advised to review their expense practices, not to mention the issues that may arise if they sponsor and administer a plan converted from DB to DC. The decision will likely affect the way in which pension obligations are treated in business transactions, since it provides challenges for lenders and for buyers who might otherwise wish to assume a seller's plan. It is hoped the court will provide some principled guidance, although it is possible the decision could be confined to the specific structures and words used in the plan documents.

4. Changes to Pensions and Benefits

It used to be a widely held view in Canada that reasonable notice of changes to benefit arrangements was sufficient and could become effective without the employee's consent upon expiry of the notice period. But in *Wronko v. Western Inventory*, the Ontario Court of Appeal found that if there is evidence an employee refused to accept the changes, and the employer allowed the employee

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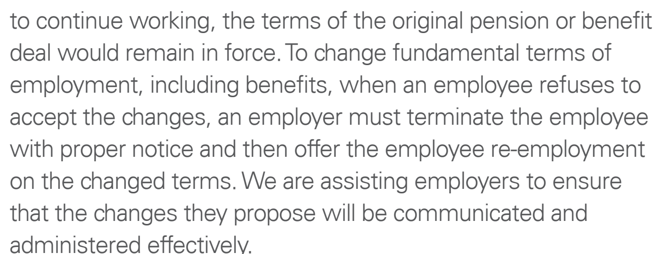

to continue working, the terms of the original pension or benefit deal would remain in force. To change fundamental terms of employment, including benefits, when an employee refuses to accept the changes, an employer must terminate the employee with proper notice and then offer the employee re-employment on the changed terms. We are assisting employers to ensure that the changes they propose will be communicated and administered effectively.

5. Service Provider Liability

Increasingly, as is the case in the U.S., service providers to pension plan sponsors and administrators in Canada are being required by their liability insurers and auditors to enter into formal engagement agreements or letters of understanding. As in the U.S., the primary purpose is to limit or restrict service provider liability. But these letters can also protect plan sponsors and administrators. Surprisingly, many employers and sponsors seem to be treating these as "form letters" to be signed back with little if any legal review or negotiation. A properly drafted letter can avoid surprises or disputes, and can provide evidence of proper execution of fiduciary obligations.

6. Personal Liability for Officers and Directors of Pension Plans

In *Re Slater Steel Inc.*, the administrator appointed by the regulator to manage the pension plan of the insolvent employer Slater sued the prior actuary appointed by Slater to recover a C$19.8-million pension shortfall allegedly caused by the prior actuary. The prior actuary in turn sued the officers and directors of Slater's audit committee personally, as they were the individuals responsible for plan administration. The actuary alleges it relied on information provided by the audit committee and was simply following the directions given to it. The members of the audit committee brought a motion to dismiss the action against them, on the grounds that such an action against them personally was prevented by the court order protecting them under the bankruptcy protection proceedings. The Ontario Court of Appeal disagreed and has allowed the matter to proceed to trial. This case raises several potentially adverse issues for persons who are responsible for managing pension issues.

7. Pension Reform Initiatives

Three reports from expert bodies commissioned by the provincial governments of Ontario, British Columbia and Alberta (jointly) and Nova Scotia have recently released recommendations for legislative change to pension standards laws. Additionally, the federal government has invited submissions in connection with a review it is undertaking. While many good ideas have been brought forward through this process, there are considerable differences in certain key areas. The differences risk making the Canadian regulatory landscape even more fractured as different governments adopt unique solutions to common problems. In the past, legislators seem to have been discouraged from taking corrective action in the face of sound-bite responses to very complex problems. In our view, the momentum and expectation for change will likely result in new legislation over the next few months.

8. Bankruptcy and Insolvency Act Changes

Amendments to the *Bankruptcy and Insolvency Act* (Canada) and *Wage Earner Protection Act* (Canada) came into force in July 2008. The amendments give certain pension contribution claims super-priority over the assets of a bankrupt employer. These claims include (i) unremitted employee pension contributions, (ii) unpaid employer contributions for defined contribution plans, and (iii) unpaid "normal cost" contributions that are required to be paid by the employer. Previously, such claims ranked as ordinary creditors in a bankruptcy. These claims will now, subject to certain exceptions, rank above every other claim or security against the debtor's assets, regardless of when that other claim or security arose. Blakes continues to assist lenders and borrowers with the implications of these developments, especially in light of recent economic trends.

9. CAPSA Multi-Jurisdictional Proposals

In Canada, pensions are constitutionally the responsibility of the provinces, except for certain types of federal employment (such as banks, railways and airlines). In October 2009, the Canadian Association of Pension Supervisory Authorities released two papers, one dealing with a model pension law and the other with proposals relating to a significant overhaul to the existing multilateral agreement between the provinces and the federal government to co-ordinate regulation of private pension plans. The proposed agreement implicitly, if not explicitly, recognizes the reality that harmonization may not be necessary or sufficient for the protection of pension interests, except possibly to contain plan administration costs. Canadian plans that operate in multiple jurisdictions present many complications both in the context of ongoing plan administration, as well as in the context of business transactions, including lending transactions, reorganizations, and M&A transactions. If adopted, the new proposals would introduce more certainty.