ACPM Submission on Draft Regulation made under the Ontario Pension Benefits Act

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ACPM/ACARR

The Association of Canadian Pension Management

L'Association canadienne des administrateurs de régimes de retraite

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FOREWORD

<u>The Association of Canadian Pension Management (ACPM</u>)

The Association of Canadian Pension Management (ACPM) is the informed voice of Canadian pension plan sponsors, administrators and their allied service providers. Established in 1976, the ACPM advocates for an effective and sustainable Canadian retirement income system through a non-profit organization supported by a growing membership and a team of volunteer experts. Our members are drawn from all aspects of the industry from one side of this country to the other. We represent over 400 pension plans consisting of more than 3 million plan members, with total assets under management in excess of $330 billion.

The ACPM promotes its vision for the development of a world¬ leading retirement income system in Canada by championing the following Guiding Principles:

- Clarity in legislation, regulations and retirement income arrangements;
- Balanced consideration of other stakeholders' interests; and
- Excellence in governance and administration

Introduction

The ACPM appreciates the opportunity to provide our input to the Pension Policy Branch of the Ministry of Finance on the draft regulation to the *Pension Benefits Act* (Ontario) (the "PBA"), amending Regulation 909 (General) (the "Draft Regulations").

Although many of the proposed changes are not a surprise given the passage of Bill 236 in May, 2010, the ACPM would like to commend the government for moving forward with further pension reform initiatives and for releasing postings and draft regulations for public comment in advance. This process provides stakeholders with an invaluable opportunity to review, provide comments, and prepare for changes that will directly impact plan administrators and the members and employers we represent.

Over the past few years the Government has undertaken the monumental task of reforming the legislative and regulatory regimes that govern pension and retirement benefits in Ontario. We understand the intricate nature and technical challenges associated with this task. That said, there are a few ways in which we believe some improvements could be made that would have a positive impact and that would allow pension plans in Ontario to better prepare for these changes.

In this Brief you will find our general comments on the Draft Regulations.

Timing of Effective Dates

The July 1, 2012 effective date of the Draft Regulations and the June 1, 2012 deadline for comment in this case is extremely short in light of the significant impact the Draft Regulations will have on the administration of Ontario pension plans as well as plans registered in other Canadian jurisdictions that have Ontario members. ACPM asks that in future consideration be given to the timing of implementing regulation changes. The Government provided a six-month window for pension plan administrators to prepare for the new family law rules. We would ask that plan administrators be provided with notice at least six months prior to the effective date of implementation to properly absorb and respond to similar legislative changes.

Exclusions from Extension of Grow-in Rights

The release of the Draft Regulations specifically requested constructive feedback from interested stakeholders with respect, inter alia, to the circumstances under which termination should not be considered an activating event that would give rise to eligibility to grow-in benefits. In this regard, the ACPM suggests that the following two additional exclusions should be added to section 30.1(2):

Employee Transfers

4. The employee is transferred to an employer who is an affiliate within the meaning of the *Business Corporations Act.*

This does not seem to be the type of economic loss that the grow-in benefit was intended to compensate. While at law it is not possible to "transfer" employees to a new employer without a termination of employment and new employment, this does not seem to be within the intention of the grow-in regime.

Purchase and Sale Transactions

5. The employee is employed by the successor employer pursuant to a transaction described in subsection 80(1) and whose employment is subsequently terminated by the successor employer.

The new grow-in rights regime reflected in the Draft Regulations will have negative implications for vendors in purchase and sale transactions. Where the purchaser provides a pension plan for employees employed by the purchaser ("transferred employees") on the purchase of the vendor's business, Section 80 of the PBA deems the transferred employees' employment not be terminated under the vendor's pension plan. The purpose of this provision is to ensure continuity of membership for the determination of eligibility service and to prevent the transferred employees from losing their previous years of service in the calculation of future benefits under the purchaser's pension plan. In short, where there is no transfer of assets from the vendor's pension plan to the purchaser's pension plan, the vendor continues to be the employer of the transferred employees for purposes of the vendor's plan. When the employees' employment is subsequently terminated by the purchaser, the "deemed employment" with the vendor for pension purposes is also terminated.

The new grown-in rules would require that the vendor's plan extend grow-in rights to such transferred employees with 55 age and service points on termination of employment by the purchaser on dates potentially many years after the transaction has closed. The subsequent termination of employment by the purchaser would be out of the vendor's control and, as such, unpredictable to the vendor and the vendor's pension plan. Therefore, ACPM requests that grow-in rights not be extended to such transferred employees.

Plan sponsors should also provided with the option to transfer assets and defined benefit liabilities relating to the transferred employees' benefits under the vendor's plan to the purchaser's plan. The ACPM strongly urges the Government to proclaim the new asset transfer provisions of the PBA reflected in Bill 236 and related regulation into force as soon as possible to coincide with the July 1, 2012 effective date of the new grow-in rules.

Grow-in – Election to Opt Out

Based on the amendments to the PBA and the proposed regulations, grow-in rights will become mandatory for all pension plans in Ontario on July 1, 2012, with the exception of JSPPs and MEPPs which will be permitted to opt out and file an election with the Superintendent. According to the Draft Regulations, the effective date of a plan's election can be no earlier than the date on which the election is filed with the Superintendent.

Based on this requirement, plan administrators will be required to file an election to opt out no later than July 1, 2012, should the plan wish its election to coincide with the effective date of grow-in changes. To meet this requirement an election will need to be filed in accordance with the recently released draft regulations or on the very date that the regulations are finalized (expected sometime in June) to ensure that the deadline is met. This is a very tight timetable.

For some plans, meeting this timetable may not be feasible if for example they have been delaying making a decision on whether to opt out of the grow-in benefits pending the necessary regulations. Depending on the plan's governance structure, making the required decision prior to July 1, 2012 may not be feasible.

For those plans that have made a decision to opt-out, the tight timetable may still present practical difficulties in meeting the election requirements. For example, if the requirements of the existing Draft Regulations change in a substantive way between now and July 1, 2012 any such election filed in accordance with the Draft Regulations could potentially be invalidated or may need to be resubmitted.

The ACPM requests that JSPPs and MEPPS be provided with a grace period after July 1, 2012 within which to elect to opt out of the application of the new grow-in rules.

Grow-in – Disclosure Requirements

Given the other changes that have been made with respect to disclosure rights the ACPM understands why the Government would be in favour of pension plans notifying affected parties of a decision to opt out of providing grow-in rights.

However, requirement under the Draft Regulations to provide notice of a plan's election to each trade union that represents members of the plan is highly problematic for many plans with multiple unions representing plan members.

Pension plans do not necessarily have a direct relationship with all of the trade unions that their members may be affiliated with, nor do they necessarily have information about each of the trade unions that represent members as this information is not required to administer the plan. As a result, pension plan administrators may face considerable challenges in attempting to fully comply with this requirement and notify all trade unions that represent members of the respective plan.

In ACPM's view, notice to trade unions should not be a requirement. Removing this requirement would not be inconsistent with the Government's intention to notify all affected parties – those who are most affected, the plan members, would still get notice of the opt-out under the Draft Regulations.

Furthermore, those unions that have a stake in the plan's governance would have had representation on the plan's governing body responsible for making the election. To provide notice to such unions would seem redundant. In addition, while it is true in some cases that not all unions representing plan members have a stake in the plan's governance structure, such unions have bargained for their members to participate in the plan and thus have agreed to defer any decision making in respect of the plan to others. To make it a requirement that such unions receive notice of a decision properly made by the plan could give the appearance of undermining the governance structure applicable to such pension plans.

If the Government does not want to remove this union notification requirement entirely, we would suggest as alternatives that notice be given: (i) only to those unions that are party to collective agreements filed with the Superintendent as documents that support or create the pension plan, or (ii) only to those unions which are known to the plan administrator as representing plan members.

Superintendent's Power to Wind Up a Pension Plan

New section 28.2 of the Draft Regulations provides that the Superintendent of Financial Services may require the wind up of a pension plan in circumstances where the pension plan does not have any active members, or members of the plan no longer accrue benefits and the plan is closed to new members. In ACPM's view, such a fundamental change to Ontario's pension legislation should be dealt with in the PBA, not in the Regulation.

Given the present historically low interest rates and the high cost of purchasing annuities, forcing the wind up of such plans will create significant financial stress for employers. Therefore, ACPM urges the Government to grandfather existing inactive pension plans from the application of the provisions of Section 28.2. As an alternative, a transition period should be granted to give employers adequate time to consider potential alternatives for the future of these plans. ACPM also requests that the Superintendent's discretion to order a wind up (effectively usurping the plan sponsor's discretion under the PBA) be subject to the following limits: (i) the power can only be exercised if the Superintendent can demonstrate that members' benefits are at risk or that it would be in the best interests of members (as a whole) to wind up the pension plan; (ii) the power cannot be exercised in respect of a particular pension plan where a successor plan is in place (pursuant to Sections 80 or 81 of the PBA); and (iii) a specific time limit be provided before the power can be exercised, such as not before the expiry of 24 months from the date the pension plan became inactive (i.e., to prevent a wind-up being ordered when a plan is temporarily closed).

Small Pensions

Throughout the Government's consultation process many pension plans have advocated for increases to the existing thresholds so that pension plans are able to commute the value of smaller entitlements and pay these amounts in lieu of a lifetime pension. For this reason, ACPM was in favour of the reforms contained in Bill 236 and welcomes the increase in the small pension threshold limits, the introduction of a new commuted value test, and the expansion of these rules to include benefits payable to surviving spouses and beneficiaries.

Although the ACPM recognizes that the pending reform to the PBA in this area has been expected for quite some time, the effective date of these changes has been unknown until recently. As small pensions are an optional benefit rather than a mandatory legislative requirement like immediate vesting, pension plans sponsors will be required to consider whether to adopt the new rules. Furthermore, changes of this nature also require plan administrators to develop or change policies, administrative procedures, communications materials, and to update operating systems. Again, we would ask that the Government give plan administrators adequate time (i.e. 6 months) to properly absorb and respond to future legislative changes.

Conclusion

We appreciate this opportunity to submit our comments and are hopeful that an opportunity will exist to review and comment further on any subsequent changes to the Draft Regulations before they take effect either on July 1, 2012 or at a later date.