

Pension Reform In Ontario: Shuffling The Deck Chairs

By: Priscilla H. Healy

Exclusive Online Article

used with permission from

BENEFITS AND PENSIONS
MONITOR

www.bpmmagazine.com

Pension

Pension Reform In Ontario: Shuffling The Deck Chairs

By: Priscilla H. Healy

WHEREAS there was a fleet of ships called the Canadian Pension Industry that was in grave peril: because of the high waves made by a stock market plunge that threatened to engulf the ship; and because of the loss of faith of the captains and crew in their ability to navigate the rocks and shoals of the regulatory and judicial systems;

AND WHEREAS it was recommended by sage experts that before any substantive help was provided that the deck chairs should be shuffled ...

Three governmental task forces established by four provincial governments have recently released reports to the irrespective governments as to reforms in pension legislation and, in Ontario's case, as to reforms in the pension regulatory structure. 'A Fine Balance: Report of the Expert Commission on Pensions (the Ontario Report); the Report of the Alberta-BC Joint Expert Panel on Pension Standard (JEPPs Report); and the Report of the Nova Scotia Pension Review Panel (Nova Scotia Report) were based on extensive consultations with stakeholders in the pension industry.

As well, during March, the federal Department of Finance held public consultations on a paper it released earlier in the year.

There is common ground in all the reports as to the problems that needed to be resolved. The most immediate and critical problem is solvency funding relief. Other issues needing resolution are the perceived lack of fairness as to ability of employers to deal with surplus; the problems caused by applying traditional trust law to pension trusts, regulatory overload, and lack of flexibility in addressing new types of pension plans. All the reports show concern over declining pension coverage.

Window Of Opportunity

All three reports propose pension reform through amendments to legislation and regulations, opening a window of opportunity for significant legislative improvements to be made. As well, the attention of elected officials has been forcefully drawn to pension legislation through the current funding crisis. Unfortunately, there is also an opportunity to worsen the situation through a failure to harmonize the legislative changes.

This article will deal not with the funding crisis or other legislative improvements, as to which there is adequate commentary, but with the recommendations in the Ontario Report as to the restructuring of the pension regulatory system. These restructuring proposals and the priority to be given them are, in the author's view, not only extraneous to the important legislative issues that need resolution, but also potentially an impediment.

The Ontario Report is strongly committed to its restructuring proposals. In its message as to implementation of the report's recommendations, there is a disturbing sentence:

"In the Commission's view, priority should be given to putting in place appropriate agencies and officials to carry the work forward."

Plug The Leaks

It appears from the Ontario budget released in March that major restructuring will be at least shelved while the government proceeds with other legislative changes.

Reforms in the pension regulatory structure will distract and divert from the legislative amendments that could be made that will genuinely help the pension industry and that could, if not rebuild the fleet and restore the confidence of the captains, at least plug the leaks in the hulls. Time, money, and sheer energy are required to establish new regulatory structures. Further, the proposed restructuring will do nothing to increase pension coverage in the private sector. Moreover, it will be largely paid for by taxpayers who will not benefit in any way since they themselves do not have Defined Benefit pension plans or indeed any employer-sponsored retirement plans. Statistics from the Ontario Report from 2006 show 65 per cent of the Ontario paid labour force is not covered by occupational pension plans. One in five of the remaining 35 per cent are in Defined Contribution plans and the biggest percentage are in large, government sponsored DB plans that are in no danger of being terminated. Accordingly, a huge majority of the labour force could not conceivably benefit from a restructuring of the pension regulatory system. To the extent

that the cost is shifted not to taxpayers but to employers with DB plans, there will be a further disincentive, as if one were needed, for those employers with DB plans to maintain them.

Let us take a look at the structural and organizational changes that are proposed in the Ontario Report (sections quoted are from the Report Summary):

- Creation of a 'Pension Champion' to promote and facilitate innovation – "A new government agency that would assume responsibility for collecting and disseminating reliable information about the pension system, for thinking creatively about new pension strategies and policies, and for working with stakeholders to improve the pension system."

We have already had extensive consultations across Canada. Let's now get on with amending the legislation, with due consideration of the proposals in other jurisdictions. As to future amendments, why couldn't the existing policy staff of the ministries of finance and labour, with some encouragement from their ministers, 'champion' this role? The pension industry is full of intelligent creative thinkers. All it takes is some governmental commitment and direction to listen to them, and a willingness to give them the latitude to put creative pension solutions in place.

If the taxpayers are going to fund champions of various causes, I personally would much rather fund a 'Champion of the Environment,' or a 'Champion of Welfare Recipients,' or a 'Champion of the Disabled.'

- Pension Community Advisory Council – "A new pension community Advisory Council should be formed representing ... [stakeholders, professionals, and academic users] and it should be invited to advise the government on all significant policy initiatives and to serve as a forum for the exchange of views. This new approach to policy making should be led by the 'Pension Champion,' which should be given adequate staff and resources."

There are a number of well-organized stakeholder groups on all sides of the political spectrum who are more than willing to give policy advice. They include the Association of Canadian Pension Management, the Ontario and Canadian Bar Associations, the Canadian Institute of Actuaries, the CAW, the Canadian Life and Health Insurance Association, and the Canadian Association of Retired Persons. There are several pension advisory committees to the Superintendent of the Financial Services Commission. All this advice is available from well-organized and articulate companies, professional service providers, and interest groups in the pension field. Further, various voluntary industry groups have been formed from time to time for various specific purposes. Examples include the CAP Guidelines and the CAPSA Governance Guidelines. In the author's experience, standing committees do not foster the creation of new ideas. Limited purpose advisory groups work better, provided that the opportunity is given to those not in the group to provide input at some point in the process.

However, the Ontario budget indicates the formation of such a council.

The issue will be, then, as now, whether decision-makers will care to listen.

- Ontario Pension Agency – "The government should establish an Ontario Pension Agency to receive, pool, administer, invest, and disburse pension plans left stranded when plan members leave a plan, when the plan is wound up, or when former plan members cannot be found or cannot find the plan to which they formerly belonged."

This proposal is a good one if its purpose is limited to providing a depository for pensions and surplus entitlements for members who cannot be located. An office, rather than an agency, would suffice and only a few staff would be needed. It would relieve trust companies and insurance companies from maintaining records and small accounts indefinitely. It would certainly be better than confiscation by governments under unclaimed property legislation or leaving unclaimed pension monies with employers who will mingle the monies with their own funds and perhaps lose records over time and through corporate reorganizations. The difficulty is the proposal to use such an agency for plan members to use as an alternative to RRSPs or for the provision of annuities in competition with insurance companies. There are ample financial institutions available to members. There is simply no need for the government to offer the same services and it is doubtful that it could be established that the members would be any better off.

- New Pension Regulator replacing the Financial Services Commission of Ontario – "an agency with powers of self-management comparable to those of the Ontario Securities Commission. The Superintendent should be the chief executive of the Regulator and, with four part-time commissioners, should be responsible for its operations. The Regulator should have greatly enhanced powers to regulate the pension system and a budget sufficient to ensure that it has the personnel and resources necessary for the purpose. It should improve its data collection, analytical and risk-management capacities, and be given power to make rules and to issue policy statements, opinion letters, and advance rulings."

This is a classic case of first we merge in 1990 for efficiency and cost savings and then a few years later when we see problems with the effectiveness of the merged organization we split again. These measures never save money. More independence and a larger budget would undoubtedly increase the profile and reputation of the pension regulator. That may be a good idea, but is it a priority right now?

- Pension Tribunal of Ontario to replace the Financial Services Tribunal – "The Tribunal would have exclusive and ultimate jurisdiction over all matters arising out of or incidental to the PBA, including plenary power to hear and decide specified matters at first instance, and to hear and decide all appeals from orders made by the Superintendent. It should have the power to make any order required to secure compliance with the Act, including the power to impose administrative fines for non-compliance. Orders of the Tribunal should be final and binding, subject only to appeal to the Divisional Court in the event of a denial of natural justice, jurisdictional error, or violation of the constitutional right of a party."

This is a return to the Pension Commission of Ontario, without the policy-making functions, and with a privative clause reducing rights of appeal. The effectiveness of such a tribunal would entirely depend on the expertise and independence of the members. It is of note that there have been few criticisms of the pension law decisions of the existing Financial Services Tribunal. Perhaps this is a case of 'let's fix it sometime,' but not as an immediate priority. More pressing needs might be to fill gaps in the Financial Service Tribunal's powers to secure compliance and to award costs, perhaps to permit the chair to sit alone for some matters. A privative clause in the Pension Benefits Act could give it more authority in dealing with issues of trust law. These needs could be met, if indeed they are pressing, without an actual restructuring.

We could, however, use a pension ombudsman whose role would be to hear members' problems, help them understand the documents and the legislation, and intercede with the plan administrators and regulatory authorities if required. I appreciate there are currently many persons who could play such a role. They are called lawyers. Unfortunately, the cost of legal services for individuals, unless a considerable amount of money is at stake, can be prohibitive. A complaints officer at FSCO would also seem to be a good idea so that pension officers are not distracted from their normal tasks of reviewing documentation and transactions, and members' complaints are given an adequate hearing. These functions could be combined with one or two dedicated staff.

The basic question is 'why these structures would result in the government giving more priority to pension issues in the absence of a crisis situation?' The lack of legislative response to pension issues is attributable to, first, the political minefield in attempting to balance business and labour and, secondly, other pressing priorities. Why would this change? Will the policy input of the pension regulator, who after all, does know something about pensions, be diminished? And what of the role of the ministry staff, some of whom also know something about pensions? Will existing knowledgeable and experienced personnel simply be moved over to the new structures? Would there be battles for influence and resources among the 'Pension Champion,' the Ontario Pension Agency, and the New Pension Regulator and ministry staff?

The Ontario Report also recommends a new study of the Pension Guarantee Fund and an increase in coverage to the first \$2,500 monthly pension from the present \$1,000 per month.

Do we need a new study? We should at least wait to see how the recent amendments to the Bankruptcy and Insolvency Act play out. However, surely we know that no reasonable amount in the PBGF will be enough in the event of a major insolvency and that increasing assessments against employers with pension plans will be another hole in the hull of the Canadian Pension Industry. In the end, the taxpayers without pension plans themselves, and whose own retirement savings have been severely eroded, will have to prop up the fund. There is no move for governments at any level to compensate these taxpayers, or to give them alleviating income tax breaks, although the economic circumstances causing pension fund deficits are the same circumstances that have caused the funding crisis for pension plans.

Placing a greater burden on the pension plan sponsor would be a mistake. Placing the burden on the taxpayer is simply unfair.

Decline In DB Plans

Nothing will turn around the decline in DB plans. That includes the proposals contained in the Budget. However, to shore up the existing plans, I would suggest that the Ontario Minister of Finance:

- address the critical short-term funding problems immediately
- improve the legislation (apart from a bureaucratic shuffle and the creation of new cost centres), in accordance with the technical and substantive recommendations of the Ontario Report with whatever

balance is practical politically, harmonized with other jurisdictions as much as possible, and with room left for flexibility

- amend the legislation relating to Defined Contribution pension plans, giving clearer standards and increased flexibility so that employers are more comfortable with their obligations
- give rule-making power to the regulators, with adequate consultation and safeguards so that the minister is ultimately responsible and accountable
- Make the existing regulatory structure work, with the right personnel, a little legislative tweaking, and a great deal more encouragement, before expending financial and human resources in re-organizing.

Lastly, and surely an idea whose time has come and which is referenced in the various reports, there needs to be established a federal or provincial DC plan to supplement the CPP and to help provide coverage for those Canadians who at this time have no access to an employer-sponsored pension plan.

That would be a good use of government resources

Priscilla H. Healy is with Fogler, Rubinoff LLP (phealy@foglerr.com). The views expressed in this commentary are her own and are not necessarily those of Fogler, Rubinoff LLP or of any organization to which of which she belongs.