

# Pension Reforms

Pensions and Benefits Seminar  
Thursday, May 6, 2010



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# Pension Reforms

May 6, 2010  
Peggy A. McCallum and Ross A. Gascho

## Background to pension reform

- Pensions are politically difficult
- Political agenda is always full
- Pension issues come up c. every 20 years:
  - mid-1960s
  - mid-1980s
  - today
- Current legislation and regulatory initiatives driven by:
  - Coverage: various commissions and consultations
    - Retirement income security is threatened
    - What should the future look like?
  - DB funding: how do we survive this mess?

## Reform activity across Canada

- Consultations on Retirement System
  - federal
  - British Columbia
  - Alberta
  - Ontario (research study)
- Pension Reform Legislation
  - federal (proposed)
  - Manitoba
  - Ontario (proposed)
  - Nova Scotia (consultations)
- Consultations on Proposed Regulatory Policies
  - Funding and Governance Policies (OSFI)

## Ontario Bill 236: Pension Benefits Amendment Act, 2010

## Background to Bill 236

- 2008 – Expert Commission on Pension releases its report “A Fine Balance: Safe Pensions, Affordable Plans, Fair Rules”
- June 2009
  - temporary solvency funding relief regulations (with retroactive effect)
  - expansion of provisions for loans and grants to Pension Benefits Guarantee Fund
  - family law changes for division of pensions on marriage breakdown
- December, 2009
  - Bill 236 introduced
  - Third Reading expected soon
  - Focus is defined benefit

## Further Reforms Announced

- March, 2010 – Ontario Budget
  - Bill 236 is Phase One
  - Phase Two is expected in fall, 2010
    - still a defined benefit focus
    - stricter funding rules
    - restrictions on benefit increases in under funded plans
    - letters of credit for solvency funding
  - Improve multi-jurisdictional regulation
  - New investment rules?
  - Future of Pension Benefits Guarantee Fund

## Bill 236 intended to balance interests

- For Plan Members
  - immediate vesting
  - phased retirement
  - notice of all proposed amendments
  - advisory committees
  - grow-in benefits on termination of employment
- For Plan Sponsors
  - elimination of partial wind ups
  - less stringent rules for payment of surplus to employer on plan wind up
  - new rules for asset transfers

## Immediate Vesting

- Full vesting and locking-in from first day of membership (current rule is two years)
- Two year eligibility period unchanged

## Phased Retirement

- Optional
- DB only
- Beginning from age 60 or age 55 if entitled to an unreduced pension
- Ending no later than age 65
- Written agreement between plan member and employer Regarding reduced work hours upon receipt of partial pension payments
- Pension will continue to accrue and contributions will continue to be made as required by plan

## Notice of Amendments

- Notice must be given to all members, trade unions, former members, retired members BEFORE filing for registration
- Applies to virtually all plan amendments
- Regulations to prescribe some exceptions where notice can be given after filing
- Electronic notice and other communications are allowed if the person permits
  - Regulations to prescribe exceptions

## Pension Advisory Committee

- Easier to establish?
  - plan administrator must distribute notice and provide assistance upon receipt of written notice of intent to establish committee and prescribed conditions being met
  - majority of those who vote
- Purposes remain the same
  - Monitor administration
  - Make recommendations
  - Promote awareness

## Advisory Committee (Cont'd)

- Rules about composition
  - Retirees can appoint at least two representatives
  - Each class of employees can appoint at least one representative (two if plan has single class)
  - Former members (deferreds) may be appointed
- Administrator required to attend meetings, provide assistance and information
  - Details to be in regulations
- Prescribed costs payable from pension fund

## Grow-in Benefits

- Members who have age plus service equal to or greater than 55 upon termination will be entitled to grow in to early retirement subsidies (based on earnings and service at termination date)
- Will apply to all plans that provide unreduced early retirement pensions and bridge benefits
- Will apply to all terminations other than for cause, not just on wind up or partial wind up
- To become effective July 1, 2012

## Partial Wind Ups

- Partial wind ups prohibited if effective date would be on or after date when Section 69.1 comes into force
- Partial wind ups may still be ordered or declared if effective date prior to date when Section 69.1 comes into force
- Partial wind ups in process not affected
- Grounds for partial wind up to remain the same
- To be repealed after a transition period
- New surplus rules
- Annuity purchase not required

## Surplus Payments to Employers

- To be permitted on wind up (and partial wind ups during transition period)
- Requirements:
  - Plan provides for payment of surplus to employer on wind up
- OR (not “and” anymore)
- Written agreement of employer and members, former members, retired members in accordance with prescribed conditions

## Asset Transfers Between Plans

- Regulatory approval still required
- Value of transferred assets to be determined in accordance with regulations
- Prescribed funding rules must be met
- Transfer of portion of any surplus to be required in accordance with regulations
- Buyer does not need to replicate past service benefits from seller’s plan, but must ensure that commuted values are not less

## Housekeeping Changes

- Duty to retain records
  - Details to be in regulations
- Plan administrators can agree to allow plan members to consolidate all of their pension benefits in the current employer's plan
- Applications for refunds of overpayments to be extended to 24 months
- Transfer to RRSPs permitted in lieu of lump sum cash payments
- Division of pensions on marriage breakdown
  - Details to be in regulations

## Bill C-9: Amendments to the Income Tax Act and Pension Benefits Standards Act, 1985

## Background to Bill C-9

- Longstanding suggestions to increase permitted DB surplus and DC contribution room
- Solvency relief regulations: 2006 and 2009
- January 9, 2009 – Department of Finance discussion paper *Strengthening the Legislative and Regulatory Framework for Private Pension Plans Subject to the Pension Benefits Standards Act, 1985*
- January 27, 2009 Federal Budget
- October 27, 2009, government releases pension reform proposals
- March 29, 2010, *An Act to implement certain provisions of the budget tabled in Parliament on March 4, 2010 and other measures* is tabled
  - PBSA and ITA amendments

## Amendments to Income Tax Act

- DB surplus threshold increases from 10% to 25% of liabilities
- No change to DC contribution room

## Amendments to Pension Benefits Standards Act, 1985

- Minimum Standards
- DC
- Void amendments
- Funding
  - Letters of Credit
  - Distressed Plan Workouts
  - Termination and Winding Up
- Superintendent's powers
- Required amendments

## New Minimum Standards

- Immediate vesting
- Locking in applies after two years of membership
- 25% commutation for pre-87 is removed
- Additional information to members
  - Annual statement showing funded ratio [i.e., assets / going concern liabilities] or prescribed ratio if Regulation has been made
- Additional information may be reviewed on member request

## Defined Contribution

- PBSA is drafted for DB
  - Has not been redrafted to reflect different nature of DC plans
  - Concern that separate DC drafting would create additional problems
- Variable benefits permitted
  - LIF-like payments from DC plan
  - Require spousal consent
  - Portability rights each year
  - Spouse at time of pension commencement may continue variable benefits
- Retirees now have opportunity to run out of money while in the plan
  - How is this a good thing for administrators?

## Void Amendments

- Amendment is void if it would have the effect of
  - Reducing benefits accrued before date of amendment
  - Reducing immediate or deferred pension to which member was entitled before date of the amendment
  - Reducing solvency ratio below prescribed level
  - Reducing Solvency ratio and the solvency ratio would be below prescribed level
  - Solvency ratio is already below prescribed level and amendment would increase pension benefits

## Letters of Credit

- Previously under 2006 and 2009 solvency relief regulations
- First time PBSA has referred to letters of credit
- Much to be set out in Regulations
- LC may be used to cover unspecified liabilities
- LC must be held by a trustee (irrespective of other plan assets)
- LC and trust must contain terms specified by regulation
- Trustee is exempted from certain civil actions
- Regulations will set out circumstances in which trustee must call LC

## Distressed Plan Workouts: “Let’s make a deal”

- Previous special regulations for
  - Air Canada and Air Canada 2009
  - Canadian Press
- Common features among those regulations:
  - Treatment of liabilities that would otherwise not be permissible
  - Special payments deferred
  - Less than 1/3 of members object
  - Less than 1/3 of “beneficiaries” object
- Structurally awkward because govt makes Regulation for which conditions may or may not be met
- How many other situations have not resulted in a Regulation?

## Distressed Plan Workouts: “Let’s make a deal”

- Available only for single-employer DB plans
  - Not available if employer is an agent of the Crown
  - Available for Crown Corporations
  - Employer must not be in liquidation, subject to assignment or bankrupt or plan terminated in full
  - Employer must pass special resolution to elect the scheme; Crown Corporation require resolution by Minister of Finance and responsible minister
- All contributions other than normal costs and employee contributions are deferred when scheme is elected
- Employer applies to Federal Court for a representative for
  - Non-union members
  - Former members, beneficiaries, other persons entitled to payment

## Distressed Plan Workouts: “Let’s make a deal”

- Employer and reps negotiate agreement that includes a new funding schedule for future payments
- Prescribed information to members
- Minister cannot approve if more than 1/3 of each group (members and beneficiaries) object to the scheme
- Funding schedule takes effect only if Minister approves
- Minister may approve if in Superintendent’s opinion it complies with regulations re: funding schedules
  - Linkage between government and regulatory system

## Partial Termination and Winding Up

- Partial wind ups eliminated except for those ordered by Superintendent
  - Immediate vesting, no grow-in, no surplus on partial wind up (*Marine Atlantic*)
  - Why does Superintendent continue to have right to declare partial wind up?
    - May be way for Superintendent to force a delinquent employer out of a MEPP

## Full Termination and Winding up

- Grounds for Superintendent to order termination expanded to include cessation of crediting of benefits
- Administrator must notify Superintendent 60 to 180 days before the effective date of termination
- On termination employer must pay
  - Normal cost
  - Special payments that would be due between termination and end of plan year
  - Payments required under workout agreement to end of year
  - Face value of letter of credit amount if issuer declines to pay

## Full Termination = Full Funding

- Expected in Regulations to be payable over 5 years
- Surplus will not be created if plan is in deficit on termination
  - If special payments > plan's obligations, the excess is not surplus and may be refunded to employer with Superintendent's consent

## Superintendent's powers expand

- Superintendent already has ability to issue directions of compliance if in Superintendent's opinion an action or course of conduct is "contrary to safe and sound financial or business practices"
  - Directions may be to cease an act or course of conduct and perform acts to "remedy" the situation as Supt directs
  - Failure to comply with a direction of compliance can result in deregistration
- Under C-9 Superintendent may:
  - Replace administrator
    - Applies if administrator is insolvent, unable to act or doing so is in best interests of members
  - Appoint actuary to prepare a valuation or termination report
    - Applies if doing so is in best interests of members

## Required amendments to plans

- Plan must state that if it is terminated
  - administrator gives written statement within 30 days after termination
  - administrator gives statement of options within 120 days after termination
- Add immediate vesting
- Remove pre-1987 10&45 vesting
- Revise information disclosure



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# BIOGRAPHIES



## Peggy A. McCallum

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Peggy McCallum practises exclusively in the pensions and employee benefits law area. She provides advice on pension plans, supplemental retirement arrangements and other employee and executive compensation plans for employers, administrators, service providers, regulators, and government. Peggy also provides specialist support in pension litigation.

Peggy has a wide range of experience in private practice as well as in the regulatory and industry sectors, including several years as counsel to the former Pension Commission of Ontario.

Before becoming a lawyer, Peggy enjoyed a successful career as a journalist with The Globe and Mail's Report on Business.

Peggy joined the firm in 1997 and is a partner.

### Areas of Practice

Pensions and Benefits

Labour, Employment and Human Rights

### Education

BA (Hons), Journalism  
University of Western Ontario,  
1976

LLB,  
University of Western Ontario,  
1983

### Year of Call

Ontario, 1985

### Representative Experience

- *Co-operators Life Insurance Company and Central 1 Credit Union complete \$245 million acquisition of The CUMIS Group*  
Advised Co-operators Life Insurance Company
- *FCI sells North American-based electrical division to Hubbell for US\$360 million*  
Advised FCI S.A.
- *Supreme Court issues landmark decision in closely watched pension law case*  
Counsel to Kerry (Canada) Inc.
- *Handleman sells its Canadian music operations to Anderson Merchandisers*  
Advised Handleman Company
- *C.H. Robinson Worldwide acquires Transera International*  
Advised C.H. Robinson Worldwide, Inc.
- *Landmark settlement restores pensions for agricultural co-ops' workers*  
Counsel to 14 of the co-operatives in the Participating Co-operatives of Ontario Trusteed Pension Plan
- *DaimlerChrysler sells Chrysler Group to Cerberus Capital Management in US\$7.4 billion deal*  
Acted as special Canadian counsel to DaimlerChrysler AG
- *Smiths Group completes US\$4.8 billion sale of aerospace business to General Electric Company*  
Advised Smiths Group PLC

### Presentations

- Pension Reforms, Pensions and Benefits Seminar, May 6, 2010
- 25th Fasken Forum, Labour, Employment, Human Rights, Pensions & Benefits Conference, February 12, 2010

- Landmark Pension Decision: What the Kerry Decision Means to You, Fasken Martineau Pensions and Benefits Seminar, September 29, 2009
- Landmark Pension Decision: What the Kerry Canada Decision Means to You, August 20, 2009
- Pension Plan Expenses and the Payment of Legal Costs Related to Pension Litigation, International Pension & Employee Benefits Lawyers Association Conference, May 24-27, 2009
- 24th Fasken Forum, Employment, Labour, Human Rights, Pensions & Benefits Conference, March 3, 2009
- What You Need To Know About Labour, Employment and Pensions, Navigating The Financial & Economic Crisis Seminar Series, January 15, 2009
- Managing Pension Risk, November 25, 2008
- 22nd Labour, Employment, Human Rights, Pension & Benefits Conference, February 8, 2007
- Managing the Risk of Pension Litigation, June 6, 2006
- Practical Primer on Reducing the Risk of Pension Litigation, Fasken Martineau Pensions and Benefits Group Seminar, February 10, 2006
- Fasken Martineau Pension Litigation Seminar, May 10, 2005

### **Publications**

- "New Developments in Pension Partial Wind Ups", Pensions and Benefits Bulletin, January 2010
- "Pension Deficits in Insolvencies", Pension Planning Journal, September 2009
- "Nolan v. Kerry (Canada) Inc. : Important Answers for Employers, Pension Plan Sponsors, Administrators And Participants", Pensions and Benefits Law Bulletin, August 10, 2009
- "Ontario Introduces Solvency Funding Relief for Pensions", Pensions and Benefits Bulletin, July 2009
- "Defined Benefit Pension Plans Face Trouble", Pensions and Benefits Bulletin, November 2008
- "Pension Planning Journal", Editor, Federated Press, ongoing

### **Memberships and Affiliations**

- Sponsors Committee, Colleges of Applied Arts and Technology Pension Plan
- Canadian Bar Association (Pensions & Benefits)
- International Pension and Employee Benefits Lawyers Association
- Canadian Pension and Benefits Institute
- Association of Canadian Pension Management
- International Foundation of Employee Benefit Plans



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Ross Gascho is a partner in the firm's Pension and Benefits Law Group. He has extensive experience advising private and public sector employers on governance, administration, design and implementation of retirement and group benefit programs as well expertise in changes to pension standards legislation and tax developments affecting registered plans. Canadian pension issues have become hugely important for many employers. Ross has worked extensively in restructuring pension and benefit plans to reflect the current economic environment. Ross joined Fasken Martineau in 2003.

### Areas of Practice

Pensions and Benefits

Cross-Border and International Transactions

Labour, Employment and Human Rights

Employment Law Advice

### Education

BA,  
Wilfrid Laurier University, 1983

LLB,  
University of Toronto, 1986

MBA,  
University of Toronto, 1988

### Year of Call

Ontario, 1990

### Representative Experience

- *MDS completes divestiture of instrument division to Danaher for US\$650 million*  
Canadian counsel to MDS Inc.
- *Co-operators Life Insurance Company and Central 1 Credit Union complete \$245 million acquisition of The CUMIS Group*  
Advised Co-operators Life Insurance Company
- *CCMP Capital stalking horse bidder in Eddie Bauer bankruptcy*  
Advised CCMP Capital Advisors
- *Yildiz Holding A.S purchases Godiva Chocolatier business from Campbell Soup for US\$850 million*  
Advising Yildiz Holding A.S.
- *NewPage buys North American paper operations of Stora Enso in US\$2.5 billion deal*  
Advised NewPage on the Canadian aspects of this transaction
- *Cerberus sells GDx Automotive to Metzeler Automotive Profile Systems*  
Advised GDx Automotive
- *DaimlerChrysler sells Chrysler Group to Cerberus Capital Management in US\$7.4 billion deal*  
Acted as special Canadian counsel to DaimlerChrysler AG
- *Goodyear sells Engineered Products Division to Carlyle Group for US\$1.475 billion*  
Advised Goodyear on the Canadian aspects of this transaction
- *Cerberus Capital Management completes US\$1 billion purchase of Tower Automotive*  
Advised Cerberus Capital Management L.P with respect to Canadian components of this transaction
- *Smiths Group completes US\$4.8 billion sale of aerospace business to General Electric Company*  
Advised Smiths Group PLC
- *MDS sells diagnostics business to Borealis Infrastructure Management in \$1.325 billion transaction*  
Advised MDS Inc.

- *Martinrea International purchases North American body and chassis operations from ThyssenKrupp Budd Company for US\$275 million*  
Advised Martinrea International Inc.
- *ING Canada acquires Allianz of Canada*

## **Presentations**

- Pension Reforms, Pensions and Benefits Seminar, May 6, 2010
- “Kerry : What does it really mean?” Federated Press, Pension Law Litigation and Governance conference, Vancouver, March 17, 2010
- “Pension and Benefits Issues in Mergers and Acquisitions”, Federated Press, Pension Law Litigation and Governance conference, Vancouver, March 17, 2010
- “Legal Issues in Communicating Pensions and Benefits”, Federated Press conference concerning communication of compensation and benefits, Toronto, October 2, 2009
- “When the Sky Falls: Managing Legal Risk in a Shaken Economy”, Federated Press, Pension Litigation conference, Vancouver, April 20, 2009
- Landmark Pension Decision: What the Kerry Decision Means to You, Fasken Martineau Pensions and Benefits Seminar, September 29, 2009
- Landmark Pension Decision: What the Kerry Canada Decision Means to You, August 20, 2009
- What are the Pension Implications of the End of Mandatory Retirement?, 10th Annual National Forum On Pension Law, Litigation & Governance, The Canadian Institute, February 5, 2009
- What You Need To Know About Labour, Employment and Pensions, Navigating The Financial & Economic Crisis Seminar Series, January 15, 2009
- Managing Pension Risk, November 25, 2008
- Federated Press 7th Annual Communicating Compensation and Benefits, December 17-19, 2007
- Canadian Pension & Benefits Institute Conference: Kerry Case - Implications for Pension Plan Sponsors, July 10, 2007
- Federated Press Conference: Communicating Compensation, Pension and Benefits, January 29-31, 2007
- Managing the Risk of Pension Litigation, June 6, 2006

## **Publications**

- “Solvency Funding Relief in Context”, Taxation of Executive Compensation and Retirement, Vol. 20, No. 5
- “SERPs in a Troubled Economy”, Taxation of Executive Compensation and Retirement, Vol. 20, No. 3
- “Solvency Funding Relief in Context”, Pension Planning, Vol. XV, No. 1
- “Federal Budget Review 2009”
- "Non-Pension Covenants", Canadian Bar Association conference on Pensions and Benefits in Mergers and Acquisitions, November 21, 2008
- "Defined Benefit Pension Plans Face Trouble", Pensions and Benefits Bulletin, November 2008

- "Reducing Pensions & Benefits Cost in Response to Challenging Times", Pensions and Benefits Bulletin, November 2008
- "Bullet Proofing Defined Contribution Plans", HRPA Newsletter, May 2008
- "MEPP Employers May Be Jointly and Severally Liable for Wind Up Deficits", Employee Benefit News Canada, January/February 2008
- "What's New in Canada", International Pension Lawyer, 2008
- "Tax Free Savings Accounts", Taxation of Executive Compensation and Retirement, Vol19, No.2, 2008
- "Ontario Unlocks: Treasure Chest or Pandora's Box?", Taxation of Executive Compensation and Retirement, Vol.18, No.8, 2008

### **Memberships and Affiliations**

- Ontario Bar Association, Pension & Benefits Section, Past Chair
- Canada Revenue Agency, Pension Advisory Committee, Member
- Financial Services Commission of Ontario, Legal Advisory Committee, Member
- Association of Canadian Pension Management, Ontario Regional Council, Member
- International Pension and Employee Benefits Lawyers Association, Member
- American Bar Association, Member
- Canadian Tax Foundation, Member

# REFERENCE MATERIALS

## FACTS

**Lexpert** named the Supreme Court of Canada decision in *Nolan v. Kerry (Canada) Inc.*, as the Top Business Case of 2009. We successfully represented Kerry in this case.

**Chambers Global** ranks our team and notes our “strength across myriad disciplines, including labour, employment, pensions, benefits, human rights and safety matters”

## Pensions & Benefits

It is not only employers and employees who are increasingly aware of the significance of pensions and employee benefits. Secured creditors and regulators also focus on pensions and benefits in new ways. Whether looking to restructure a plan, ensure its legal compliance, or include it in a transaction, you need expert advice. Fasken Martineau's Pensions Group provides practical and innovative advice that is both timely and cost-effective. Home to one of the longest-established pensions groups in Canada, we have been involved in many of Canada's leading pension actions and class actions before the courts and tribunals.

### Our Clients

Our clients include public and private sector employers, plan administrators, financial institutions, consultants, service providers, investment managers, governments, and pensions regulators. We work with clients from across all economic sectors.

Clients rely on us for our:

- **Business savvy approach** – We have a proven ability to address pension and benefits issues pragmatically. For mergers and acquisitions, we structure our pension and benefits advice to fit with our clients' transactional and broader business interests.
- **Long-term relationships** – Many of our clients have worked with us for more than 20 years, which has given us a clear understanding of how their pension and benefits plans – and the legal issues they raise – evolve over time.
- **Dispute resolution expertise** – Together with our pension litigation specialists, we play a key role in resolving pension and benefits disputes.
- **Multidisciplinary approach** – We draw from the diverse expertise of our colleagues in other specialty practice areas such as labour and employment, litigation, trusts, and taxation. This winning combination of specialist knowledge has proven invaluable to our clients.

### Our Expertise

Clients rely on us for:

- Litigation matters before the courts and tribunals
- Treatment of pension and benefits plans in acquisitions, divestitures, mergers, and other corporate reorganizations
- Surpluses and deficits (e.g. surplus entitlement and distribution, surplus withdrawals, contribution holidays, funding obligations)
- Investment and management of plans
- Plan design, drafting and amendment
- Plan governance and fiduciary obligations
- Full and partial plan termination
- Regulatory matters
- Supplementary pensions and retirement compensation arrangements
- Post-retirement benefits
- Division of pensions on marriage breakdown.

# FACT SHEET

## Selected Experience

Fasken Martineau provided pension and benefits advice in the following recent transactions and cases:

**Kerry (Canada) Inc.**, in the Supreme Court of Canada case dismissing an appeal by former Kerry employees concerning contribution holidays, payment of plan expenses, and costs.

**Participating Co-operatives of Ontario Trusteed Pension Plan** in the Government-mediated settlement of a regulatory hearing and class action regarding an insolvent pension plan.

**Co-operators Life Insurance Company** which, along with Central 1 Credit Union, acquired The CUMIS Group Limited for \$245 million.

**Yildiz Holding A.S.** in its US\$850 million purchase of the Godiva Chocolatier business from Campbell Soup Co.

**Cerberus Capital's NewPage** in its US\$2.5 billion acquisition of the North American paper operations of Stora Enso Oyj.

**The Woodbine Entertainment Group** in a regulatory hearing and appeal regarding pension plan membership.

**Daimler Chrysler** in its US\$7.4 billion sale of its controlling interest in Chrysler Group to an affiliate of Cerberus Capital Management, L.P.

