British Columbia's New Pension Benefits Standards Act – Key Changes

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Pensions

This regular feature is edited by Elizabeth H. Boyd of Blake, Cassels & Graydon LLP. It reviews current developments pertaining to pensions and other deferred plans.

LEGISLATION

British Columbia's New Pension Benefits Standards Act – Key Changes

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British Columbia's new *Pension Benefits Standards Act* (the "PBSA" or the "Act") received Royal Assent on May 31, 2012. While this new Act will eventually repeal and replace the existing PBSA, it will not come into force until the underlying regulations are developed and finalized, likely in 2013 or later. As the new Act is the final product of the November 2008 Joint Expert Panel on Pension Standards ("JEPPS") report and subsequent work by the B.C. and Alberta governments, it is anticipated that Alberta will introduce a substantially identical bill later this year.

New Plan Designs

One of the most important features of the new Act is that it provides for new plan designs. The new Act sets out five basic plan structures: single employer plans, collectively bargained multi-employer plans, non-collectively bargained multi-employer plans, jointly sponsored plans and negotiated cost plans, on top of which may be overlaid one or more categories of benefit provisions, including defined benefit, target benefit and defined contribution provisions. Interestingly, not all of the plan structures appear to be mutually exclusive. For example, while these combinations may well be limited by the regulations, it would seem at present that a jointly sponsored plan could also be a single employer plan, a non-collectively bargained multi-employer plan, a collectively bargained multi-employer plan or a negotiated cost plan.

What follows are some of the basic rules in the new Act distinguishing these new plan and benefit structures.

Non-collectively Bargained Multi-Employer Plans

The new Act requires that each employer of a non-collectively bargained multi-employer plan enter into a participation agreement with the administrator. It also provides special rules for employer withdrawal that are analogous to partial wind-up rules, whereby the employer remains liable for a portion of the solvency deficiency. This is the closest the new PBSA comes to the "partial termination" concept, which has been eliminated generally from the new Act.

Collectively Bargained Multi-Employer Plans

A collectively bargained multi-employer plan, on the other hand, is defined to be established through a collective agreement and no participation agreement is required as a rule. In addition, employer withdrawal is to be dealt with in the plan text rather than through the partial termination-like provisions noted above.

Negotiated Cost Plans

A negotiated cost plan can be structured as either a single employer plan or a collectively bargained multi-employer plan. The definition of negotiated cost plan is much clearer in the new Act than in the existing PBSA, setting out that the plan must be established under a collective agreement and that the contributions (and in turn employer and active member liability) are determined and limited by the collective agreement. Importantly, as in the existing PBSA, accrued benefits can be reduced with the consent of the Superintendent of Pensions (the "Superintendent") and employers are not liable for solvency deficiencies on termination.

Jointly Sponsored Plans

Jointly sponsored plans can be either single employer or multi-employer plans, but

must have defined benefit or target benefit provisions. While we do know that both employers and active members will have to contribute to the plan and share the plan's governance, it is not yet clear how to become a jointly sponsored plan. The Act sets out that a jointly sponsored plan must meet the criteria to be prescribed in the regulations. Like a negotiated cost plan, a jointly sponsored plan will be subject to solvency funding rules, but will be able to reduce accrued benefits with the Superintendent's consent. Similarly, the employer(s) is/are not liable for solvency deficiencies.

Target Benefit Provisions

A target benefit provision looks like a defined benefit provision, but benefits can be reduced without the Superintendent's consent. Under a target benefit provision, an employer is liable only for the amount it is contractually required to contribute to the plan and is not liable for solvency deficiency on termination. Further, a target benefit provision can be contained in any plan structure, including in a single employer plan where the employer retains sole control of governance.

This new benefit structure should be attractive to employers that want both cost containment and the efficiencies of a defined benefit-like arrangement and, accordingly, has the potential to buck the trend towards defined contribution plan conversion. Unfortunately, although the new Act states that plans will be able to switch from a defined benefit to a target benefit design, we do not yet know how this will occur as the process remains to be prescribed in the regulations.

Governance

The Administrator

Like the existing PBSA, the Act draws a distinction between the governance roles of the "administrator" and the "participating employer" ("employer" under the current PBSA). The characterization of these roles has, however, shifted somewhat. Under the existing PBSA, the administrator is defined by who has that role, whether it be the employer, a board of trustees or another person appointed by the Superintendent. The Act, on the other hand, defines the administrator more broadly as the person responsible for administering the plan; however, as it elaborates only to the extent it specifies a pension plan must have an administrator who meets the prescribed criteria, we will not know until the regulations are published who precisely will fit the role of administrator.

Interestingly, while the administrator is still permitted to employ an agent (provided that it carries out reasonable and prudent supervision), the provision in the existing PBSA imposing on the agent fiduciary obligations to plan members has been eliminated.

The Participating Employer

As for the other "hat," while the term participating employer is used in the current PBSA only in relation to multi-employer plans, the term will now be defined as "an employer that is required to make contributions to the Plan." Thus, the language will shift such that we will refer to a participating employer even in the context of a single employer plan.

Governance Policy

The Act requires the introduction of a new compliance and assessment regime. The rationale behind this development is that by setting out governance, funding and investment standards, it is easier for stakeholders and others to monitor performance and challenge the administrator's actions.

Under this new regime, all plans will be required to have a written governance policy established in respect of the structures and processes overseeing, maintaining and administering the plan, the elements of which will be set out in the regulations. While the new Act does not provide any guidance as to what those elements will be, the elements noted in both CAPSA Guideline No. 4 and the JEPPS Report provide a good indication. The Act does not require the administrator to write the policy, but does require the administrator to comply with the governance policy.

Funding Policy

All plans with a benefit formula provision are also going to have to create a written funding policy respecting funding objectives and the intended method for achieving the objectives, the elements of which will also be prescribed. Again, a good indicator of what

these elements will be is CAPSA Guideline No. 7 and the JEPPS Report. As with the governance policy, the new PBSA does not require the funding policy to be written by the administrator. Further, unlike the governance policy, the new PBSA does not require the plan to be administered in accordance with the funding policy.

Governance and Compliance Assessment

Finally, in terms of governance and compliance assessment, the new PBSA states simply that the administrator must, at the times and in a manner required by the regulations, assess in writing the administration of the plan, including compliance with the Act and regulations, plan governance, plan funding, plan investments, performance of trustees (if any) and performance of administrative staff and agents. Of course, we will not know until the regulations are published such details as whether this will be an annual assessment, whether there will be requirements for reporting non-compliance or taking remedial action for non-compliance, or what the standard of care will be for this function. In addition, while the new Act provides that the assessment must be available to the Superintendent as requested, it is at present unclear as to what confidentiality standards will apply, including whether the report will have to be transparent to all stakeholders.

Core Versus Ancillary Benefits

The existing PBSA defines "benefit" broadly as a pension or any other benefit under a pension plan. As the power to amend and restrictions on amendments that reduce benefits do not differentiate between types of benefits, there have been recurring questions as to whether entitlement to certain types of benefits, such as indexing and bridging benefits, can be amended as well as when the right to those benefits vests.

The Act now draws a distinction between core and ancillary benefits, providing that ancillary benefits include disability benefits, bridging benefits, cost of living adjustments (indexing), pre-retirement and early retirement benefits, joint survivor pension benefits that exceed statutory minimums and any other prescribed ancillary benefits. The Act also provides guidance as to when ancillary benefits vest, setting out that an amendment cannot reduce ancillary benefits if a person has met all requirements necessary to exercise the right to receive the benefits.

The Act sets out a procedure for reducing benefits under a target benefit provision, which contains as its first step the reduction or elimination of ancillary benefits.

Plan Funding Rules

Many of the detailed funding rules under the Act will not be known until the regulations are released, including whether the JEPPS recommendation for "going concern plus" will be introduced for target benefit provisions. However, the new Act does state that in a negotiated cost plan or under a target benefit provision, the liability for funding the benefits is limited by the amount the employer/members are contractually required to contribute. The Act also provides that where a plan contains a benefit formula provision other than a target benefit provision, the plan may have a solvency reserve into which solvency deficiency payments can be deposited (prescribed actuarial excess may be withdrawn from that account despite the language of the plan text).

The Act crystallizes what the case law has provided in respect of contribution holidays. First, in general, a plan's actuarial excess can be used to reduce the contribution paid by employers, or by employers and members. Second, where a plan has both a benefit formula provision and a defined contribution provision, the excess can be used to reduce employer contributions for the defined contribution benefit.

Administrative Expenses

Finally, also crystallizing the case law as to when plan administration expenses may be paid from plan funds, the Act states that the administration and investment expenses of the plan may be paid from the plan's pension fund unless the plan documents specifically provide otherwise. This reduces the likelihood of litigation about administrative expenses.

Benefit Rules

The Act amends many of the detailed rules in the existing PBSA that must be followed by plan administrators when paying out benefits under their plans.

Immediate Vesting

The Act has amended a number of the general plan rules respecting benefit payments, the most talked about of which is probably the switch to immediate vesting. A plan member will now be eligible for benefits in respect of the active period of active membership while employed in B.C. in provincially regulated employment. However, it will still be open to a plan administrator to impose a waiting period of up to two years before an employee is eligible for plan membership as the eligibility rules remain in place.

Pre-retirement Death Benefits

The pre-retirement death benefit formulas hinging on vesting and the pre/post January 1993 distinction have been removed, streamlining the section significantly. The most noticeable change, however, is the amount of the benefit, which will be the "pension to which the member was entitled." In other words, there will be no more permitted reduction to 60% of commuted value, meaning that the pre-retirement death benefit will be 100% of commuted value.

Interestingly, the Act provides in respect of a pre-retirement death benefit that "in no case is the surviving spouse entitled to receive any benefit as [the member's] designated beneficiary or from the [member's] estate." Presumably, this language is designed to prevent circumvention of the locking-in rules by ensuring that a member cannot have his or her spouse sign a waiver then subsequently designate the spouse as beneficiary (either on the designated beneficiary form or through a Will as will be permitted once the British Columbia *Wills, Estates and Succession Act* is in force) such that the spouse would receive the benefit on a non-locked in rather than a locked-in basis.

Post-retirement Death Benefits

The minimum amount of the joint and survivor pension will remain as 60% of the amount of pension that would have been payable to the member had the death not occurred. What is new, however, is a double waiver procedure that will now be required for a spouse to fully waive his or her right to such benefit. The first waiver will be the same as exists under the current PBSA in that the spouse must sign a prescribed form stating he or she is aware of the entitlement and waiving the right to that entitlement. Under the Act, however, even if the spouse has signed that waiver, he or she will still explicitly be deemed to be the member's sole designated beneficiary, despite any actual beneficiary designation. In order to avoid this deemed designation, the spouse will have to sign a second waiver, also in a prescribed form, explicitly acknowledging his or her entitlement to the death benefit and waiving that entitlement.

Unlocking

There will be two shifts to unlocking under the Act. First, unlocking on shortened life expectancy will be a mandatory rather than optional plan provision. Second, and more significant, hardship unlocking is introduced, which will apply to former members who have transferred their funds out of a pension plan and into a locked-in retirement account or retirement income arrangement. The process will require a spousal waiver. However, we know very little about the details of such financial hardship unlocking as they remain to be prescribed in the regulations.

Temporary Suspension of Membership

Although financial hardship unlocking will not apply to funds held in a pension plan, under the Act, a plan text will be permitted to provide that an active member may suspend their plan membership in the plan while continuing to work. The Plan may also set out that the member does not accrue benefits during the suspension period, and the suspended member must be allowed to lift the suspension at any time prescribed in the regulation. Notably, the member will not be able to receive or transfer any of his or her benefit entitlement until actual termination of membership.

Small Benefit Force-out

The current PBSA provides that benefits under a defined benefit provision may be forced out of a plan where a member terminates and is entitled to a benefit that is less than a prescribed amount. While the current Act provides that the small benefit threshold may be calculated in two ways, based either on commuted value or the value

of future pension payments, the Act refers only to commuted value, indicating that the regulations will likely provide for a single calculation based on commuted value.

Superintendent's Powers

The Act gives the Superintendent a variety of enhanced regulatory powers. For example, the Superintendent will be able to impose conditions on any approval, authorization, extension or consent, will be able to sever part of an amendment submitted for registration and will be able to direct the plan administrator to terminate if the plan documents do not comply with the Act or the administrator has not complied with the Act. In addition, during the life of the plan, the Superintendent will be empowered to remove the administrator and appoint a temporary administrator if either (i) the administrator is unable/unwilling to act, insolvent or can not be located; or (ii) the plan or its administrator fails in a substantial manner to comply with the Act.

While the Superintendent currently has the power to obtain a court order to compel compliance with the PBSA, he or she will now have enhanced power under the Act to take preventative action by issuing a direction where someone has not yet but is about to do something that is contrary to safe and sound pension practices. As of yet, there is no guidance as to the meaning of "safe and sound pension practices."

A further interesting addition to the Superintendent's powers is that the Superintendent will be able to designate an actuary to prepare an actuarial or termination report if in his or her opinion, the methods or assumptions used by the plan's actuary were inappropriate in the circumstances, even if these methods or assumptions were consistent with actuarial practice. The designated actuary will have broad powers to obtain information needed and will file a report in the normal course, upon which the plan must be funded in accordance with the new report.

Under the Act, the Superintendent will be able to impose administrative penalties if a person breaches prescribed provisions of the Act, fails to file records within the time required, fails to provide information or records required or fails to make contributions. Such penalties may be disputed within certain time limits and the Superintendent has a three-year limitation period from knowledge of the breach to impose a penalty in respect of it. If the Superintendent takes certain actions (such as issuing a direction for compliance, ordering a date for termination, ordering payment of expenses of an investigation, refusing to register an amendment, etc.), he or she must give notice of the decision. That notice triggers a 30-day limitation period of serving a notice of objection, which notice of objection in turn acts as a stay of the Superintendent's decisions or directions or order, as the case may be. In addition, if an administrative penalty is imposed in respect of a corporation's breach, the penalty can be imposed on an officer/director who directed or participated in the breach.

Noticeable Absences From the New Act

The provisions in the current PBSA respecting required arbitration of certain disputes will be eliminated, as will the concept of partial termination and the provision setting out that all pension plan documents filed with the Superintendent are on the public record. There will not be a requirement to establish a pension advisory committee at the request of members, nor a provision for the Pension Benefits Standards Advisory Council. Finally, the language used throughout the Act has shifted from "members" and "former members" to the new terms of "active members," "deferred members" and "retired members."