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Bill 30: Québec Revises Its Supplemental Pension Plans Act

By: Natalie Bussière

When the Québec National Assembly adopted, on December 13, 2006, An act to amend the Supplemental **Pensions Plans** Act (SPPA), particularly with respect to the funding and **administration** of **pension plans** (Bill 30), it modified numerous sections of that act. The result is some of the current practices of plan sponsors and **administrators** will require revision.

In Québec, as elsewhere, many **Defined Benefit pension** plans face important solvency deficiencies. These deficiencies are not caused by mismanagement or bad decisions by pension plan **administrators**, but by economic circumstances beyond their control. However, the act requires the funding of such solvency deficiencies over a five-year period which created an additional financial burden for **pension plan** sponsors.

Temporary relief was granted in 2005 when the Québec National Assembly adopted the Act respecting the funding of certain **pension plans**. This act provided temporary rules on the funding of solvency deficiencies, including the possibility of combining prior solvency deficiencies with a newly disclosed one and extending the maximum amortization period to 10 years for solvency deficiencies, if specific conditions were met. The provisions contained in this act were meant to apply for a limited time and a revision of the funding rules for **DB pension plans** provided in the SPPA was, accordingly, expected.

New Rules Pertaining To Funding

Effective January 1, 2010, DB plans will have to submit an annual actuarial valuation, unless the plan is fully solvent and funded, in which case a partial valuation may be performed. Bill 30 also requires the creation of a provision for adverse effects. This provision will accrue from the actuarial gains that are expected to appear over time. Accordingly, the Régie des rentes is of the opinion that the creation of the provision for adverse effects will not require the payment of additional contributions by plan sponsors. However, until the provision for adverse effects is fully accumulated, the employer will not be allowed to take any contribution holidays.

Bill 30 also provides that any modification that will make the solvency level of a DB pension plan fall below 90 per cent will require a special contribution payable to the pension fund. Such contribution will be payable in full on the day following the date of the evaluation in relation to the modification and will have to be sufficient to bring back the plan's solvency level to 90 per cent.

The amortization period for a solvency deficiency is maintained at five years. However, employers will be allowed to provide a letter (or letters) of credit that will be considered part of the assets of the pension plan for determining its solvency. The total amount of the letter (or letters) of credit may not exceed 15 per cent of the value of the plan's liabilities.

Unfortunately, these measures will not ease the financial burden of employers participating in a DB pension plan. It appears that, at least for the time being, the funding rules were not relaxed in order to protect the benefits of members and beneficiaries of existing plans. Such measures do not make DB pension plans an attractive benefit for employers.

Additional Amendment Requirements

A group of retirees made it publicly known they would lobby for changes to the SPPA further to the decision of the Court of Appeal in Association provinciale des retraités d'Hydro-Québec v. Hydro-Québec. This decision did not satisfy retirees who were claiming that modifications to an ongoing pension plan should be equitable for all groups of members. Bill 30 specifically provides for new requirements in relation to modifications to a pension plan.

Effective January 1, 2010, all members and beneficiaries of a pension plan must receive a notice explaining the nature of any amendment to the pension plan affecting any surplus assets before such amendment can be registered. If 30 per cent or more of the members of a specific group oppose such an amendment, it is deemed not to be equitable and not in compliance with the applicable legal requirements.

Even though these provisions will come into force in 2010, they already create discomfort for parties involved in the administration of pension plans. Employers are expected to face additional constraints when deciding on modifications to a pension plan. In a unionized context, it will be very difficult, if not impossible, to negotiate amendments to a pension plan funded from surplus assets when members are represented by different associations of employees, where there are both unionized and non-unionized members in the plan, or when many retirees receive benefits under the plan. As the modifications are deemed not to comply with legal requirements if 30 per cent or more of the members of each different group oppose it, then the agreement reached with the union could be affected further to the sending of the required notices.

These new provisions also put the pension committee in a somewhat uncomfortable position. If more than 30 per cent of the members of a specific group oppose the amendment, it will be deemed not to comply with applicable legal requirements. However, the pension committee cannot change the amendment and it has, under the SPPA, an obligation to file modifications brought to the plan by the employer.

The pension plan must also administer the plan in accordance with the law. Unless the SPPA is further revised, a pension committee will face an interesting dilemma if 30 per cent or more of a group of members oppose an amendment as it will have to either file an amendment that is not in compliance with the requirements of the SPPA or not fulfill one of its obligations under the SPPA.

Administration Of Pension Plans

Bill 30 also imposes additional obligations for pension committees. Each committee must establish an internal by-law providing rules pertaining to its workings and governance before December 13, 2007.

The list of topics to be covered by the internal by-laws is found at Section 151.2 of the SPPA and includes:

- Duties and obligations of the committee members
- Rules of ethics to which those persons are subject
- Rules governing the appointment of the chair, vice-chair, and secretary
- Procedures for meetings and the frequency of meetings
- Measures to be taken to provide professional development to committee members
- Measures to be taken to ensure risk management
- Internal controls
- Books and registers to be kept
- Rules to be followed when selecting, remunerating, supervising, or evaluating delegates, representatives, or service providers
- Standards that apply to services rendered by the pension committee including standards applicable to communications with plan members and beneficiaries Bill 30 provides that such rules may prevail over the provisions of the pension plan itself, except for:
- Rules governing the appointment of the chair, vice-chair, and secretary of the pension committee, as well as their respective duties and obligations
- Quorum and the granting of a casting vote at committee meetings
- The proportion of committee members who must participate in a decision in order for it to be valid

We note that the new wording of Section 151.2 of the SPPA allows the pension committee to modify effectively the text of the pension plan in relation to its operation and governance. Even though such encroachment to the usually exclusive power of the employer to modify a pension plan may appear to be minor, it constitutes a disturbing precedent.

Section 150.1 of the SPPA now provides that the pension committee chooses and retains the services of the delegates, representatives, and service providers. It appears to be the legislature's intent to make the pension committee the party ultimately responsible for the choice of service providers.

Legal Responsibility

Bill 30 includes several provisions seeking to protect members of a pension committee from potential lawsuits. Legal recourses filed recently against members of pension committees in Québec made it increasingly difficult to recruit persons to sit on such pension committees. The solution chosen by the legislature was to transfer liability to other parties involved in the administration of pension plans and to limit such persons' ability to exclude their legal responsibility.

Section 151.1 of the SPPA, as modified by Bill 30, provides for the transfer of the pension committee's liability where it acted in good faith on the basis of an expert's opinion. Under such circumstances, the pension committee is presumed to have acted with prudence and the legal liability for the decision taken could very well rest with the expert who provided the opinion on which the pension committee relied.

Bill 30 also adds a paragraph to Section 153 of the SPPA that clearly imposes the fiduciary obligation to service providers and representatives who exercise a discretionary power of the pension committee. We expect that delegation of powers and service agreements will be drafted in a more precise manner in order to clearly determine which obligations are taken over by this service provider and representative. This will be necessary in order to decide which standards of care will apply to the service providers and representatives when providing specific services to a pension committee.

Bill 30 contains provisions that prohibit the use of clauses limiting the liability of service providers. The scope of this provision is quite broad and affects not only contracts to be negotiated, but also existing and expired ones. We note that the scope of the prohibition is broad enough to include both classic clauses limiting or excluding a service provider's liability, as well as indemnification provisions. It can, however, be argued that indemnifications not affecting the pension plan's assets, such as indemnifications given by the plan's sponsor, would not fall within the scope of Section 154.4 of the SPPA and could, accordingly, be valid.

Service Provider's Liability

Section 154.4 of the SPPA provides that, for existing or expired contracts, clauses limiting or excluding a service provider's liability may be declared null and void if abusive. In order to determine whether any such clause is abusive, the SPPA refers to the clauses of the Québec Civil Code in relation to consumer contracts and contracts of adhesion. As such rules are intended to protect the consumer or party who is assumed to have had no possibility to negotiate the terms of the contract it entered into, it will be very interesting to see how the courts will apply these rules in the context of the administration of a pension plan. Even though we think that it will be possible for service providers to justify the reasonable nature of a clause limiting or excluding their liability, we fear that the standard of review to be used by the court may be difficult to meet.

Bill 30 renders the administration of DB pension plans even more demanding and, over time, more costly. Over and above the financial burden imposed on plan sponsors by the economic environment, they will also have to bear additional costs in relation to Bill 30. Such costs are caused by both the additional funding requirements that will come into force in 2010, as well as from the additional requirements in relation to the plan's administration.

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