Knowledge & Insights

MORNEAU SHEPELL

News & Views

Volume 16 | Issue 12
December 2019

In this issue

Ontario Bill 132 amends electronic communication rules

On December 10, 2019, Ontario Bill 132 received royal assent. Bill 132 amended the Ontario *Pension Benefits Act* (PBA) to permit pension plan administrators to provide plan member communications electronically on the basis of deemed consent, as well as making other changes that will affect Ontario-regulated pension plans.

Deemed consent to receive electronic communications

Bill 132 enables pension plan administrators to provide certain documents to members, former members and retired members in electronic form based on deemed consent. These changes follow the release of a draft amendment in August 2019, in which it was proposed that the PBA be amended to permit pension plans to use electronic communications as a default communication method for providing information to their members. The draft amendment was summarized in the August 2019 *News & Views*.

In order to use the deemed consent provisions, the administrator is first required to send a notice by regular mail to the member or former member. The notice must include (1) the date on which the administrator will begin to send documents electronically, (2) the recipient's last known email address, (3) a statement explaining that the recipient may decide at any time that he or she no longer wishes to receive documents electronically, and (4) any other prescribed information. A member or former member who receives such a notice will be deemed to have consented to receive documents in electronic form, unless he or she instructs the administrator otherwise.

Bill 132 differs from the August 2019 draft amendment in certain respects. While the draft amendment had proposed that deemed consent would expire when the member or former member became a retired member, Bill 132 provides that a retired member can also be sent documents electronically as long as a subsequent notice is provided. When a member or former member who had been receiving documents electronically on the basis of deemed consent retires, the administrator must send another notice, both electronically and by regular mail, setting out the retired member's last known email address and stating that he or she may, at any time, instruct the administrator to send documents in paper form, as well as including any prescribed information.

The deemed consent provisions in Bill 132 only apply to documents that are required to be provided under the PBA, the regulations or FSRA rules.

Documents containing personal information or any other prescribed information may not be sent electronically unless they are sent through a secure information system that requires recipients to identify themselves, and complies with any other prescribed requirements.

Waiver of requirement to send statements to former and retired members

Bill 132 amends the rules for obtaining a waiver from the requirement to send biennial statements to unlocated former and retired members. Previously, in order to obtain the waiver there must have been reasonable and probable grounds to believe that the former or retired member is missing. Under the new rules, FSRA may waive the notice requirement if it is satisfied that the pension plan administrator is unable to locate the individual after having made reasonable efforts to do so. In making its decision, FRSA is required to consider: (1) the amount or commuted value of the pension; (2) the searches that were undertaken by the pension plan administrator, including the search methods that were used; and (3) the costs of the searches that were undertaken and the anticipated costs for additional searches.

The deemed consent provisions of Bill 132 and the provisions dealing with the requirements pertaining to missing members came into effect upon the bill receiving royal assent.

Family law changes

Bill 132 sets out rules for calculation of the imputed value of pension benefits where assets have been transferred out of the pension plan on or after the family law valuation date. It also sets out rules for transfers of divided pensions from successor pension plans and provides additional rule-making powers to FSRA. The family law changes introduced in Bill 132 will come into force upon proclamation.

Comment

The introduction of deemed consent to electronic communications promises to ease the transition towards using electronic means to communicate with Ontario pension plan members and expand the use of electronic communication in the pension sector. It remains to be seen whether FSRA will use its rule-making authority to make additional rules concerning the use of electronic communications.

Federal retirement security protections now in force

With the intention of safeguarding the interest of pensioners and retirees, a number of changes to bankruptcy and insolvency law and federal corporate law that were promised in the 2019 federal budget, as discussed in the March 2019 *News & Views*, are now in force. These changes were adopted in Bill C-97 on June 21, 2019, and came into force either immediately or on November 1, 2019.

Protections for plan members and retirees in bankruptcy and insolvency law

Duty of good faith

Bill C-97 adds a "duty of good faith" to both the *Bankruptcy and Insolvency Act* (the BIA) and the *Companies' Creditors Arrangement Act* (the CCAA), requiring any person involved in a proceeding under either legislation to act in good faith with respect to the proceeding. Courts are also given the power to make appropriate orders where an interested person has failed to act in good faith.

Prohibited compensation payments

The BIA has been amended to make directors of a corporation liable for termination pay, severance pay, incentives or other benefits paid to a director, officer or manager of the corporation within one year prior to the date of the bankruptcy. For directors to be liable, the payment must have: (a) rendered the corporation insolvent or been made at a time when the corporation was insolvent, (b) been conspicuously over the fair market value of the consideration received by the corporation and (c) been made outside the ordinary course of business. Directors will not be liable if they had reasonable grounds to believe that the corporation was not insolvent at the time of payment or would not have been rendered so by the payment, or that the payment was not conspicuously over the fair market value of the consideration received by the corporation or was made in the ordinary course of business.

Disclosure of economic interest

Bill C-97 amends the CCAA to permit any interested person to apply for a court-ordered disclosure of another person's economic interest in respect of a debtor company. Additionally, interim financing under the CCAA shall not be ordered by the court unless the court is satisfied that the terms of the loan are limited to what is "reasonably necessary for the continued operations of the debtor company in the ordinary course of business."

Federal corporate law amendments

The federal government has also introduced a number of new provisions to corporate law with a view towards enhancing retirement security measures among corporations registered under the federal *Canada Business Corporations Act* (the CBCA).

The CBCA has been amended to permit directors and officers of federally regulated corporations to consider the interests of employees, retirees and pensioners, when acting with a view to the company's best interests. However, directors and officers are not required to do so.

Additional amendments to the CBCA will require prescribed corporations to disclose to shareholders certain information about the well-being of employees, retirees and pensioners. However, it remains to be seen what information will need to be provided and which corporations will be required to provide it. Certain prescribed corporations will also have to develop an approach to remuneration of directors and senior management and present it to shareholders. These requirements will come into force on proclamation.

Comment

The federal enhancements to retirement security in the bankruptcy and insolvency context follow a number of high-profile corporate insolvencies that resulted in significant impacts on the pension liabilities of the insolvent companies. These changes signal that courts may approach bankruptcies and reorganizations involving pension and benefit plans with increased scrutiny in the future. The bankruptcy and insolvency amendments will affect all bankruptcies and insolvencies in Canada.

The inclusion of the interests of employees, retirees and pensioners in the CBCA's definition of corporate interests means that directors of federally regulated employers may consider expanding the scope of their considerations in respect of their pension and benefit plans.

While insolvencies can be difficult to foresee, strong corporate and pension governance practices can help ensure employers are meeting their legal duties and guard against potential liability.

Manitoba introduces legislation to reform pension funding and provide more unlocking options

On November 27, 2019, the Manitoba government introduced Bill 8, *The Pension Benefits Amendment Act*. Bill 8 will amend *The Pension Benefits Act* (the PBA) to permit greater flexibility for unlocking pension funds. In addition, the Manitoba government has promised to reduce solvency funding requirements to 85% of solvency liabilities, enhance going concern funding requirements, and introduce solvency reserve accounts. The measures follow the Manitoba Pension Commission's January 2018 proposals, which were discussed in the February 2018 *News & Views*.

Funding reform

Bill 8 will permit pension plans to establish solvency reserve accounts for special payments in respect of solvency deficits. These accounts could be withdrawn by employers under specified circumstances, regardless of whether the plan documents permit employers to withdraw pension surplus.

The Manitoba government announcement states that the government will reduce solvency funding requirements to 85% of solvency liabilities and enhance going concern funding requirements. These proposals would be enacted through future regulations.

Unlocking provisions

Bill 8 will permit individuals with funds held in a locked-in retirement account (LIRA) or life income fund (LIF) to unlock the entire amount after reaching the age of 65. The individual may make a lump sum withdrawal of the balance or transfer the balance to a registered retirement income fund (RRIF) or to a registered retirement savings plan (RRSP). The consent of the spouse or common-law partner would be required.

Bill 8 will also permit withdrawals from LIRAs and LIFs on prescribed grounds of financial hardship, subject to spousal consent.

Flexibility in relationship breakdown division

Several measures will provide greater flexibility upon spousal or common-law relationship breakdown. Bill 8 will allow parties to split pension assets up to 50%, rather than electing from the current division options of a 50/50 split or no division at all.

Bill 8 will also clarify that the small pension commutation rule applies to locked-in amounts payable to a former spouse or common-law partner upon a division of pension on the breakdown of a relationship.

Commencing pension after the normal retirement age

Bill 8 would permit a pension plan member who continues to be employed after reaching the normal retirement age (NRA) to elect to stop contributing to the plan and accruing benefits, if permitted to do so under the terms of the plan. This would permit the member to retire and commence receipt of a pension without having to terminate employment.

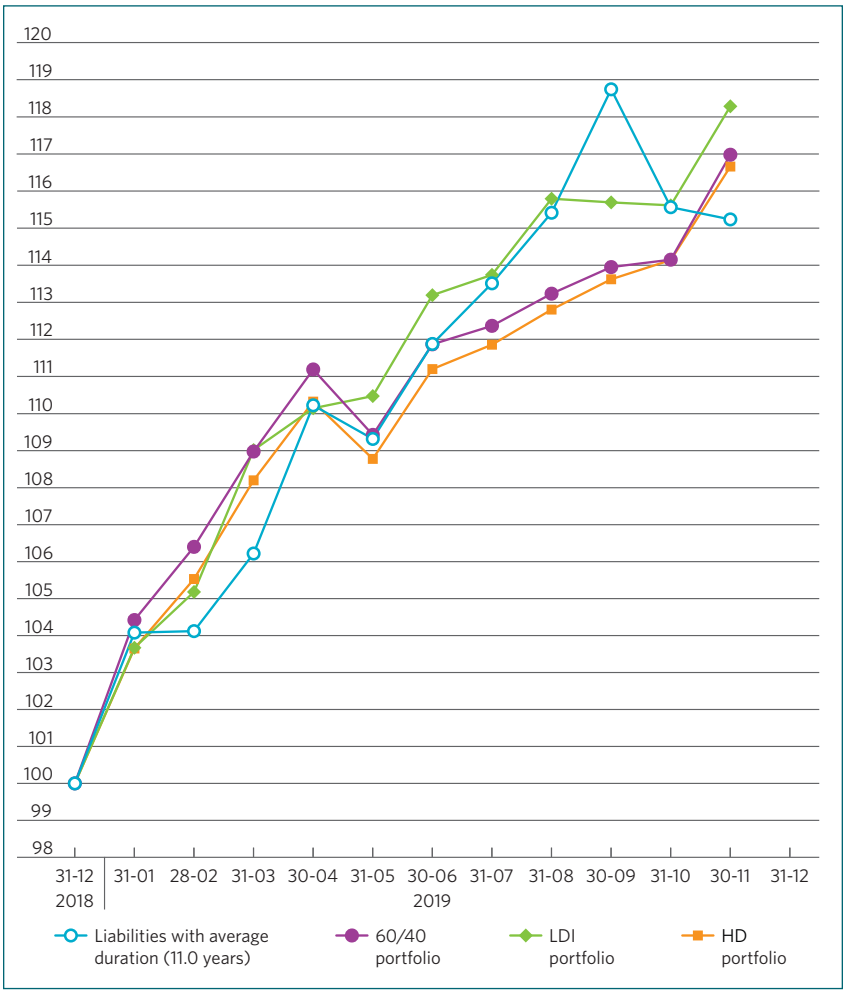
Comment

The reduction of solvency funding requirements from 100% to 85% and the enhancement of going concern funding requirements is consistent with Ontario's funding reform, as well as proposals in British Columbia and Nova Scotia. The introduction of more relaxed unlocking rules and flexibility in pension division promises to make it easier for Manitoba pension plan members and former spouses to manage and access their retirement funds during financial hardship and relationship breakdown.

Tracking the funded status of pension plans as at November 30, 2019

This graph shows the changes in the financial position of a typical defined benefit plan with an average duration since December 31, 2018. For this illustration, assets and liabilities of the plan were each arbitrarily set at $100 million as at December 31, 2018. The estimate of the solvency liabilities reflects the new CIA guidance for valuations effective September 30, 2019 or later. The following graph shows the impact of three typical portfolios on plan assets and the effect of interest rate changes on solvency liabilities of medium duration.

The evolution of the financial situation of pension plans since December 31, 2018



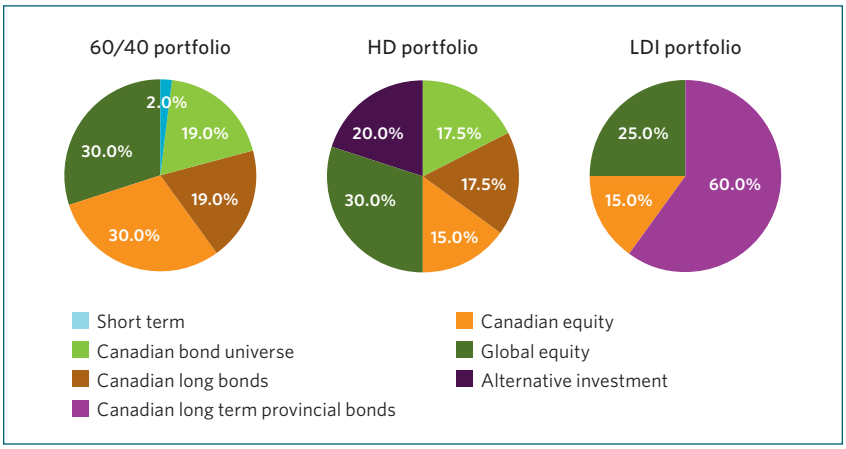
During the month of November, Canadian universe bonds, Canadian long-term bonds, Canadian long-term provincial bonds, Canadian equity markets, global equity markets (CAD) as well as alternative investments all showed positive returns. With a return of 2.5%, the 60/40 portfolio outperformed the low volatility portfolio (LDI[1]) (2.3%) and the highly diversified portfolio (HD) (2.2%).

[1] Liability driven investment

The prescribed CIA Annuity purchase rates slightly decreased while the commuted value rates used in the calculation of solvency liabilities increased during the month. As a result, the solvency liabilities decreased for a medium duration plan. For this type of plan, an investment in the 60/40, in the HD and the LDI portfolio resulted in an increase of the solvency ratio.

The table shows the impact of past returns on plan assets and the effect of interest rate changes on solvency liabilities of a medium duration plan, based on the plan's initial solvency ratio as at December 31, 2018. The graph shows the asset allocation of the three typical portfolios.

Initial solvency ratio as at December 31, 2018	Evolution of the solvency ratio as at November 30, 2019 for three different portfolios		
	60/40 portfolio	Low volatility portfolio (LDI)	Highly diversified portfolio
100%	101.5%	102.7%	101.2%
90%	91.4%	92.4%	91.1%
80%	81.2%	82.1%	81.0%
70%	71.1%	71.9%	70.9%
60%	60.9%	61.6%	60.7%



Since the beginning of the year, driven by strong positive returns in the Canadian fixed income and equity markets, global equity markets as well as the alternative investments, the 60/40 portfolio, the LDI portfolio and the HD portfolio returned 17.0%, 18.3% and 16.7% respectively. The solvency liabilities fluctuated over that same period from 14.8% to 15.7% depending on the duration of the group of retirees. The variation in the plan's solvency ratio as at November 30, 2019 stands between 0.7% and 2.7%.

Please contact your Morneau Shepell consultant for a customized analysis of your pension plan.

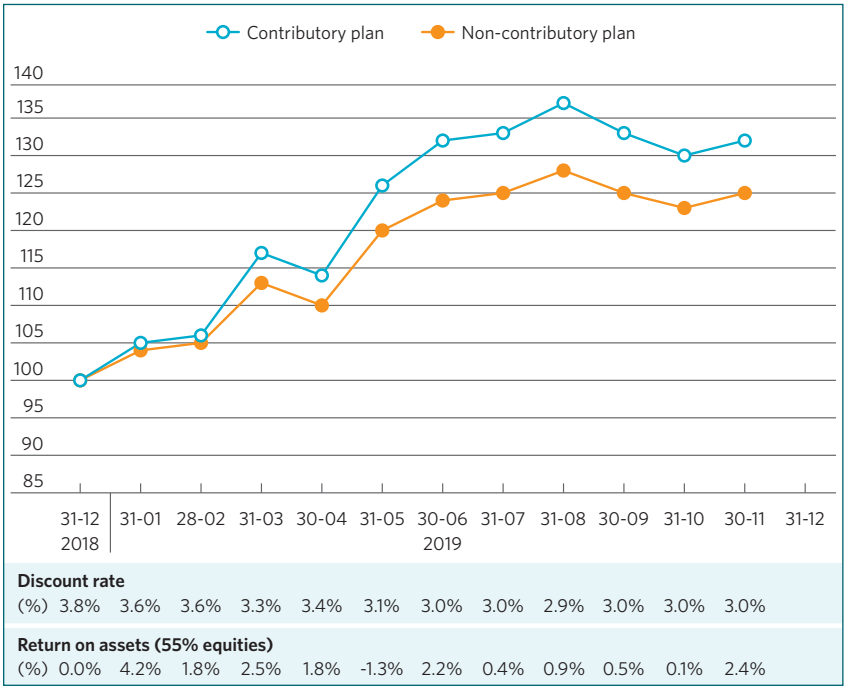
Comments

1. No consideration has been made for contributions paid to the plan or for benefits paid out of the plan.
2. Solvency liabilities are projected using the rates prescribed by the CIA for the purpose of determining pension commuted values.
3. The underlying typical defined benefit plan is a final average plan with no pension indexing, including active and inactive participants representing 60% and 40% of liabilities, respectively.
4. Assets are shown at full market value. Returns on assets are based on three typical benchmark portfolios.

Impact on pension expense under international accounting as at November 30, 2019

Every year, companies must establish an expense for their defined benefit pension plans. The graph shows the expense impact for a typical pension plan that starts the year at an arbitrary value of 100 (expense index). The expense is influenced by changes in the discount rate based on high-quality corporate and provincial (adjusted) bonds and the median return of pension fund assets.

Expense Index from December 31, 2018



The table below shows the discount rates for varying durations and the change since the beginning of the year. A plan's duration generally varies between 10 (mature plan) and 20 (young plan).

Discount rate

Duration	December 2018	November 2019	Change in 2019
11	3.72%	2.90%	-82 pdb
14	3.81%	2.97%	-84 pdb
17	3.87%	3.01%	-86 pdb
20	3.90%	3.04%	-86 pdb

Since the beginning of the year, the pension expense has increased by 32 % (for a contributory plan) due to the decrease in the discount rates, despite the good returns on assets (relative to the discount rate).

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Comments

1. The expense is established as at December 31, 2018, based on the average financial position of the pension plans used in our 2018 *Survey of Economic Assumptions in Accounting for Pensions and Other Post-Retirement Benefits report* (i.e. a ratio of assets to obligation value of 95% as at December 31, 2017).
2. The return on assets corresponds to the return on the Morneau Shepell benchmark portfolio (55% equities and 45% fixed income), which reflects the average asset mix in our 2018 Survey.
3. The actuarial obligation is that of a final average earnings plan, without indexing (two scenarios: with and without employee contributions).

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