

A CALL FOR COMPROMISE

Employers urged to embrace dialogue as a way to avoid legal pitfalls of pension innovation *By Ari Kaplan*

Canada's workplace pension system is going through a recalibration due in part to an aging population and demographic shifts, declining coverage and unpredictable financial markets.

None of these is the fault of employers, unions or pensioners.

One result of the recalibration is the opportunity for pension stakeholders to innovate workplace pension plans. In the broader public sector and the area of skilled trades, where both coverage and concentration are high, there's an opportunity to address all of the realities in the pension sphere when it comes to governance, funding, economies of scale, vested rights and future benefits.

The risks of litigation

Litigation is one way to bring about change but it's always uncertain and usually very expensive.

In New Brunswick, the provincial government sought to reduce pension costs by implementing a new public service plan. The result is three active lawsuits against the province by employees and pensioners,

two of which allege a breach of the Charter of Rights and Freedoms.

In another instance, *Telecommunications Employees Association of Manitoba v. Manitoba Telecom Services Inc.*, the company's privatization led to 12 years of litigation on the new pension arrangement and went all the way to the Supreme Court of Canada. After several million dollars in legal fees, the top court ruled on a question of law and then directed the parties to work out "an appropriate implementation process that adequately protects the interests of all of the relevant beneficiaries."

Within six months, the company, unions and a pensioner group reached a facilitated resolution, held meetings with affected beneficiaries and went back to the trial judge, who adopted a settlement binding everyone. All of that happened within the same calendar year as the Supreme Court decision.

Finding consensus

There are many benefits to seeking consensual resolutions to pension issues. And given the public interest in negotiating solutions aimed at stabilizing pension funding, governments have rolled out legislation across Canada offering new templates for renewed deals that leave the stakeholders to work out the specifics.

Some regulations are time-sensitive. In British Columbia, the end of 2017 is the deadline for certain employers and unions to negotiate changes to their current pension structures.

While the clock ticks, many in the pension community are debating the merits of the new templates, such as target-benefit or hybrid pension plans.

But the fact is that almost any change seeking to stabilize pension costs involves shifting risk to the beneficiaries. That's why employers that want to open a pension contract have to explain clearly why they need relief and what they can offer instead of contractual certainty.

For employees, unions and pensioners, the case for a pension trade-off may not feel immediately obvious, especially when faced with a less secure deal on benefits.

Process is key

As a result, conversations with members are particularly important in making the case for pension innovation. That means changing conventional thinking on the pension deal by loosening binary positions on the relative merits of the benefit formula and who backs the guarantee and instead focusing on the process of change.

Legal risks are inherent in any pension change involving a shift of financial risk. But plan sponsors can mitigate the risks through meaningful processes leading to informed compromises that respectfully consider all interests in the plan. 

Ari Kaplan is a partner at Koskie Minsky LLP and an adjunct professor of law at the University of Toronto.

