

CARSWELL'S
PENSION MANUAL

DAVIES

CARSWELL

Chapter 10

PENSION PLAN TERMINATIONS

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ing requirement (NLPBA – Section 61(2)). Full funding is required over not more than five years from the effective date of the wind-up (NLPBA Reg. – Section 25.1).

For further details on solvency deficiencies, please see Chapter 5, “Funding and Solvency.”

As of July 1, 2011, the Agreement Respecting Multi-Jurisdictional Pension Plans took effect between Ontario and Quebec. The Agreement creates asset allocation rules that apply to transactions such as plan spin-off and plan wind-up. Pursuant to the Agreement, plan assets must be allocated into jurisdictional portions following a standard allocation methodology. A different allocation may be permitted in some circumstances. The allocation of assets affects the employer liability on wind-up for plans that have Ontario and Quebec members.

The standard methodology uses levels of priority starting with defined contribution member contributions (including flexible contributions), then core liabilities, other liabilities, additional liabilities and finally, the balance of liabilities. The central concept is core liabilities, which are certain accrued benefits for which solvency funding is required. For example, for an Ontario-Quebec plan, post-retirement indexing is a core liability for Quebec members but not for Ontario members because Ontario permits plan sponsors to exclude post-retirement indexing for purposes of solvency funding. Also at a lower level of priority are most subsidized early retirement benefits for non-pensioners (including those that might be provided due to “grow-in” and bridging benefits), consent benefits, pre-retirement inflation protection (such as the Quebec “additional benefit”) and disability benefits that are not in payment. The asset allocation rules are very detailed and complex and vary according to circumstances.

10.7(c) Statutory Trusts, Liens, and Charges

10.7(c)(i) *Statutory Trusts*

The legislation of most jurisdictions imposes a statutory trust on employers with respect to contributions received from employees and owing by employers to the pension fund (PBSA – Section 8(1), MPBA – Section 28, NBPBA – Section 51, NLPBA – Section 32(1), NSPBA – Section 46, Proposed NSPBA – Section 80, OPBA – Section 57, SPBA – Section 43).

The legislation of New Brunswick, Newfoundland and Labrador, Nova Scotia, and Ontario specifically provides that where a pension plan is wound up, the employer is deemed to hold in trust for the beneficiaries of the pension plan an amount equal to the employer contributions accrued to

the date of wind-up but not yet due under the plan or the pension standards legislation (NBPBA – Section 51(4), NLPBA – Section 32(3), NSPBA – Section 46(4), Proposed NSPBA – Section 80(4), OPBA – Section 57(4)). Federal rules create a deemed trust for overdue wind-up funding (PBSA – Section 8(1)).

The Supreme Court of Canada reaffirmed that the deemed trust in the Ontario pension legislation did not apply to the full wind-up deficiency of the pension plan in *Re Indalex Ltd.* (2013), 2 C.C.P.B. (2d) 1, 2013 CarswellOnt 733, 2013 SCC 6 (S.C.C.), reversing (2011), 89 C.C.P.B. 39, 2011 CarswellOnt 2458, 2011 ONCA 265 (Ont. C.A.), additional reasons (2011), 92 C.C.P.B. 277, 2011 CarswellOnt 9077, 2011 ONCA 578 (Ont. C.A.). The Supreme Court overturned a decision of the Ontario Court of Appeal and ruled in favour of giving an insolvent employer's secured creditors priority for the company's assets ahead of the pension plan's members. The company, Indalex, also acted as the administrator of the pension plan. After becoming insolvent, Indalex filed for protection under the federal Companies' Creditors Arrangement Act. Indalex received debtor-in-possession loans from the financing company, which was granted super priority over the claims of other creditors. The pension members sued, claiming they had priority under Ontario's Pension Benefits Act. Although the Supreme Court found that Indalex breached a fiduciary duty owed to the plan members, the court found no basis to impose a constructive trust regarding the assets in question. The court's decision resulted in the secured creditor retaining super priority over the pension plan and its members.

The purpose of the statutory trust is to shelter from creditors of the employer certain amounts owing to the pension plan. It is beyond the scope of this chapter to discuss in detail the ranking of claims against the assets of the employer and the constitutional problem with provincial deemed trusts in bankruptcy situations. However, it should be noted that a claim by plan beneficiaries is an equitable one that is subordinate to the claims of secured creditors of the employer, the claims of those with equitable interests in the assets of the employer that arose prior to the creation of the statutory trust, and in most cases to a claim of a person who in good faith purchased property from the employer for value and without notice of the trust.

10.7(c)(ii) *Statutory Liens and Charges*

The legislation of New Brunswick, Newfoundland and Labrador, Nova Scotia, and Ontario provides that the administrator of a pension plan has a lien and charge on the assets of the employer for the amounts deemed to be held in trust (NBPBA – Section 51(5), NLPBA – Section 32(4),

NSPBA – Section 46(5), Proposed NSPBA – Section 80(5), OPBA – Section 57(5)).

The legislation of Manitoba provides that the province has the right to enforce the statutory trusts on behalf of beneficiaries of a pension plan (MPBA – Section 28(4)).

The statutory lien and charge provisions create legal, as opposed to equitable, interests in the assets of the employer. These complement the statutory trust provisions to provide additional protection to plan beneficiaries. Again, while it is beyond the scope of this chapter to discuss in detail the ranking of claims against the assets of the employer, it should be noted that generally the lien ranks behind the claims of secured creditors whose security interests arose prior to the date of the lien and ahead of the claims of secured creditors whose security interests arose after the date of the lien.

10.8 PENSION BENEFITS GUARANTEE FUND OF ONTARIO

10.8(a) Background

The Pension Benefits Guarantee Fund, effective December 4, 1980, was established by the Ontario government to increase the statutory protection offered to pension plan members in the event of plan wind-up. To date, Ontario is the only jurisdiction in Canada that has established a guarantee fund.

10.8(b) Purpose of the Guarantee Fund

The purpose of the Pension Benefits Guarantee Fund is to guarantee payment of certain pension benefits in respect of service in Ontario in the event a pension plan is wound up in whole or in part.

10.8(c) Guaranteed Benefits

Where the Superintendent of Financial Services declares that the Pension Benefits Guarantee Fund applies to a pension plan, the Pension Benefits Guarantee Fund guarantees payment of pension benefits as follows (OPBA – Section 84(1)):

1. any pension in respect of employment in Ontario;
2. deferred pension benefits in respect of employment in Ontario accrued to plan members who terminated employment or membership prior to January 1, 1988 and who had attained age 45 and completed 10 or more years of continuous service with their employer at the date they terminated employment or who were members of the pension plan for a continuous period of at least 10 years;

3. a percentage of deferred vested benefits in respect of employment in Ontario accrued to plan members who terminated employment or membership on or after January 1, 1988 equal to 20% if the sum of the member's age plus years of employment or membership in the pension plan equals or exceeds 50, plus an additional 2/3 of 1% for each additional one-twelfth credit of age and employment or membership, to a maximum of 100%;
4. all additional voluntary contributions with interest, made by members while employed in Ontario;
5. the minimum value of all required contributions with interest made by members in respect of employment in Ontario;
6. that part of a deferred pension guaranteed under this subsection to which a former spouse of the member or a former member is entitled under a domestic contract or an order under the Family Law Act;
7. any pension to which a survivor of a former member is entitled under Section 48(1) of the OPBA (pre-retirement death benefit);
8. bridging benefits provided the member had completed 10 or more years of continuous service with the employer (OPBA – Section 84(2)).

The payments that are not guaranteed by the Pension Benefits Guarantee Fund are as follows (OPBA – Section 85):

1. payments under a plan that has been established for less than 5 years at the date of wind-up for wind-ups effective on or after December 8, 2010 (previously 3 years);
2. increases to benefits, made within 5 years of the date of wind-up;
3. the amount of any benefits including any bridging supplement, in excess of \$1,000 per month or such greater amount as is prescribed by the Regulations;
4. benefits provided under a multi-employer plan or a designated multi-jurisdictional plan;
5. benefits under a defined benefit plan where the employer's contributions are fixed by collective agreement;
6. pension benefits provided by plans as prescribed in the Regulations.

10.8(d) Guarantee Fund Declaration

The Superintendent of Financial Services may declare that the Pension Benefits Guarantee Fund applies to a pension plan where the following conditions are met (OPBA – Section 83(1), (2)):

1. the pension plan is registered under the Ontario Pension Benefits Act