

Getting our acts together

Canada's patchwork of pension regulations is discouraging national employers from sponsoring retirement plans. Will we ever agree to a unified regime?

By Yves Faguy

Canada, like the rest of the developed world, has been putting off meaningful pension reform for years. But last December, after a meeting with provincial counterparts in Kananaskis, Alta., federal Finance Minister Jim Flaherty announced Ottawa's intention to move ahead with its proposed Pooled Retirement Pension Plan (PRPP). The plan's primary aim is to boost private retirement savings for future pensioners. But it remains to be seen whether the initiative will amount to "a major breakthrough for the Canadian pension market," as Flaherty reckoned. The minister himself acknowledged that more work was needed to "forge a consensus" because pension reform in Canada is a multijurisdictional issue, with constitutional division of powers to consider.

Flaherty's remark resonated with pension lawyers who, for decades, have advocated in vain for a more harmonized regulatory environment across the country. Canada is unique in the world in having 11 different pension regimes — 10 provincial, one federal — each with its own idiosyncratic rules. Christopher Brown, a partner at Spectrum HR Law LLP in Calgary, says the current patchwork of provincial and federal pension regulations "has delivered a level of complexity that not only serves to drive up costs but to drive plan sponsors away from sponsoring pension plans at all."

Why does this matter? Though the Canada Pension Plan (CPP) is relatively well-funded compared with other countries' public pensions, payouts are hardly enough to fill the gap in lost revenues for many retirees. This is exacerbated by the twin facts that Canadian businesses have no obligation to sponsor plans if they



don't want to, and that private pension coverage has fallen steadily over the years to roughly one-third of Canada's work force.

"Harmonization is the big elephant in the room. And the government might just work around it."

— Elizabeth Brown, Hicks Morley LLP, Toronto

A tangled web

Under current rules, national sponsors must register their plans in the province where a plurality of their workers is located. "Then if you have employees across the country you'll have an appendix for each province," says Elizabeth Brown, a partner at Hicks Morley LLP in Toronto. That means considerable time and money spent on lawyers, consultants and actuaries to cover the myriad of different provincial rules on vesting periods, survivor benefits, and partial windups, to name but a few.

According to a 2009 C.D. Howe Institute report on pension uniformity, the administrative costs involved in sponsoring plans in multiple jurisdictions are likely well above \$1-billion annually.

Not only are these costs unnecessary, says Elizabeth Brown, but national employers also run the risk of committing costly errors due to the uneven regulatory environment.

“We have a system in Canada which is completely different than that in the U.S., which has a pre-emptive federal pension law” — the Employee Retirement Income Security Act (known as ERISA). “So in the U.S. when you have a dispute

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— Ken Burns, Lawson Lundell LLP, Vancouver

and you have case law, all the judges in the country are dealing with the same legislation, whereas here we’re dealing with different statutes.”

To illustrate the challenge facing national employers, consider last year’s decision by the Court of Queen’s Bench of Alberta in *Halliburton Group Canada Inc. v. Alberta*. The case turned on an attempt by Halliburton to convert its pension plan’s design from defined benefit, which guarantees a certain payout at retirement, to defined contribution, in which the employee bears the investment risk. The sticking point was

whether freezing the defined pension benefit at a future date would amount to a reduction in members’ accrued benefits. The court upheld an earlier decision by the Alberta superintendent of pensions to reject the requested amendments because benefits were calculated on the basis of a member’s final average earnings.

While not necessarily binding on the courts outside of Alberta, “the Halliburton decision now has the entire country scrambling,” says Elizabeth Brown. “Employers in Ontario today, who want to convert their plans from defined benefits to defined contributions, and might be considering this type of amendment, do not know whether this Halliburton case is going to be picked up or not by the Ontario regulator. If we had one uniform law, obviously we wouldn’t have this problem. If there was a case in Alberta that dealt with the exact wording of a provision that we are also bound by in Ontario, we would know that that would be something we have to comply with.”

But Ken Burns, a partner at Lawson Lundell LLP in Vancouver, says there is little pressure on politicians to untangle the mess. “Most plan sponsors — just by sheer numbers — are smaller organizations with employees in only one provincial jurisdiction or maybe two,” he says. “They don’t worry about harmonization,” though he does concede they are concerned about excessive regulation.

Still, as policymakers pay more and more attention to bringing down barriers to labour mobility within Canada, it is expected that pensions will have to become part of the discussion.

“If you’re working in a province where the rules are more favourable, would you be willing to move to a province where the rules are less favourable if your employer wants you to?” wonders Christopher Brown. “Also if you work in a variety of jurisdictions and then retire in another jurisdiction, which rules apply to you? It becomes very complicated for individual plan member.”

But Dominique Monet, a pension lawyer and partner at Fasken Martineau LLP in Montreal, is not convinced these variations constitute a real barrier to labour mobility in Canada.

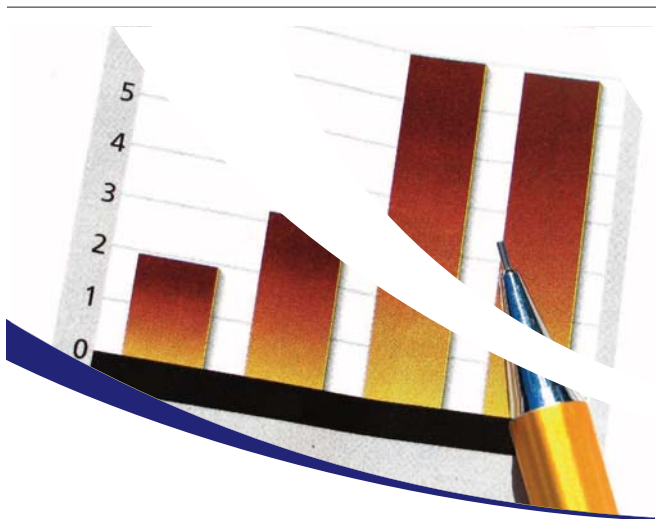
“It is difficult to conjure up a precise scenario where a person would refuse relocation on the basis of a term in a pension plan or because of a variation in the pension standards legislation between the old and the new province,” he says.

Nonetheless, in 2009 Alberta and British Columbia implemented the Trade, Investment and Labour Mobility Agreement. That same year, a joint expert panel on pension standards released a report calling on the two provinces to adopt uniform pension laws and set up a joint regulator. It also invited policymakers to consider the feasibility of uniform pan-Canadian standards enforced by a single regulator.

Nationally, there is a proposed Agreement Respecting Multi-Jurisdictional Pension Plans currently under consideration by the provinces. If implemented, it would replace the existing reciprocal agreement originally signed in 1968 and, in theory, simplify the current regime.

It would subject pension plans to the administration rules of the province of registration, says Monet. Even so, workers living in the same province but participating in different plans would often be governed by different rules. “It won’t bring equality for all matters,” he adds. And according to Christopher Brown, it would achieve little in terms of harmonizing investment rules for pensions.

In truth, Ottawa and the rest of the provinces have little appetite to overcome the constitutional challenges that are involved in switching to a national pension regime.



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À quand un régime national?

Les règles canadiennes en matière de régimes de retraite sont à ce point éclectiques qu'elles n'encouragent pas les employeurs à investir. Entre souci d'harmonisation et respect des compétences constitutionnelles, la recherche de solutions se poursuit.

Pendant des années, le Canada a fait comme plusieurs autres pays développés : il a remis à plus tard les réformes significatives dans le domaine des pensions. Mais en décembre dernier, après une rencontre avec ses homologues provinciaux à Kananaskis, en Alberta, le ministre fédéral des Finances, Jim Flaherty, a annoncé l'intention d'Ottawa d'aller de l'avant avec un régime de pension agréé collectif (RPAC). Son objectif premier : stimuler l'épargne privée pour assurer les vieux

jours de futurs retraités.

Reste à voir si l'initiative entraînera une « avancée majeure » pour le marché canadien des fonds de pension, comme l'a affirmé M. Flaherty. Il a lui-même reconnu que plus de travail serait nécessaire pour « former un consensus ». Après tout, ici, la réforme des régimes de retraite en est une de compétences multiples — avec toutes les questions constitutionnelles que cela implique.

Les remarques du ministre ont néanmoins trouvé une oreille attentive chez

des avocats spécialisés qui, depuis des décennies, plaident en faveur d'une plus grande harmonisation des lois sur les régimes de retraite. Le Canada est le seul pays du monde qui a 11 différents régimes — 10 provinciaux, un fédéral — chacun avec ses propres règles.

Christopher Brown, associé chez Spectrum HR Law à Calgary, estime que cette mosaïque « a donné lieu à un niveau de complexité qui a non seulement fait monter les coûts, mais qui a découragé les promoteurs de contribuer

“You're also talking about how to accommodate regional issues,” says Christopher Brown, who is also president of the Association of Canadian Pension Management. “Where would it be headquartered, all those same issues that we read about around the disputes associated with the national securities regulator could easily flare up.”

In the last year alone, Ontario, Manitoba and Prince Edward Island have all gone their own way by adopting new pension laws or amending existing ones.

Circumventing the elephant in the room

According to Burns, who generally favours harmonization, it's more realistic to expect, in the short- to medium-term, that Ottawa will focus on solutions that don't step on provincial jurisdiction.

And that's why its PRPP proposal is significant. “Pension standards have evolved out of employment law,” says Burns, which explains why plans are always either sponsored by an employer, a group of employers or employees. The self-employed don't participate because there's no such relationship. “The PRPP instead takes the approach that pension plans can be looked at as a financial product, in the way RRSPs are treated like a financial product, administered by a financial services institution.”

With financial institutions sponsoring PRPPs, employers need not worry about assuming the costs and fiduciary obligations associated with offering pensions to employees — all of which are outside of their core business. “Small employers are the big target here,” says Burns. “They just have to go along for the ride and not do any administration.” In that sense, he adds, “harmonization is going to be enhanced to a small degree because the federal government is driving the initiative as much as it can under the *Income Tax Act*.”



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aux régimes ».

La situation pourrait s'améliorer. Par exemple, tandis que les politiciens accordent de plus en plus d'importance à éliminer les obstacles à la mobilité de la main-d'œuvre à travers le pays, la question des pensions pourrait être abordée.

Sur le plan national, les provinces se penchent également sur un nouveau projet d'entente interprovincial pour des régimes de pension. Si elle était adoptée, elle simplifierait le régime actuel en remplaçant une entente en vigueur depuis 1968.

Mais dans les faits, Ottawa et les provinces ont peu d'appétit pour affronter les défis associés à l'adoption d'un système purement national.

Uniquement dans la dernière année, l'Ontario, le Manitoba et l'Île du Prince-Édouard ont mis beaucoup d'efforts

à adopter de nouvelles lois dans le domaine ou à amender leur législation existante.

Selon Ken Burns, un associé chez Lawson Lundell à Vancouver, il est plus réaliste de s'attendre, à court ou moyen terme, à ce qu'Ottawa travaille dans le sens d'une harmonisation qui se tient loin des compétences provinciales.

C'est pourquoi le RPAC est significatif, dit-il. « Les normes dans le domaine des pensions ont évolué. Le RPAC adopte l'approche selon laquelle les régimes de pension peuvent être vus comme un produit financier, au même titre qu'un REER, et administrés pas des institutions financières. »

Ces changements pourraient avantager les petites et moyennes entreprises et les travailleurs autonomes, souvent tenus à l'écart à l'heure actuelle. Reste à savoir s'ils iront jusqu'à

rétablir un équilibre entre les régimes à prestation définie et ceux à cotisation définie. L'incertitude du premier pour les employeurs a encouragé un exode vers le second au cours des dernières années.

Mais c'est peu probable, croit Elizabeth Brown, associée chez Hicks Morley à Toronto. « L'harmonisation est l'éléphant dans la pièce », dit-elle.

« Le gouvernement risque de simplement éviter le problème. La solution pour une couverture élargie se situe à l'extérieur du système de prestations définies. Ce sera un univers de cotisations définies, avec des initiatives comme le RPAC et les REER, qui sont complètement à l'extérieur du spectre du droit des régimes de pensions. »

Bref : des solutions typiquement canadiennes à des problèmes typiquement canadiens. **N**

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Perhaps, but according to Christopher Brown, we still need to simplify the system for existing plans. "It's important that we ensure that defined benefit plans continue to be a viable option."

Both DB and DC plans have their advantages and disadvantages. From the worker's perspective, DB plans provide certainty around the expected level of pension benefits at retirement. But from a budgeting standpoint, DC plans have more cost certainty for employers and the funding rules are much less onerous. But many employers like DB plans as an employee attraction and retention mechanism, says Christopher Brown.

"The point is that having a legislative framework that makes both types of plans equally viable then allows employers and employees to determine what type of plan is best suited to their circumstances," he says. The current flight to DC plans is partly due to the patchwork of onerous rules governing DB plans, he adds.

"Ultimately, a system that permits flexibility for existing plan types, and permits innovation and the creation of new plan designs as Canadian society and the economy evolve, is the best solution for ensuring broader pension coverage in the voluntary private sector pension system."

While preferable, that kind of reform is unlikely, says Elizabeth Brown. "Harmonization is the big elephant in the room. And the government might just work around it. The place for increased coverage is going to be outside that DB system. It's going to be a DC world with initiatives like the pooled retirement pension plan and RRSPs which are not governed by pension law at all."

In the end harmonizing laws has always been a struggle in this country. That's why our governments favour uniquely Canadian solutions to uniquely Canadian problems. **N**

Yves Faguy is senior editor of *National*.