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Pension surplus fight heats up

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MONEY TALK

ONTARIO has opened the emotional issue of who gets to share surplus pension funds.

Never mind that many of these pots of gold have melted away with plunging stock prices. That development has only sharpened interest in who benefits when a pension fund has accumulated more money through investments than the fund's actuaries estimate is needed to meet pension commitments.

For companies and pension contributors alike, there's a lot at stake.

Days after a Sept. 14 deadline, some groups are still hurrying to reply to a consultation paper Ontario Finance Minister Jim Flaherty released July 18, in the thick of summer vacations.

The most excited reaction was sparked by a proposal to let employers alone decide whether or not to negotiate a division of surplus funds when they have a mass layoff and wind up part of their pension plan.

This would be a complete reversal of a legal interpretation the province's own superintendent of financial services sprung on Monsanto Canada Inc. in 1997. Three Ontario Divisional Court judges agreed in March that the Pension Benefits Act requires a fair sharing of any surplus.

Employers and pension consultants who had predicted long fights over vanished surpluses are relieved by the apparent reversal. But they warn that a backlog of partial windup cases could result in dozens of claims on surplus money if the March court ruling stands up to appeal.

"Retroactivity of proposals is not addressed and it must be addressed," argues Priscilla Healy, chair of advocacy and government relations for the employer-dominated Association of Canadian Pension Management.

Workers and retirees who are lined up to share in surplus funds are infuriated, particularly the 1,000 laid-off workers who covet a share of a \$160 million surplus (as of last October) that the Bank of Nova Scotia inherited when it bought National Trust.

"In effect, our interest in the National Trust pension plan surplus would be expropriated by the consultation paper proposals," the group complains. "This only serves to frustrate and infuriate our members who are only trying to obtain that to which they are legally, rightfully and morally entitled."

MPP John O'Toole, Flaherty's parliamentary assistant responsible for the pension consultation, insists that the proposals remain open for discussion. The paper is full of open-ended questions.

“I have not got the impression that the government has taken any decisions yet,” he says as he awaits a summary of the initial public comments.

The consultation paper proposes that victims of mass layoffs get a say if their former employer decides to negotiate a sharing of surplus pension money at a later date. No provision is offered for workers who quit or are let go individually.

Lawyer Mark Zigler of Koskie Minsky argues that workers deserve to get a share of any surplus at the time of partial windup, as they would upon a full windup. “If they have to wait forever, the surplus will disappear,” he said.

Nothing in the proposals would stop employers from using excess funds to pay for a suspension of company contributions, as many plan documents permit.

A review of surplus distribution rules was also prompted by a court decision in May, 2000, involving TecSyn International Inc. That ruling's effect was to bar employers from withdrawing or sharing any surplus unless their plan documents permit and two thirds of plan members consent.

The province is proposing to reduce the hurdles for withdrawals from ongoing plans that leave a minimum financial buffer. The concern was that stiff rules encouraged employers to merely wind up desirable pension plans altogether.

Henry Jacek, president of the Ontario Confederation of University Faculty Associations, says that some proposals “appear to tilt the rights of surplus ownership in favour of plan sponsors, who could remove surplus without consulting those whose pensions are at stake.”

Employers would always be in the driver's seat. If plan documents made any surplus theirs alone, they would not have to consult plan members or share surplus. But, if the money was to be held in trust for plan members, then the province wants to encourage negotiated settlements.

In other words, says Zigler, “They are like classic communists: What's mine is mine and what's yours we will share.”

Some faculty associations that fear cash-strapped universities draining surplus funds, are calling for negotiated settlements, including contribution holidays.

Clearly the government has widely divergent interests to balance. But it will be hard to judge the government's efforts until it takes a final stand, and publishes reasons.

The paper “Surplus Distribution From Defined Benefit Pension Plans” can be viewed at <http://www.gov.on.ca/FIN/english/pensione01.pdf>.

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