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Essential Updates on Key Pension Law Issues

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Over the past year, pension issues have been in the spot light drawing attention to the risks involved in sponsoring pension plans and driving many companies to revisit pension plan design. Cases at the Supreme Court of Canada and the Ontario Court of Appeal have brought uncertainty to pension plan wind-ups, mergers and the payment of pension plan expenses. New laws concerning privacy and new regulatory pronouncements on pension plan fiduciary and legal responsibilities compounds this uncertainty while class action lawsuits are driving home potential liabilities.

To manage the risks and liabilities inherent in sponsoring pension plans, employers should institute an appropriate pension plan governance framework. The goal of such a framework should be to ensure that the right people are providing the right information at the right time. Without proper oversight, command of the issues and expert advice, employers face the risk of incurring ever increasing costs and liabilities.

On the following pages are listed ten topics concerning pension plans that should be on the watch list of every plan sponsor and plan administrator. The ten topics are:

- (1) **Communication with Pension Plan Members;**
- (2) **Pension Plan Mergers/Asset Transfers;**
- (3) **Pension Plan Terminations;**
- (4) **Family Law and Pension Plan Administration;**
- (5) **Pension Plan Investments;**
- (6) **Outsourcing;**
- (7) **Pension Plan Design - Is Defined Contribution Better?**
- (8) **Pension Plan Administration Expenses;**
- (9) **Privacy Law and Benefit Plans; and**
- (10) **Class Action Lawsuits.**

1. Communication with Pension Plan Members

If done properly, employee benefits communication can enhance an employer's benefit program by ensuring that employees understand and profit from promised benefits. If done improperly, however, employee benefits communication has the potential to create significant legal liability for employers. This potential for employer liability has been repeatedly exposed through Canadian court challenges involving the communication of employee benefits. The recent trend of the courts is to find in favour of employees in instances where the pension plan administrator or the employer did not, in the court's view, provide sufficient or accurate information to employees about their benefits, election options or the implications of such options. Here are some examples of "communication traps" that have caught employers and plan administrators, exposing them to legal liability.

- The agent of the pension plan administrator failed to provide "relevant and complete information" to the spouse of a plan member regarding the implications to the spouse of signing the prescribed spousal waiver form under the Ontario *Pension Benefits Act* (the "PBA Ontario").
- An employer failed to fully inform the employee of the option to buy back past service with the employee's prior employer, for purposes of the employer's pension plan.
- An employee who was terminated from employment without cause had been given two severance payment options. The employer did not sufficiently explain the pension implications of the two options to the terminated employee. The two severance options produced material differences in the pension benefits payable to the terminated employee.
- A member of a teachers' pension fund was given inaccurate information about the cost of living adjustments he could expect to receive on his

pension, in a telephone discussion with an employee of the pension fund administrator.

- The employer provided a retiring employee and his spouse with inaccurate information about the life insurance coverage available to the retiring employee, and also omitted to inform them that conversion privileges were available.
- The plaintiff, a common law spouse of a plan member, was denied a survivor pension by the plan member's employer, as she did not qualify as a common law spouse on the date that the plan member became entitled to receive a disability pension. Even though the plaintiff was not entitled to receive a survivor pension according to the terms of the pension plan, the employer had previously indicated in a letter to the plan member the amount of survivor benefits available, and in an attached statement, the plaintiff was listed as the "spouse" of the member. The plaintiff was successful in her claim and the employer was required to pay such survivor benefits to the plaintiff from its own funds.

It should be remembered that an employer's "misrepresentation" of information (which includes an employer's failure to provide sufficient information) does not automatically result in legal liability for the employer. The employee must still prove that he or she suffered damages due to the employee's reliance on the misrepresentation.

However, since it is usually within the competence and control of employers to provide correct and complete benefits information and foreseeable that employees will rely on this information, employers are often at a disadvantage when trying to defend against a claim of negligent misrepresentation. That being said, devising an appropriate communications strategy and ensuring ongoing monitoring will assist an employer in minimizing the potential liability inherent in employee communication.

2. Pension Plan Mergers/Asset Transfers

Pension plan sponsors have always merged pension plans, as either a function of plan design or in order to access surplus assets, and have transferred assets between pension plans during corporate reorganizations. Recently, however, there has been an emerging trend of cases and regulatory policies that have intervened to set aside or stop plan mergers and pension asset transfers. These cases and regulatory policies are significant and worrying for plan sponsors and administrators alike, since they place restrictions on how a pension plan can be administered and create significant potential liabilities. One case in particular, *Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc.* (“Transamerica”), which was decided by the Ontario Court of Appeal (leave to appeal to the Supreme Court of Canada denied), is particularly noteworthy for pension plans registered in Ontario.

In *Transamerica*, a pension plan sponsor, in an effort to merge two separate Ontario registered pension plans, gave an undertaking to the Pension Commission of Ontario (as it then was) to keep the assets of each of the pension plans separate and apart. The Superintendent of the Pension Commission of Ontario required the undertaking because one of the pension plan trust agreements contained exclusive benefit language in favour of plan members (i.e. plan assets must be applied exclusively for the benefit of members). The Ontario Court of Appeal found that because of the undertaking and the exclusive benefit language, the ability to merge the assets of the pension plans was restricted.

The decision casts doubt on the ability of plan sponsors to merge pension plans whose assets are governed by trusts, the terms of which contain exclusive benefit language. As a result of this decision, the Ontario pension regulator has severely restricted the ability of pension plan sponsors to merge or transfer assets between pension plans in Ontario. Although *Transamerica* is an Ontario decision that may be distinguished on its facts, it does deal with common law trust principles that may apply in other Canadian jurisdictions.

The Ontario pension regulator's moratorium and the *Transamerica* decision raise more questions than answers. How will mergers in jurisdictions other than Ontario be affected? If the pension plans to be merged do not have surplus, will approval be given? How are pension plan assets of the merging plans to be kept separate and apart in the merged plan? Is there a concern with merging defined contribution pension plans? What happens if you have already merged pension plans or transferred assets?

As a result of the FSCO moratorium and the *Transamerica* decision, at the very least, legal advice should be sought when considering an agreement that contains pension language or when dealing with a proposal to merge or transfer assets between pension plans.

3. Pension Plan Terminations

Pension plan terminations, whether in whole or in part, are always a thorny issue. Considerations which might arise on a plan termination include funding deficiencies (if the plan has been underfunded), surplus sharing and withdrawal (if surplus exists), the provision of additional wind up benefits (such as "grow-in" benefits in Ontario), the tracing of missing members, and employee communication pitfalls.

Partial plan wind-ups have of late become the newest termination issue of concern. Historically, partial wind-ups, which most often occur when a company terminates a significant number of employees or sells or closes a portion of its business, have been straightforward. Plan administrators prepared a partial wind up report and, upon receiving regulatory approval, distributed terminated members' benefits. This all changed with the Supreme Court of Canada ruling in *Monsanto Canada Inc. et al v. Superintendent of Financial Services et al* ("Monsanto").

In *Monsanto*, the Supreme Court of Canada interpreted the Ontario PBA to say that when a pension plan is partially wound up and surplus existed at that time, the surplus related to pension plan members affected by the partial plan wind up must be determined and distributed. Although the decision in *Monsanto* focused on the interpretation of subsection 70(6) of the Ontario PBA, which deals with rights and benefits on a partial wind up, the decision may apply in other Canadian jurisdictions whose legislation is similar to subsection 70(6). For instance, provisions in the federal *Pension Benefits Standards Act*, 1985 respecting rights and benefits on a partial wind up are virtually identical to those contained in the Ontario PBA. As a result, *Monsanto* could have a very persuasive effect in respect of registered pension plans in other Canadian jurisdictions.

Like *Transamerica*, *Monsanto* has created a lot of uncertainty for those who administer registered pension plans in Canada. There are numerous questions that are outstanding in respect of partial wind-ups that have already taken place and in respect of partial wind-ups that may take place in the future. For instance, what should be the date of partial wind up? What should happen if the employer is entitled to surplus? Is a distribution of surplus still required? How does *Monsanto* affect pension plans and pension plan members in jurisdictions outside of Ontario? What is the effect on defined contribution pension plans? How is an employer supposed to determine surplus in respect of a partial wind up that occurred many years earlier, especially if the pension plan is now under funded? All of these questions and many more will need to be answered by regulators or courts before we have a clear picture of the implications of *Monsanto*.

Needless to say, a careful legal review of past employee terminations, business reorganizations and partial plan wind ups will need to be undertaken by employers to determine whether any liability currently exists. In this day and age of corporate governance and financial disclosure, such a liability will likely need to be properly disclosed to auditors and shareholders.

4. Family Law and Pension Plan Administration

Since pension benefits are included in the property that makes up marital assets on divorce or separation, marriage breakdown has become an important issue for pension plan administrators. Although matrimonial laws that govern the financial arrangements between the spouses do not impose direct legal requirements upon pension plan administrators, a court order or separation agreement may require the plan administrator to take some action (e.g. splitting the pension). Frequently, these court orders or separation agreements are unclear as to what is required of the plan administrator. Complicating the plan administrator's task is the interplay of various jurisdictional requirements, family law and pension law, and the demands of separated spouses and their lawyers.

The following are a few of the initial steps that a plan administrator in Ontario should take once a court order or separation agreement is received. Other more specific steps may be required depending on the situation at hand.

The plan administrator should:

- ensure that it has the whole of the court order or separation agreement and that the order or agreement is certified as a true copy by the lawyer for the member or non-member spouse. This will ensure that the order or agreement is the correct version and is still in full force and effect. Mere notice of the order or agreement or amendment thereto (e.g. by way of a telephone call or letter) is not sufficient;
- determine whether the court order or separation agreement is valid. For instance, if a court order assigns a portion of an Ontario member's pension to the non-member spouse, it must be made under Ontario's *Family Law Act* in order to be valid. Therefore, if the order is from outside of Ontario, the parties may need to obtain a further order from an Ontario court. Jurisdictional issues play a prominent role in marriage breakdown situations and must be carefully reviewed;

- determine who has the payment obligation under the court order or separation agreement: the plan administrator or the member. Some orders indicate that the member is to make payment, if and when payments are received by the member from the pension plan, while others impose a payment obligation on the plan administrator. Where the plan administrator has the payment obligation, the non-member spouse's contact information should be obtained;
- ensure that the court order or separation agreement does not provide that more than 50% of the member's benefit accrued during the marriage is to be paid to the non-member spouse. If the order or agreement provides that more than 50% is payable, the plan administrator should refuse to comply and should request that an amended order or agreement be obtained. [Note: In certain jurisdictions other than Ontario, the "50% Rule" does not apply];
- provide all legislatively required information to the non-member spouse. Do not provide the value of the member's benefit entitlement where there is no legal requirement to do so. Providing a value may lead to liability if the value is incorrect or misleading. The plan administrator should also be aware of all privacy law requirements when providing information to a non-member spouse or that individual's representatives, and should seek the member's consent where information, other than that which is legally required to be provided, is requested by the non-member spouse;
- write to the member and non-member spouse and summarize what the court order or separation agreement appears to require. Set out any requirements that cannot be fulfilled;
- ensure that advice is not provided to the member or non-member spouse as to how a court order or separation agreement should be drafted. Where there appears to be areas of concern with the order or agreement, advise the member or non-member spouse to seek clarification from their lawyer;

- ensure that all marriage breakdown information is kept in the member's file.

Pension issues on marriage breakdown can be very complicated. Differing jurisdictional requirements and the individual circumstances of the parties involved make each situation unique. Poorly written court orders and separation agreements, support orders and garnishment orders and issues of death and multiple marriage breakdowns can add further layers of complexity. As a result, a plan administrator must be very careful in the way it handles a court order or separation agreement to ensure it complies with all legislated requirements and its fiduciary duties. Where in doubt, the administrator should seek expert advice.

5. Pension Plan Investments

One of the biggest risks that pension plans face is investment risk. In defined benefit plans, poor investment returns can lead to large unfunded liabilities, which can affect a plan sponsor's bottom line, credit risk and stock values. In defined contribution arrangements, poor investment returns can lead to employees not retiring with enough retirement income, which could generate lawsuits against a plan sponsor for breach of fiduciary duty or compliance with laws, as well as erode employee-employer relations.

In trying to ensure that it is meeting with its fiduciary as well as statutory duties, the employer must, among other things, consider issues such as: compliance with quantitative and qualitative limits in pension legislation; the taxation of investments including foreign property exposure; pension fund structure; the risk tolerance of the pension plan population; asset mix and liquidity; and how much investment information to provide to defined contribution plan members. Notwithstanding the delegation of some or all of these matters to a third party, the plan sponsor or plan administrator will retain ultimate responsibility. If investments are not properly and prudently addressed, the costs to a plan sponsor, the plan administrator as well as the plan beneficiaries could be significant.

Investments tend not to get as much attention in the pension plan governance structure as they probably should. This may be because pension fund investments are an area of pension administration that has received little attention from regulators. However, because of severe pension funding shortfalls created over the last number of years, which have been caused in part by the downturn in equity markets, regulators are now beginning to focus more of their attention on the financial health of registered pension plans.

For its part, the Ontario pension regulator implemented a monitoring program in 2000 that focused on pension plan funding. As a follow up to that program, it has now released a consultation paper entitled *A Proposed Risk-Based Investment Monitoring Model for Supervising Defined Benefit Pension Plans* (the “Investment Monitoring Model”) which focuses specifically on the investment of defined benefit pension plan assets. This approach focuses on pension plans most at risk of not providing members with the benefits they have been promised under their pension plan. In introducing the Investment-Monitoring Model, the Ontario pension regulator’s main objectives were to encourage appropriate investment conduct and processes and to promote good fund governance. The Investment Monitoring Model tries to achieve these regulatory goals through a selective review process.

The Ontario pension regulator intends to implement the Investment Monitoring Model for filings made in respect of the 2004 plan year. As such, pension plan sponsors in Ontario are going to need to start properly monitoring legislated investment criteria and their investment manager’s compliance with those criteria. Plan sponsors should review their current investment management contracts and amend those contracts where proper compliance and reporting from investment managers has not been addressed.

6. Outsourcing

Outsourcing various pension plan administrative duties will allow an employer access to expertise which in turn will decrease the administrator's risk of non compliance with plan terms and applicable laws. Although specific acts of administration can be delegated to third parties, pursuant to legislation, the overall responsibility for the administration of the pension plan cannot be delegated. When it comes to lawsuits by employees or prosecutions by regulators, it will be the pension plan administrator who will be legally responsible.

It is therefore imperative that plan sponsors or plan administrators enter into a detailed and properly considered contract when commencing an outsourcing arrangement. A good contract ensures that the risks inherent in the arrangement between the sponsor or administrator and the service provider are fairly and adequately allocated. An outsourcing contract should not simply be a service provider template. Templates are starting positions and usually one sided. Each contractual relationship is unique and the contract should reflect that uniqueness. Further, once a contract is entered into, it should be reviewed on a ongoing basis, since it is inevitable that relevant factors such as the law, risk tolerance and plan structure will change.

The following sets out a few of the more important considerations a plan sponsor or plan administrator should consider when entering into an outsourcing contract.

- One of the most important provisions in an outsourcing contract is the standard of care provision. This provision sets out what quality standard the service provider must meet in fulfilling all of its duties and obligations. An example of a proper standard of care is as follows:

“In performing all of its duties and obligations under this Contract, the Service Provider shall exercise the care, diligence and skill that a prudent, professional pension administrator experienced in the administration of

registered pension plans would exercise in dealing with the property of another person.”

- Be mindful of specific limitations of liability, exculpatory clauses or specific standards of care throughout the outsourcing contract that will override the general limitation of liability provision and the general standard of care (e.g. language that indicates that the pension administrator will complete a task in “good faith”). A specific limitation replaces the general standard or limitation in respect of the applicable task. As a fiduciary, resist limitations on service provider liability. It is your job to ensure those providing services to your pension plan are held accountable.
- The outsourcing contract should require the service provider to make available clear, useful and timely reports of performance over a specific period of time (e.g. monthly or quarterly). The contract should define precisely what information should appear on the reports, such as missed service levels. The format of the reports should be acceptable to the plan sponsor or plan administrator and examples should be attached to the contract. The sponsor or administrator should ensure that reports are being reviewed on a timely basis so as to catch any errors or misunderstanding.
- As previously mentioned, the plan administrator, as fiduciary, is ultimately responsible for ensuring that pension plan administration complies with all applicable laws. A number of different laws affect pension plan administration. For instance, if your company maintains a defined contribution arrangement and your service provider offers a call in centre that plan members will use to change their investment options, you will need to ensure that the service provider is complying with all applicable securities legislation. Since, the employee is talking to the service provider concerning investments, the service provider could be seen as a “market intermediary” and therefore subject to registration requirements under applicable securities laws.

- In investment management outsourcing, make sure your manager can comply with pension investment restrictions. One such restriction is that no more than 10% of the book value of the assets of a pension plan fund can be invested directly or indirectly in any one company or affiliate of that company. Many managers measure assets in market value and not book value, so this should be watched. Also be careful of indirect holdings. Quantitative limits like the 10% restriction apply to direct and indirect holdings in a pension plan fund. Examples of indirect holdings are units of pooled or mutual funds. Direct and indirect holdings must be aggregated when assessing the applicable limit.
- There are a number of different contract termination rights that a plan sponsor or a plan administrator should consider. At all times, the contract should contain a termination right for material breach of the contract (e.g. breach of confidentiality) and insolvency or bankruptcy. The sponsor or administrator should also consider termination rights for convenience, poor service levels, or change in control related to the service provider. These termination rights are more difficult to negotiate and may come with a fee attached. The sponsor or administrator should also consider what it requires in respect of termination in order to meet its fiduciary goals and negotiate accordingly. It is important that the contract stipulate the rights and obligations of the parties upon termination. From the plan sponsor's or plan administrator's point of view, there is a need for continuity and cooperation from the service provider. Consideration should be given to including a clause that requires the service provider to assist the client in transitioning the services to another service provider over a stipulated period of time (e.g. six months).
- When entering into an outsourcing contract, ensure that you have completed your due diligence in respect of the service provider, you know precisely the service you are going to outsource and that the contract is properly reviewed and negotiated.

7. Pension Plan Design — Is Defined Contribution Better?

It is often assumed that a defined contribution retirement plan eliminates an employer's liability by shifting key areas of responsibility to employees. This is especially true in times such as the present when defined benefit pension plans are heavily under funded. However, many employers are coming to realize that potential liability associated with the operation of a defined contribution retirement plan can be as great if not greater than that associated with the operation of a defined benefit pension plan. A number of areas in which potential liability may arise in the defined contribution context are set out below.

➤ Investment Options

An employer acts as a fiduciary when selecting the investment options for the pension plan. Its responsibilities as a fiduciary will include offering a diverse number and range of options with differing risk and return characteristics. Deciding on the number of investment options, the diversity of those options and the risk and return characteristics is a difficult task and will depend on the make up of the plan population and employees' sophistication in investment matters. Notwithstanding the difficulty in making such a decision, it is imperative that the employer get it right in order to avoid liability.

➤ Investment Option Changes

It is also important that the employer ensure that employees have the opportunity to move freely between investment options. Mobility between options allows employees to better diversify and adapt according to their changing situations and in response to changes in the economy. Where movement between investment options is unduly restricted, the effects can be devastating as was aptly illustrated by the Enron situation in the United States.

➤ Investment Education

Given the transfer of investment risk to employees, education is crucial in the defined contribution context. Proper education involves, among other things, providing the employee with the required tools to properly assess contribution levels, investment choices, and investment risk and risk tolerance, and to understand the link between risk, age and investment diversification. To be prudent, the employer should continually assess if the education being provided to employees is accurate, sufficient and effective.

➤ Providing Investment Advice

Employers need to provide employees with education in respect of plan investments but must at the same time avoid providing investment advice. Providing investment advice to employees increases an employer's fiduciary responsibility, which in turn will increase the potential liability of the employer. The line between education and advice is often difficult to draw, especially where employees lack the expertise to analyse the information provided by the employer.

➤ Employee Communication

Because of the transference of investment risk from the employer to the employee, the need to provide proper and sufficient employee communication is very important in the defined contribution context. As discussed earlier, case law in Canada reveals that employers are being held to a demanding standard when communicating with their employees in respect of employee benefits. This standard requires that the information communicated be accurate, relevant, complete and timely.

➤ Service Providers

Where employers do not possess the requisite knowledge, skill or facilities to provide certain pension plan functions, they must take the prudent step of hiring third party service providers who are experts (e.g. investment advisers). The employer must also ensure that the service providers appointed are, both at the time of appointment and on an on-going basis, reputable, stable and professional, since the employer will be seen as endorsing the particular providers chosen. As noted above, employers must also realize that they remain responsible for the selection, monitoring and control of all service providers. This is true even where a service provider contract contains language that relieves the employer of liability for the service provider's mistakes. This language may not actually protect an employer where the employer has wilfully turned a blind eye to the selection or ongoing monitoring of service providers. The employer should ensure that legal counsel properly reviews all service provider agreements.

Employers should realize that shifting to or originally establishing a defined contribution pension plan may alter the type of potential liability the employer faces but does not necessarily reduce the potential liability. Defined contribution retirement plans may actually serve to increase those liabilities since the employer has the added burden of ensuring that employees are provided with enough information and education to make prudent investment choices. To reduce potential liability employers should undertake appropriate governance procedures in respect of all of their defined contribution retirement plans.

The challenge to employers is that no guidelines exist under current Canadian pension legislation to assist employers in deciding how to structure defined contribution pension plans in order to avoid legal liability. However, it should be noted that in May 2004, the Joint Forum of Financial Market Regulators, which has representatives from the pension, insurance and securities regulators across

Canada, released the much-anticipated “Guidelines for Capital Accumulation Plans”. Capital Accumulation Plans (“CAPs”) include defined contribution pension plans, deferred profit sharing plans and group RRSPs.

These CAP guidelines are intended to, among other things:

- outline and clarify the rights and responsibilities of CAP sponsors, service providers and CAP members; and
- ensure that CAP members have the information and assistance they require to make investment decisions in such plans.

Although the CAP guidelines do not have the force of law, employers can look to them for guidance on “best practices” that might be expected from the regulators. The guidelines serve as a useful starting point in developing a governance policy or strategy for CAPs, which is recommended in order to minimize the risks of lawsuits by dissatisfied CAP members.

8. Pension Plan Administration Expenses

The running of a pension plan can be expensive. Costs are generated through member communication, amendments to the pension plan, actuarial and other advisor fees, regulatory filing fees, staff time, equipment and office costs and much more. Generally speaking, under the Ontario PBA the administrator or agent of the administrator of a pension plan is entitled to payment from the pension plan fund in respect of any fees and expenses related to the administration of the pension plan and permitted by the common law or provided for in the pension plan. The difficulty for plan sponsors and plan administrators lies in defining what fees and expenses are chargeable to the fund as the Ontario PBA does not provide any clear guidance in this regard.

Regulatory policies and statements provide some insight as to what types of fees and expenses might be chargeable to a pension plan as “administrative” fees and

expenses, subject always to the wording of the pension plan documents (discussed below).

For example:

- The Ontario pension regulator has indicated in one of its bulletins that a plan administrator must determine whether payment of the fees and expenses from the pension fund would be a “prudent use” of the plan funds (i.e. is the service rendered to the pension plan appropriate and does it provide value to the pension plan when compared to the cost of the service?). Even if the plan administrator decides that a charge against the fund is reasonable and appropriate, the charge cannot be made if the plan documents do not permit it;
- The Ontario pension regulator has also taken the view that actuarial/consulting fees incurred in collective bargaining negotiations by the employer or the union are not “usual and reasonable expenses” which can be charged to the pension fund; and
- The Federal pension regulator has indicated that an administrator should establish guidelines as to what expenses can be appropriately charged to the pension fund and the procedures involved before making the charge (e.g. requirement for written service contracts for legal, actuarial, consulting and other services; requirement for receipts or bills). In the past, the Federal pension regulator has found these expenses to be unreasonable:
 - attendance at distant conferences by individuals who are responsible for administering the pension plan;
 - unjustifiable travel expenses; and
 - purchase of capital equipment which is not used primarily for pension plan administration.

Notwithstanding various statements made by the regulators, in order to make a proper legal determination of whether fees and expenses can be paid from a pension plan fund, all current and historical plan documents must be reviewed to determine if the terms of a pension plan permit the payment of certain fees and expenses from the pension fund or the reimbursement from the pension fund of certain fees and expenses which the administrator has paid for itself. Plan documents to be considered include plan texts and all amendments, funding agreements (e.g. trust agreements, insurance policies) and all amendments and employee communications (e.g. notices, booklets, statements).

It is clear from the case law that even if the current plan documents permit administration fees and expenses to be paid from the pension fund, that does not necessarily mean that it is legally permissible to charge such fees and expenses to the pension fund. For instance, suppose the original plan provided that plan administration fees and expenses are to be paid by the employer but the current text provides that such fees and expenses may be paid out of the pension fund. In this case, it is necessary to ensure that the original plan was amended in accordance with the amendment power granted under that plan to change the fees and expenses provision. If the original plan was not amended in accordance with the amendment power, the current plan text provision, which permits fees and expenses to be paid from the pension fund, may be invalid.

The bottom line is that a plan administrator must first determine whether a fee or an expense is a proper administrative fee or expense. If it is, the plan administrator must then complete a legal analysis of whether specific wording of both current and historical plan documents allows the payment of fees and expenses from the pension fund. In many cases, the employer was found to have improperly charged fees and expenses to the pension plan fund and was required to repay the fund the amounts charged with interest.

9. Privacy Law and Benefit Plans

Plan administrators have always had a fiduciary duty in respect of plan members' personal information. Starting January 1, 2004, privacy legislation, whether it is by way of the federal Personal Information Protection and Electronic Documents Act ("PIPEDA") or other like provincial privacy legislation, will now create a legislated duty for benefit plan administrators in respect of benefit plan members' personal information.

The following are some matters that benefit plan administrators will need to consider:

- Determine whether privacy law applies to you and your benefit plans. PIPEDA applies with respect to personal and health information held or used by employers engaged in federally regulated commercial activities. British Columbia, Alberta and Quebec have their own privacy legislation. With respect to benefit plans, the application of PIPEDA will depend on whether the benefit plan can be considered a "commercial activity";
- Put in place a process to track personal information and how it is used and disclosed. Make sure all personal information is up to date and discard information when it is no longer required;
- Obtain consents for the use of personal information. In respect of information collected prior to the existence of privacy legislation, provide notice to benefit plan members that you have personal information and that you will be complying with the company privacy policy and applicable privacy laws;
- Ensure that third party service providers who are involved in the administration of the benefit plan have proper safeguards in place to protect personal information that is flowing to them as part of the administration process. Review all old and new contracts with service

providers to ensure that a contractual obligation exists respecting privacy to which the service providers will be held.

The application of privacy laws to benefit plans is in its infancy and will certainly become more of an issue and concern as time passes. Plan administrators and plan sponsors should start considering how to properly protect member information before potential liability is attracted pursuant to a member complaint.

10. Class Action Lawsuits

Pension and benefit disputes have been described by one Ontario judge as “tailor made” for class proceedings. Pension and benefit plans usually have a multitude of members whose claims against the employer may not, on an individual basis, be significant, but would be considerable on a group basis. Class actions also allow pension and benefit plan members and particularly retirees to proceed with claims that can often be complex, which they would not otherwise be able to pursue on a cost-effective basis. Because of the increasing use of class action lawsuits, employers are going to need to be more and more vigilant in avoiding administrative errors, which can compound over time, in order to reduce the risk of potential liability. Employers must also take care when changing plan terms to ensure that they have the right to make the change. The following reveals some of the significant pension and benefit class action lawsuits that have most recently taken place:

- a former employer unilaterally cut back certain supplemental health, hospital and dental benefits to 60,000 retirees. The retirees are suing for breach of contract and violation of their rights under the *Canadian Charter of Rights and Freedoms* for actual damages suffered by the 60,000 retirees and \$1 million in punitive damages;
- an employer paid \$5.4 million for taking improper “contribution holidays” with respect to its obligation to make annual contributions to the pension plan and \$2.7 million as a result of the allegedly improper transfer of

assets and liabilities and also for providing benefit improvements, which appeared to favour senior management;

- a \$100 million claim was instituted against an employer for improper activity in the investment of pension fund assets. The employer has been accused of failing to establish a prudent investment policy, investing plan assets in inappropriate investments, failing to enter into written contracts concerning the investment of plan assets, failing to guard against conflict of interest and failing to establish and implement proper governance procedures;
- a \$75 million claim was instituted against an employer for improperly diverting surplus assets to make employer contributions to members of another pension plan that was merged with the employer's pension plan.

All of the above-mentioned cases and the many more that are in process reveal claims for significant damages from employers. Coupled with the costs of proceeding to defend class action lawsuits and the undesirable publicity that comes with being sued, class actions are becoming major concerns for employers. Given the uncertainty in the law brought about by *Transamerica*, *Monsanto* and changes to regulatory policy and the downturn in the equity markets which are significantly affecting plan funding and member account balances, it appears that a perfect storm is brewing in respect of pension class actions. Employers would be wise to ensure that their governance procedures and practices are up to date and enhanced so that they will be prepared to properly face the possibility of a class action law suit in respect of their benefit arrangements.