

# Newsletter

## Supplemental Pension Plans

Number 21

June 2007

## New pension plan administration measures enacted in 2006

This issue of the *Letter* informs pension plan administrators on certain measures that came into force following passage, on 13 December 2006, of the [Act to amend the Supplemental Pension Plans Act, particularly with respect to the funding and administration of pension plans](#) (Bill 30).

The new measures mainly concern plan administration and other provisions of the *Supplemental Pension Plans Act*. They are mainly intended to clarify the liability of pension committees and suppliers of services (delegatees, service providers and representatives) and to ensure that pension committees have pertinent information for carrying out their duties. These measures take effect from 13 December 2006, with the exception of the provisions on the compensation of pension committee members for losses related to liability, which take effect from 14 June 2006.

Finally, the obligation of pension committees to adopt internal by-laws will come into force on 13 December 2007 and the new measures on the funding of defined benefit pension plans and the principle of equity will come into force on 1 January 2010.

### Clarifications on the liability of pension committees and suppliers of services

#### Liability of pension committees

The members of a pension committee are personally liable for the committee's decisions. Like any other person who administers the property of others, the committee must act with prudence and diligence. It must also act with competence, honesty and loyalty, in the best interest of the plan members and beneficiaries.

The *Supplemental Pension Plans Act* now provides for a **presumption of prudence** with regard to a pension committee that acts in good faith, basing its decisions on the opinion of an expert.

This new measure is intended to protect pension committee members by encouraging them to seek advice before acting, which will also improve the administration of pension plans.

To avail itself of the presumption of diligence, a pension committee must make sure that it chooses a real expert and provides the expert with all the information needed for him or her to give proper advice.

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By “expert”, we mean “a person in a position to provide a specialist’s opinion on a given subject”.

The presumption provided for in the *Act* means that a pension committee that acts in good faith, basing its decisions on the advice of an expert, does not have to otherwise prove that it acted with prudence. Conversely, anyone who wants to take legal action against a committee has the burden of overturning that presumption by showing that the committee, at one time or another during the consultation and decision-making process, committed a fault. In brief, the committee must at all times act as a reasonable person would act, for example, by being sure to seek appropriate advice from the right people.

Moreover, section 180 of the *Supplemental Pension Plans Act* provides that a person who, on the basis of an **expert’s** opinion, makes an investment otherwise than according to law is not liable for any losses resulting from that investment.

### **Liability of service providers and representatives**

Under the *Supplemental Pension Plans Act*, service providers and representatives (mandataries within the meaning of the *Civil Code*) who exercise a **discretionary power** of a pension committee are **likened to delegates**.

A “discretionary power” is characterized by the full scope of evaluation, action and decision making that is conferred on its holder. For example, a fund manager who buys and sells securities under a portfolio management contract exercises discretionary powers of a pension committee.

The new measure is intended to clarify the liability of service providers and representatives who act without having to obtain a pension committee’s authorization.

Such persons have the same obligations and the same liability that the committee itself would have had if it had acted. They assume the obligations of an administrator of the property of others and must act in the best interest of the pension plan’s members and beneficiaries.

As is the case where powers are delegated, the pension committee is responsible for the care that it takes in choosing a service provider or representative and in giving him or her its instructions and in the follow-up that it exercises over the provider’s work.

### **Exclusion or limitation of liability**

Suppliers of services (delegates, service providers and representatives) cannot exclude or limit their liability. Any clause to that effect in a contract between a pension committee and a supplier of services is, as of 13 December 2006, **null**. This includes a clause limiting the indemnity that a pension committee can claim from a supplier of services who causes damage to the pension fund.

In terminated contracts or contracts still in effect on 13 December 2006, a clause limiting liability is null only if it is **abusive**.

Generally, a clause is abusive if it grants an excessive advantage to the supplier of services. For example, a clause that provides that a supplier of services is in no way responsible for any losses, expenses or damages and interest arising from the supplier’s failure to carry out obligations would be considered abusive. Such a clause would force a pension fund to assume damages in their entirety.

### **Compensation of pension committee members**

The *Supplemental Pension Plans Act* has now established a fundamental principle: compensation for the liability of pension committee members .

Committee members who **are not covered by liability insurance** or who are accused of acts not covered by their liability insurance and **have not committed any fault** are entitled to receive from the pension fund reimbursement for damages incurred as a result of exercising their duties, including legal fees incurred for their defense.

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Generally, the term “fault” means “any breach of a rule or dereliction of duty”, for example, an administrative error or failure to observe the pension committee’s duty to exercise prudence.

Furthermore, if a court action instituted against a committee members is withdrawn, the pension fund must reimburse the members’ legal fees since no fault can be attributed to them.

Where committee members **are covered by a liability insurance policy**, the pension committee **will be able to compensate them** up to the policy’s deductible, provided such members have not committed any deliberate or gross fault.

A deliberate fault is one committed with the intention to cause the damage that results therefrom or with awareness of the damage that will, or is likely to, ensue. A gross fault is, according to the *Civil Code*, “a fault that shows gross recklessness, gross carelessness or gross negligence”, for example, where a pension committee hires a person knowing that the person does not have the required competence.

The pension committee must act with prudence before reimbursing a deductible. If there is any doubt as to the degree of fault, it would be advisable to seek a legal opinion. In addition to keeping records of each incidence of a reimbursement made from the pension fund’s assets, the committee should also keep records on the personal situation of its members. This is because it may be inappropriate to reimburse a deductible if a committee member can be compensated in some other way.

Finally, if there is withdrawal of a court action, the insured’s defense expenses should, according to the *Civil code*, be assumed by the insurer for any act covered by the liability insurance.

The measures on liability compensation for pension committee members have effect from 14 June 2006. They also apply to matters pending before the courts on that date.

### **Measures to strengthen pension plan administration**

A group of measures were introduced by Bill 30 to aid pension committees and committee members to adequately carry out their duties. These measures are the following:

#### **Choice of suppliers of services**

The *Supplemental Pension Plans Act* now clearly establishes that the choice and hiring of suppliers of services is a responsibility of the pension committee. However, a committee can delegate that responsibility to another person.

This rule does not terminate service contracts that were in effect on 13 December 2006 and to which the pension committee is not a party.

#### **Circulation of information to a pension committee’s members**

The **secretary of a pension committee** or any other person designated by the committee must provide each member of the committee with all **documents and information pertinent** to a plan’s administration. This allows all the members of a committee, regardless of who designated them, to receive the information that they need to carry out their duties.

The members of a pension committee have the **right to consult**, and to obtain a copy of, any document concerning the plan or its administration. Their right to access applies even to documents predating their arrival on the committee.

The only restriction to this right under the *Supplemental Pension Plans Act* concerns personal information, that is, information concerning a natural person and that makes it possible to identify him or her. Committee members can consult only the information that they need to carry out their duties, for example, when they must study a complaint filed by a plan member with respect to the amount of his or her retirement pension.

Pension committees must adopt written rules to ensure that these new obligations are respected.

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### **Accountability of suppliers of services**

Suppliers of services must file with the **pension committee** the reports required by the committee. However, reports prepared at the request of delegates, service providers or representatives must be submitted to them. For example, if a pension committee's delegate requests an actuarial valuation of the plan, the valuation report must be submitted to the delegate. Remember that the pension committee must adopt rules so that its delegates, service providers and representatives provide the committee with an account of their work.

A supplier of services who, **in the usual exercise of his or her duties**, becomes aware of a situation that may be prejudicial to the financial interests of the plan and that requires correction must inform the pension committee in writing. For example, if the actuary called on to prepare the report on the plan's actuarial valuation observes that the amortization payments made to the pension fund are less than the payments required by the preceding actuarial valuation, he or she must inform the pension committee so that the committee can seek payment of the sums in question, with interest.

The pension committee or its delegatee must correct **without delay**, that is, as soon as possible, the situation reported by the service provider. If the committee or its delegatee fails to correct the situation without delay, the service provider must inform the Régie des rentes du Québec. The obligation to inform in this case applies even to a person otherwise bound to professional secrecy.<sup>1</sup>

The *Supplemental Pension Plans Act* does not require a service provider to investigate any matters that are over and above the duties conferred on him or her by his professional assignment.

### **Circulation of information received from governmental authorities**

Service providers must provide to the pension committee all documents and information received from governmental authorities and that raise questions as to whether the plan or its administration is in conformity with applicable laws.

This would include, for example, a written communication by which the Régie des rentes du Québec, a similar agency elsewhere in Canada or the Canada Revenue Agency questions a service provider on whether a report is in conformity with an existing law although no official determination has yet been made.

### **Expenses for training pension committee members**

The *Supplemental Pension Plans Act* clearly establishes that expenses for training pension committee members are plan administration costs. Since such expenses arise from the exercise of the committee's duties, the pension committee is empowered to incur reasonable expenses for training its members, even if the plan text provides that administration costs are not paid by the pension fund but by another person.

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1. The *Charter of Human Rights and Freedoms* provides that any person bound by an obligation of professional secrecy may be relieved of that obligation by an express provision of law.

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## Other provisions in effect from 13 December 2006

### Information to be provided in the annual information return

The information to be provided in the annual information return is no longer prescribed by regulation but within the Régie's Annual Information Return form.

### Abolition of the review procedure

A decision rendered by the Régie des rentes du Québec on or after 13 December 2006 can be contested only before the Administrative Tribunal of Québec, within 30 days following notification of the decision. Abolition of the review procedure is intended to make it possible for all parties to obtain a final decision more rapidly.

The Régie retains, however, its power to review, on its own motion, erroneous or incomplete decisions. This power is provided for in section 26 of the *Act respecting the Québec Pension Plan*.

### Determination of the degree of solvency in a defined benefit plan

From now on, the degree of solvency in a defined benefit plan must be determined without taking any defined contribution benefits into account (section 141 of the *Supplemental Pension Plans Act*). This rule applies to actuarial valuation reports submitted to the Régie on or after 13 December 2006.

### Payment of defined contribution benefits in a defined benefit plan

In a plan that has both defined contribution benefits and defined pension benefits and whose assets are insufficient, from now on, **the defined contribution benefits must be considered independently of the defined pension benefits**. Since defined contribution benefits are no longer taken into consideration in determining such a plan's degree of solvency, the contributions credited to a member must not be reduced in order to take

the plan's degree of solvency into account upon **cessation of a person's membership, plan termination or withdrawal of an employer** from a multi-employer plan (see sections 142 and 218 of the *Supplemental Pension Plans Act*).

Defined contribution benefits are the following:

- additional voluntary contributions credited to the member, with interest;
- employer and member contributions paid under provisions which, in a defined benefit plan, are identical to those of a defined contribution plan, with interest (for example, contributions paid under the defined contribution component of a dual-component plan);
- sums credited to a member that come from a transfer, even a transfer not referred to in the *Supplemental Pension Plan Act*, with interest (for example, sums from a pension plan for government employees where such sums do not have to be converted into a pension as at the date of cessation of active membership).

Upon **termination** of a plan or the **withdrawal of an employer**, unpaid contributions must be included in the value of the plan's assets as well as in the value of the members' benefits. However, such contributions will not be paid out unless they have been recovered.

Furthermore, the value of members' benefits must be increased by the amount of any interest that they bear. Interest must be credited between the plan's termination date or the withdrawal of an employer and the date of payment of benefits, at the rate provided for in section 217 of the *Supplemental Pension Plans Act*. Prior to 13 December 2006, interest was paid separately from the related interest-bearing benefits.

Similar rules apply where there is a division of an insolvent pension plan which has both defined contribution benefits and defined pension benefits. The defined contribution benefits must be transferred in full. The sum transferred to the receiving plan may not be reduced to take into account a deficiency of assets.

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## Insured pension upon termination of a defined benefit plan

A pension already being paid when a defined benefit plan is terminated must be insured by an insurer. It may be that annuities with certain characteristics are not being marketed. Prior to 13 December 2006, the residual value of a member's pension had to be paid by means of a transfer with similar characteristics and equal in value. If an annuity of equal value cannot be purchased because of taxation limits, the difference between the pension provided for under the pension plan and the annuity guaranteed by an insurer must be refunded to the member.

For example, upon termination of a plan, the indexation of the pension already being paid is higher than the annuity indexation rate that an insurer can guarantee under the taxation rules. The pension committee must purchase an annuity with a fixed indexation rate and refund to the member the difference between the value of the pension provided for under the plan and the annuity purchased from an insurer. These values must be determined using the assumptions referred to in section 61 of the *Supplemental Pension Plans Act*.

## Regulatory powers of the Régie

The Régie's powers to make regulations (section 244 of the *Supplemental Pension Plans Act*) have been changed to include the following powers:

- determine which attestations, certificates and documents must accompany the annual information return;
- prescribe the fees payable in the event of delay or failure to perform certain formalities within the time allotted. Such fees may be required even if no annual fee is payable to the Régie. For example, the Régie can prescribe by regulation the fees payable in the event of a delay in filing an actuarial valuation report.

Between now and 1 July 2010, the Québec government may, by regulation, set transitional provisions to ensure the application of the *Supplemental Pension Plans Act* and the *Act respecting the funding of certain pension plans*. Those transitional provisions can be applied retroactively to 13 December 2006.

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