2500, 20 Queen Street West
Toronto, ON
Canada M5H 3S1
Tel. 416.595.8500
Fax. 416.595.8695
www.millerthomson.com

MILLER THOMSON LLP
Barristers & Solicitors, Patent & Trade-Mark Agents

TORONTO VANCOUVER CALGARY EDMONTON WATERLOO-WELLINGTON MARKHAM WHITEHORSE WASHINGTON, D.C.

Holiday Wish List

by Brent K. Duguid
December 2003

Adding a 10 per cent allocation to real estate allows the plan to increase their foreign content while maintaining their current level of volatility. This also does better if consensus views are correct and helps improve the downside (Pessimistic Case) while not forgoing the return potential in the Optimistic Case.

Every Basis Point

While these return enhancements do not seem like much improvement, in the search for return, every basis point helps to improve the probability of achieving the plan sponsor's requirements. For a $100 million dollar plan, the difference between earning 6.9 per cent versus 6.5 per cent over the next five years is equivalent to a $2.6 million difference in asset growth. Finding the best real estate manager to achieve value added above this return can improve this result further.

The space afforded only allowed for a simplified approach, but further analysis was conducted to show the plan sponsor the probabilities of achieving their goals and assessed their impact on dollar growth for each mix under each scenario. Incorporating liability projections and testing surplus maximization or deficit minimization can also be added to this analysis if clients want more input in the decision process.

Regardless of the analysis, real estate provides considerable merit for inclusion in any asset mix policy. It does not behave like other asset classes. ■

Heather Cooke is senior vice-president and director of manager research, Canada, for Northern Trust Global Advisors. (heather_cooke@ntrs.com)

Holiday Wish List

By: Brent K. Duguid

For many pension industry stakeholders, the annual extension of the surplus sharing regulation has become somewhat of a holiday tradition. Unfortunately, this tradition is held in the same reverence as the gift of a fruitcake.

Will the new Liberal government at Queens Park bring an end to this holiday tradition?

While I am optimistic that some changes to pension legislation will eventually occur, I do not foresee Finance Minister Greg Sorbera – similar to George Bailey (Jimmy Stewart) running down the streets of Bedford Falls in *It's A Wonderful Life* – racing down Bay Street and announcing the introduction of new pension surplus legislation this year or possibly even the subsequent year.

In light of the effective labour opposition to Bill 198, one should expect an extensive consultation process prior to the implementation of any significant pension reform. The Ontario government will probably not be in a position to introduce new surplus legislation until the Monsanto decision is rendered by the Supreme Court of Canada. However, the consultation process should commence immediately and be broad enough to include other issues outside the realm of Bill 198.

The difficulty lies in prodding a government that has witnessed first hand the potential downside and political heartache that reforms to pension surplus legislation can potentially bring with an effective and organized union lobbying protest (misinformed or otherwise). The government may, therefore, opt to establish a taskforce or expert committee (including representation of organized labour) in the new year in order to move the pension reform process along. By gaining a fuller and complete understanding of the numerous challenges facing plan sponsors, the government may be in a better position to negotiate with various stakeholders in order to bring about the necessary reforms without the ghost of Christmas Past (Conrad Black) coming back to haunt us.

Perhaps the government can obtain some pension reform concessions from organized labour in return for proceeding with a number of labour-friendly initiatives which the government intends to implement over the next year. For example, the Ontario government intends to increase the minimum wage from the current $6.85 per hour to $8 over a four-year period. The new government also intends to repeal the *Employment Standards Act* provisions allowing an employer, with the employee's consent, to work 60-hour work weeks. In addition, the government is also expected to:

- provide the Labour Relations Board with the power to automatically certify unions without a vote if the board determines that workers have been intimidated
- extend 'successor rights' to OPSEU resulting in bargaining rights continuing when the government privatizes a government business;
- introducing a Family Medical Leave Act that would permit employees to take up to six weeks of unpaid 'job protected' leave in order to care for family members

Perhaps in the spirit of giving, the Dalton McGuinty government will also be prepared to leave some presents under the tree for employers. Here is my wish list:

Surplus Legislation

The courts have repeatedly requested that the government clarify the issue of surplus distribution on wind-ups of DB plans. Despite broad consultation on Bill 198 with pension industry stakeholders, the previous Conservative government was forced to retreat due to labour protest prior to the

pending election. Reform of the existing deficient surplus distribution regime is necessary for the long-term health of private pension plans in Canada. Some tweaking of the legislation introduced in Bill 198 will obviously be necessary in light of the Liberal's past opposition to Bill 198 and, in particular, the retroactivity of certain proposed changes. However, one may doubt whether a common ground between employers and unions is achievable.

Review of the PBGF

Ontario remains the only jurisdiction in Canada that provides such a guaranty fund. In light of the impact of the Algoma, questions have been raised concerning its solvency and effectiveness. The PBGF is not capable of taking further significant financial hits without the government being forced to possibly ante-up from their general revenues. The government has sent a strong message to hospital, municipalities, school boards, and public sector unions to temper their funding requests by recognizing the debilitating budget deficit. Perhaps its time for the government to get out of the guarantor business and allocate precious financial resources to other more pressing needs while, at the same time, eliminating another form of tax on Ontario employers.

Grow-ins

Similar to the PBGF, Ontario and Nova Scotia are the only jurisdictions in Canada that provide enhanced pension benefits to members on the wind-up or partial wind-up of a pension plan. Grow-in rights create a considerable financial burden on pension plans. In 1995, the government exempted itself from grow-ins on the grounds of costs. Perhaps its time for the government to consider the impact on private sector employers and look to the *Employment Standards Act* rather than pension legislation to provide protection to older, long service employees.

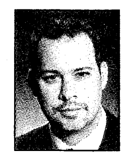
Location, Location, Location

FSCO has taken the position that pension benefits in multi-jurisdictional DB plans must be pro-rated based on the number of years of service in each jurisdiction rather than on the final location of the plan member at the time of termination or retirement. This 'checker boarding' approach creates an administrative nightmare for employers who sponsor pension plans in more than one jurisdiction in Canada and adds a further level of significant complexity to pension regulation. It is desirable for the Ontario government to bring legislative clarity to this issue and, preferably, implement a final location approach with respect to the entitlement of all rights and benefits under pension legislation.

Divestments

FSCO is of the view that the PBA mandates that plan members whose pension benefits are being transferred to another DB plan in the context of a sale or merger must be afforded the exact identical benefits provided in the exporting plan. The legislation must be clarified to provide a more flexible approach with respect to transferring pension liabilities as opposed to the current 'exact replication' requirement which is often costly or not feasible.

The new Ontario government is proposing a number of substantial gifts for employees over the next year. Let's hope there are presents under the tree for employers and plan sponsors as well in order to facilitate the growth, rather than the demise, of private pension plans in Canada. ■



Brent K. Duguid is with Miller Thomson LLP. (bduguid@millerthomson.ca)

The Tax Man And The Holiday

By: Ian Edelist

Like most people, you need to save for your retirement. To find out how much you should save, you arrange a meeting with your trusted financial advisor who tells you that you need to invest $7,000 each year until retirement in order to live comfortably in your senior years.

So, you start contributing $7,000 to