Recent Developments in Pension and Employee Benefits Law

Wednesday, May 16, 2012
# Seminar Index

**Recent Developments in Pension and Employee Benefits Law**  
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**Tab**

1. **Welcome Letter**
2. **Agenda**
3. **Regulatory Round-Up and Recent Case Law Updates**  
   Caroline Helbronner and Lindsay McLeod
4. **Pension Plan Issues in Corporate Transactions**  
   Jeffrey Sommers
5. **A Problem for Our Times: Reducing Benefits: Pension and Non-Pension**  
   Kathryn Bush
6. **Investments Under Defined Contribution Pension Plans: Selected Recent Topics**  
   Jeremy Forgie
7. **Jointly Sponsored Pension Plans and Joint Governance Issues**  
   Elizabeth Boyd
SEMINAR AGENDA

8:30 - 9:00 A.M.  BREAKFAST

9:00 - 9:05 A.M.  INTRODUCTION

9:05 - 9:50 A.M.  REGULATORY ROUND-UP AND RECENT CASE LAW UPDATES
                  CAROLINE HELBRONNER AND LINDSAY MCLEOD

9:50 - 10:15 A.M.  PENSION PLAN ISSUES IN CORPORATE TRANSACTIONS
                    JEFFREY SOMMERS

10:15 - 10:35 A.M.  A PROBLEM FOR OUR TIMES: REDUCING BENEFITS:
                    PENSION AND NON-PENSION
                    KATHRYN BUSH

10:35 - 10:45 A.M.  Q&A

10:45 - 11:00 A.M.  COFFEE BREAK

11:00 - 11:25 A.M.  INVESTMENTS UNDER DEFINED CONTRIBUTION PENSION PLANS: SELECTED RECENT TOPICS
                    JEREMY FORGIE

11:25 - 11:50 A.M.  JOINTLY SPONSORED PENSION PLANS AND JOINT GOVERNANCE ISSUES
                    ELIZABETH BOYD

11:50 - 12:00 P.M.  Q & A AND CLOSING REMARKS

12:00 - 1:00 P.M.  LUNCHEON
Regulatory Round-Up and Recent Case Law Updates

Presented by:
Caroline Helbronner and
Lindsay McLeod

May 16, 2012

Agenda

• Regulatory Round-Up
  – legislation/regulations
  – policies
  – focus on Ontario, with limited commentary on other jurisdictions
• Case Law
  – pension benefits and wrongful dismissal
  – retiree benefits
  – bankruptcy and insolvency
  – administrative issues
  – partial wind-ups
  – failure to pay contributions
  – operation of “successor employer” provisions in PBA

Regulatory Round-Up

• Ontario
  – Budget: Continued Pension Reform
    • changes to PBA to take effect July 1, 2012
      – immediate vesting
      – elimination of future partial wind-ups
      – grow-in benefits for all members terminated from employment other than for cause
      – increased small benefit limit
      – use of electronic means to provide notices, statements and other records
Regulatory Round-Up (cont’d)

- Ontario (cont’d)
  - Budget: Continued Pension Reform (cont’d)
    • pooling of pension fund assets
    • financial hardship unlocking
    • solvency funding relief
      - extension of 2009 solvency relief regulations
    • letters of credit
    • special payments

Regulatory Round-Up (cont’d)

- Ontario (cont’d)
  - Budget: Continued Pension Reform (cont’d)
    • draft regulations
    • more regulations to be released this fall
      - funding concerns test
      - conditions for taking contribution holidays
      - accelerated funding of benefit enhancements
    • Bill 55
      - debated during second reading as of May 15, 2012

Regulatory Round-Up (cont’d)

- Ontario (cont’d)
  - Draft Regulations released April 30, 2012
    • immediate vesting
    • retired members
    • individual pension plans
    • qualifying plans
    • small benefits
Regulatory Round-Up (cont'd)

• Ontario (cont’d)
  – Draft Regulations released April 30, 2012 (cont’d)
    • surplus withdrawal requirements
    • plan amendments
    • crediting interest
    • termination statements

Regulatory Round-Up (cont’d)

• Ontario (cont’d)
  – Draft Regulations: Grow-In Benefits
    • discussion paper
    • draft regulations
  – Draft Regulations: Disclosure Requirements
    • ability to provide documents by mail or electronically for a prescribed fee
    • investment information summary filing requirement

Regulatory Round-Up (cont’d)

• Ontario (cont’d)
  – Changes to Pension Benefits Guarantee Fund
    • higher assessments
    • less coverage
  – Mandatory electronic filing
    • as of January 1, 2013
Regulatory Round-Up (cont’d)

• Ontario (cont’d)
  – FSCO Policy: Natural Termination of a Pension Plan
    • expedited wind-up process for pension plans with:
      – no members, former members or other plan beneficiaries
      – all benefits settled and related assets distributed from the pension plan
      – no assets or liabilities remaining in the plan

Regulatory Round-Up (cont’d)

• Ontario (cont’d)
  – FSCO Q&A: Overpayments and Plan Wind-Up
    • contributions to fund a deficit on wind-up
    • surplus arises
    • application deadlines

Regulatory Round-Up (cont’d)

• Ontario (cont’d)
  – FSCO Policy: Eligibility for Membership
    • non-contributory plans
      – employees must be enrolled on the day they become eligible for the pension plan
    • contributory plans
      – enrolment may coincide with pay periods for administrative ease
Regulatory Round-Up (cont’d)

• Federal
  – Draft Policy Advisory
    • buy-in annuity products

Regulatory Round-Up (cont’d)

• Pooled Registered Pension Plans
  – Federal
    • Pooled Registered Pension Plans Act
      – administrators licensed under the Act
      – automatic enrolment for employees
      – limited by RRSP contribution limit
    • draft amendments to Income Tax Act and Income Tax Regulations

Regulatory Round-Up (cont’d)

• Pooled Registered Pension Plans
  – Ontario Budget
    • concerned about:
      – coverage
      – protection of members under the fiduciary framework
      – achieving low-cost objective
      – provincial licensing and regulatory costs
    • enhanced CPP
Regulatory Round-Up (cont’d)

• Voluntary Retirement Savings Plan
  – Quebec Budget
    • similar to PRPPs
    • to be effective January 1, 2013
    • many employers will be required to offer a VRSP
    • default contribution rate

Regulatory Round-Up (cont’d)

• British Columbia and Alberta
  – British Columbia: new PBSA
    • Bill 38 was introduced on April 30, 2012, and received second reading on May 2, 2012
    • incorporates recommendations made by the Alberta/B.C. Joint Expert Panel on Pension Standards
    • new rules-based approach
  – Alberta: legislation similar to Bill 38 is expected later this year

Regulatory Round-Up (cont’d)

• Nova Scotia
  – New PBA
    • received Royal Assent December 15, 2011
    • not yet been proclaimed into force
    • No regulations have been published yet
Recent Case Law Updates

• Pension Benefits and Wrongful Dismissal
  – *Waterman v. IBM Canada Limited*
    • issue: whether pension benefits can be deducted from an award of damages for wrongful dismissal
    • BCCA found pension benefits received during reasonable notice period were not deductible from wrongful dismissal award
    • SCC granted leave to appeal on April 5, 2012

Recent Case Law Updates (cont’d)

• Retiree Benefits
  – *Dell’Aniello v. Vivendi Canada Inc.*, (Quebec)
    • class action certified
  – *Bennett v. British Columbia* (B.C.)
    • BCCA upheld lower court’s decision to dismiss a class action against the Crown regarding changes to health-care premiums and coverage

Recent Case Law Updates (cont’d)

• Retiree Benefits
  – *Lacey v. Weyerhaeuser Co.* (B.C.)
    • successor employer bound by former employer’s contractual promise to fund post-retirement health benefits
    • employer filed leave to appeal with the BCCA on April 2, 2012
Recent Case Law Updates (cont’d)

• Beneficiary Designation
  – Orpin v. Littlechild
    • conflict between will and beneficiary designation
    • will revoked the beneficiary designation in the RRSP

Recent Case Law Updates (cont’d)

• Bankruptcy and Insolvency
  – Sun Indalex Finance, LLC, et. al. v. United Steelworkers, et. al.
    • SCC to hear appeal on June 5, 2012
  – Re Timminco Ltd. (Ontario)
    • applied Indalex
    • super priority granted

Recent Case Law Updates (cont’d)

• Bankruptcy and Insolvency
  – White Birch Paper Holding Company (Quebec)
    • Indalex does not apply in Quebec
Recent Case Law Updates (cont’d)

• Partial Wind-Ups
  – *Lacroix v. Canada Mortgage and Housing Corporation*
    • court does not have jurisdiction to terminate a pension plan at the request of employees

Recent Case Law Updates (cont’d)

• Failure to Pay Contributions
  – *Industrial Alliance Insurance and Financial Services*
    • 6 counts of failing to notify the Superintendent of failure of the employer to remit contributions
    • pleaded guilty to 1 count and was fined $60,000 plus a 25% victim surcharge

Recent Case Law Updates (cont’d)

• Operation of Successor Employer Rules
  – *Ratansi et al. v. Superintendent of Financial Services and Ontario Pension Board (FST)*
    • section 80(3)
      – in “sale of business” scenarios, employment is deemed to continue for purposes of the PBA
    • issue:
      – in view of section 80 of the PBA, can the Applicants who are eligible for an early unreduced pension start receiving pensions from the original plan?
Regulatory Round-Up and Recent Case Law Updates

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INTRODUCTION

The first part of this paper outlines significant amendments and proposals relating to federal and provincial legislation affecting registered pension plans and other employee benefit arrangements since our last Regulatory Round-Up in November, 2011. The second part of this paper provides an overview of recent court and tribunal decisions pertaining to pension and employee benefits since our last case law update.

1. REGULATORY ROUND UP

   (a) Ontario

   (i) 2012 Budget Announcement

On March 27, 2012, the Ontario government released its 2012 budget, entitled “Strong Action for Ontario” (the “Budget”). Included in the Budget are a wide array of proposals relating to pension matters.

Highlights of the Budget include a number of proposals aimed at reducing the costs of public sector pension plans, a suggestion that the federal government’s pooled registered pension plan (PRPP) model should be tied to Canada Pension Plan (“CPP”) enhancement, new proposals to affect private sector pension plans, and a status update respecting previously announced pension reform.

PUBLIC SECTOR PENSION PLANS

In the Budget, the Ontario government makes a number of specific proposals relating to public sector pension plans which generally relate to reducing costs. These proposals can be separated into three categories: those relating to public sector jointly sponsored pension plans (“JSPPs”), those relating to public sector single-employer pension plans (“SEPPs”), and those relating to the pooling of pension fund assets for investment purposes.
Public Sector Jointly Sponsored Pension Plans

The Budget states that the Ontario government plans to move to a 50-50 funding model between employers and employees for all JSPPs. Consultations will be conducted for the purpose of creating a legislative framework that operates within the following preset parameters when there is a plan deficit:

- reduction of future benefits or ancillary benefits would be mandatory prior to an increase in employer contributions;
- accrued benefits would not be impacted by benefit reductions (current retirees would not be affected);
- an increase in employee contributions would be an option where employer contributions are greater than employee contributions;
- limits on reductions before contribution increases are considered will be available in “exceptional circumstances”; and
- a third-party dispute resolution process will be invoked where sponsors cannot agree on benefit reductions.

A final parameter is that the framework is to be reviewed after Ontario’s budget is balanced. The Ontario government will be contacting six public sector jointly sponsored pension plans directly but also welcomes comments from other interested parties. These consultations will be discussed in more detail in another presentation at the seminar.

Public Sector Single-Employer Pension Plans

The Ontario government states that many employees in the broader public sector, in particular those in the electricity and university sectors, are members of SEPPs. The Budget asserts that under these plans, employers are responsible for funding deficits
and also typically contribute more than employees. Consequently, the Ontario government sets forth the expectation that within five years these plans will move to a 50-50 cost sharing formula for ongoing contributions. Nevertheless, employers will remain responsible for funding shortfalls.

In order to encourage implementation of the 50-50 cost sharing formula, the Ontario government proposes to adjust temporary solvency relief measures in the five-year transition period and will also support plan conversions from SEPPs to JSPPs with 50-50 cost sharing. In this respect, the Ontario government proposes to remove what the Budget refers to as “a barrier” to the creation of an electricity sector JSPP following consultations with stakeholders.

**Pooling of Pension Fund Assets**

The Budget states that the Ontario government intends to introduce a legislative framework in the fall which would facilitate the pooling of the fund assets of smaller public sector plans. Such pooling could be accomplished either by building on larger public sector pension plans or by way of a new investment management entity. The Budget provides that the Ontario government will appoint an adviser to lead the implementation process. The Budget emphasizes that studies have shown that there have been benefits in the form of cost savings and enhanced rates of return resulting from pooled pension fund investments.

**CONTINUING PENSION REFORM**

In the Budget, the Ontario government outlines a general implementation schedule for certain changes to the *Pension Benefits Act (Ontario)* (the “PBA”) which were passed in 2010 but are not currently in effect. Specifically, the Budget announced the government’s intention to proclaim certain measures, which are described below, to take effect July 1, 2012.
Further, the Budget announced the Ontario government’s intention to post some of the long awaited regulations under the PBA that will clarify the rules relating to pension surplus, implement many of the asset transfer provisions that will apply on a corporate restructuring; and implement the provisions affecting “retired members”. These regulations were posted in draft on April 30, 2012 and are discussed below.

Additionally, later in 2012, the Ontario government intends to post draft regulations that will:

- provide a “funding concerns” test for plans not required to fund on a solvency basis;
- address the eligibility conditions for sponsors taking “contribution holidays”; and
- provide for accelerated funding of benefit enhancements.

We expect that there will be at least a 45 day consultation period with respect to the proposed regulations.

**Financial Hardship Unlocking**

The Budget also announces the Ontario government’s intention to restructure the current regime for accessing locked-in accounts due to financial hardship and create a simpler, more streamlined process. Consistent with the federal regime, individuals will be able to request withdrawals directly from their financial institutions and consent of the regulator will no longer be necessary. Regulations implementing this change will be posted for public consultation.

**Solvency Funding Relief**

a) Extension of the 2009 Solvency Relief Regulations

In the Budget, the Ontario government proposes to extend the temporary solvency relief measures for sponsors of private-sector defined benefit pension plans (the term used in
the Budget), which were introduced in 2009. Consistent with the 2009 measures, plan administrators who file an actuarial valuation report dated September 30, 2011 or later will be able to:

- consolidate existing solvency payment schedules into a new five-year payment schedule; and

- extend the solvency payment schedule to a maximum of 10 years for a new solvency deficiency determined in the report, subject to the consent of plan beneficiaries.

b) Letters of Credit

Regulations are expected this Spring which will permit employers to use irrevocable letters of credit from financial institutions to cover up to 15% of solvency liabilities.

c) Special Payments

Additional flexibility with respect to permitting solvency and going concern special payments to be amortized beginning one year after a plan valuation date will also be introduced.

**REACTION TO THE FEDERAL PRPP MODEL**

In the Budget, the Ontario government explicitly expresses a number of concerns with the proposed federal model for PRPPs. These concerns include that PRPPs may replace one form of retirement arrangement with another instead of expanding retirement income savings and coverage; that members may not be adequately protected by the PRPP fiduciary framework; that the low-cost objective may not be achieved; that there may not be sufficient flexibility for life events; and that provincial licensing and regulation costs must be kept reasonable as such costs will be passed on to members. However, the Budget expresses the Ontario government’s willingness to continue to work collaboratively to develop the PRPP model.
In the Budget, the Ontario government also expresses its continued support for a modest, phased-in and fully funded enhancement of the CPP, and states that pension innovation should be tied to CPP enhancement as part of a comprehensive approach.

(ii) **Ontario Legislation**

(A) **Proclamations**

In the Budget, the Ontario announced that the following measures will be proclaimed to take effect July 1, 2012:

- elimination of future partial wind-ups;
- immediate vesting of pension benefits;
- the ability for multi-employer pension plans and JSPPs to elect not to provide grow-in benefits; and
- provision of grow-in benefits to all eligible members terminated from employment, other than for cause.

On May 9, 2012, the Ontario government announced that, if approved by Cabinet, the following changes to the PBA would also be proclaimed to take effect July 1, 2012:

- Section 30.1 of the PBA – which will allow plan administrators and the Superintendent to provide certain records electronically.
- Section 50 of the PBA – which will increase the limit for small pension payouts. The new limit will be:
  - (a) if the annual benefit payable at normal retirement is not more than 4% of the Year’s Maximum Pensionable Earnings (“YMPE”) in the year that he or she terminates; or
(b) if the commuted value of the benefit is less than 20% of the YMPE in the year of termination.

(B) **Bill 55 – An Act to implement Budget measures and to enact and amend various Acts**

Bill 55 - *An Act to implement Budget measures and to enact and amend various Acts* ("Bill 55") received first reading on March 27, 2012. Bill 55 includes technical amendments to the PBA. Many of the changes simply “clean up” the language or implement the measures described above in the Budget announcement. Of particular note though, is the addition of subsection 44(7.1) to the PBA (on a date to be proclaimed) which addresses the small benefit commutation of survivor benefits for pensions that are in pay at the time subsection 44(7) comes into force. On a date to be proclaimed, subsection 44(7) of the PBA will state that a pension plan may provide for payment of the commuted value of the survivor benefit if, at the date of death of the retired member, the survivor benefit satisfies the small benefit threshold. New subsection 44(7.1) will provide that subsection 44(7) will not apply (i.e., a plan cannot require the small benefit to be transferred out of the plan) if the pension is in pay at the time subsection 44(7) comes into force, unless the person entitled to the survivor benefit consents in writing to the payment of the commuted value.

(C) **Draft Pension Regulations**

On April 30, 2012, the Ontario government released the first set of amendments to Regulation 909 under the PBA (the “Ontario Regulation”) that are needed to implement many of the changes to the PBA which were announced in 2010. The Ministry of Finance is accepting comments on the draft regulations until June 1, 2012. Many of the changes to the Ontario Regulation are housekeeping in nature, however, the following changes are of particular note:
**Immediate Vesting**

Immediate vesting will be introduced as of July 1, 2012 and the Ontario Regulation will be amended to reflect this change and remove any references to amounts that have not vested.

**Retired Members**

The Ontario Regulation will be amended to facilitate the proclamation of the provisions in the PBA relating to “retired members”. Essentially all references in the Ontario Regulation will be clarified to refer to “members, former members and retired members” (except where these groups are dealt with differently).

**Small Benefits**

Section 19 of the Ontario Regulation requires the initial amount that is transferred from a plan when a member elects portability on termination of plan membership to be reduced if the plan is underfunded, with the balance paid within 5 years. Section 19 will be amended to exempt transfers that pertain to small benefits from the requirement to reduce the initial transfer amount.

Further, new subsection 41(1.1) of the Ontario Regulation outlines the contents of a termination statement that will be given to a member who is to be paid out under the small benefit commutation rule. These individuals will be able to receive a less detailed termination statement than other members on termination.

**Termination Statements**

A termination statement that a member receives upon ceasing to be a member of a plan will now need to include the individual's date of hire with the employer.
**Surplus Withdrawal**

*Surplus withdrawal from an on-going plan:* The contents of a surplus withdrawal notice provided under section 78(2) of the PBA will no longer require the employer to provide information on the surplus attributable to employee and employer contributions. In addition, for the purpose of determining surplus in a continuing plan, the calculation of liabilities on surplus withdrawal from an ongoing plan will now be based on solvency liabilities and all other benefit liabilities (except with respect to qualifying annuity contracts).

*Surplus withdrawal on wind-up:* The amended Ontario Regulation will modify the process used by employers to recover surplus that arises as a result of making wind-up amortization payments that are larger than what is required to satisfy the wind-up deficiency. Currently, an employer must make a surplus withdrawal application under section 79 of the PBA in order to receive the surplus. The Ontario Regulation will now treat such surplus as an over contribution by the employer which can be withdrawn by the employer by way of an application under section 62.1 of the PBA. An application under section 62.1 still requires the Superintendent’s consent but is much less onerous than a typical surplus withdrawal application under section 79 of the PBA. In addition, a (regular) surplus withdrawal application by an employer on plan wind-up will no longer require information in respect of surplus attributable to employee and employer contributions.

**Qualifying Plans**

The amendments to the Ontario Regulation repeal the special rules which exempt certain large pension plans (with more than $500 million of assets at market value) from solvency funding payments. Large plans which made the election under Section 5.1 of the Regulation before June 28, 2002 are subject to higher Pension Benefits Guarantee Fund (“PBGF”) assessments and accelerated funding in the event of a plan wind-up.
**Individual Pension Plans (“IPPs”)**

The Ontario Regulation will be amended to add a definition of “individual pension plan” and to make amendments that clarify that an individual pension plan is treated in a similar manner to designated plans. IPPs will be exempt from funding requirements that are inconsistent with the requirements of the Income Tax Act and will also be exempt from filing PBGF assessments.

**Plan Amendments**

The Ontario Regulation will now provide an exemption from the requirement to file an actuarial report when an amendment reduces or increases contributions or improves benefits in situations where the amendment to confer a benefit improvement is required by law.

Similarly, the Ontario Regulation will now provide relief from the accelerated funding requirement that would otherwise apply to a pension plan (that is not a jointly sponsored pension plan) where the plan makes an amendment increasing or improving benefits while taking advantage of the solvency relief provided in Sections 5.6(3)(2) and 5.6(3)(3) of the Ontario Regulation. The new exception will provide that the accelerated funding requirements will not apply with respect to an amendment made to confer a benefit improvement where the amendment is required by law.

**Crediting Interest**

The Ontario Regulation will be amended to clearly distinguish between the crediting of interest for defined contribution plans and defined benefit plans. The Ontario Regulation will also be modified to clarify when average interest rates may be used and the crediting of interest with respect to lump sums, commuted value transfers, payments into a plan and on plan termination. The prescribed rate of interest to be used did not change.
(D) Draft Pension Regulations - Grow-in Benefits and Related Amendments

Grow-In Benefits

On April 30, 2012, the Ontario government released a discussion paper entitled Grow-in Benefits and Related Amendments. The associated draft regulations were posted on May 3, 2012. The discussion paper describes the amendments which are proposed to come into effect July 1, 2012 and which will require pension plans to provide grow-in benefits for members whose age and service total at least 55 and whose employment is ended by their employer irrespective of whether there is a plan wind-up. There will be an opt-out mechanism for employers and members of jointly sponsored and multi-employer pension plans. The election mechanism will be discussed in more detail in another presentation at the seminar. Further, grow-in benefits will extend to any eligible member whose plan is fully wound up or whose employment is terminated by an employer other than as a result of “wilful misconduct, disobedience or wilful neglect of duty by the member that is not trivial and has not been condoned by the employer of such other circumstances as may be prescribed”.

The discussion paper suggests that the regulations will prescribe that grow-in will be required where an employer has given notice of termination of employment and the employee decides to end their employment within 60 days before the date of termination. In this context, it is said that the member should not lose their entitlement to grow-in benefits by leaving a job shortly before termination to pursue other employment. There are also a number of exclusions from the requirement to provide grow-in: (a) where a member is an employee who is hired on the basis that the employment would end on a definite term or contract or on completion of a specific task; (b) for construction employees as defined in the Employment Standards Act; and (c) for employees who are on temporary lay-off as defined in subsection 56(2) of the Employment Standards Act.
The discussion paper also flags that the PBA will allow the Superintendent to order a wind-up where all or substantially all of the members cease to be employed by an employer. It also notes, for greater clarity, that the Superintendent will be allowed to order a wind-up where there are only inactive members.

**Disclosure Requirements**

On May 9, 2012, the Ontario government posted additional changes to the Regulation regarding the disclosure requirements under sections 29 and 30 of the PBA. Sections 29 and 30 of the PBA require plan administrators and the Superintendent to make certain records about the pension plan available to members, former members, spouses and certain other specific parties. Section 45 of the Regulation outlines the documents that must be made available to those individuals upon request and it is proposed that the Regulation will be amended to expressly include actuarial information summaries, other information summaries and copies of any statements of investment policies and procedures in the list of documents that administrators must make available. In accordance with the proclamation described above, as of July 1, 2012 an administrator will be required to provide certain records by mail or electronically if the administrator receives the prescribed fee. The records for this purpose are the current provisions of the plan (including any amendments), the statement of investment policies and procedures and the most recent reports and regulatory filings (e.g. actuarial report, financial statements, annual information return, investment information summary etc.). Since the statement of investment policies and procedures does not currently need to be filed with FSCO, the Superintendent is not required to provide individuals with this document. The administrator and the Superintendent will be permitted to use electronic means to provide this information when the recipient has consented. The maximum fee that an administrator may charge is 25 cents per page for each paper copy and $10 for each request for one or more records to be provided electronically. In addition, the Regulation will also be amended to expressly require an administrator of a defined benefit pension plan to file an investment information summary in the prescribed form.
within six months after the fiscal year end of the plan. Individual pension plans and designated plans are exempt from this requirement.

Comments on the discussion paper and draft regulations are due by June 1, 2012.

(E) Proposed Amendment to Regulation 909 under the Pension Benefits Act Filing Extension for Certain Pension Plans in the Public Sector and Broader Public Sector

On April 26, 2011 the Ministry of Finance posted a proposed amendment to the Ontario Regulation for comment. Further to the announcement in the Ontario Budget, the proposed amendment is to consider providing additional temporary solvency funding relief to certain single employer, defined benefit or hybrid pension plans in the public sector and the broader public sector, including Ontario university pension plans. Details of the proposed relief have not yet been released.

Generally, the proposed amendment will provide a filing extension for a public sector pension plan that (a) falls within the definition below; (b) is not a jointly sponsored pension plan; (c) is not a multi-employer pension plan; (d) provides defined benefits; (d) has at least 25% of total membership that are active members; (e) is required to file a valuation report on or after June 30, 2012 and before February 28, 2013. The proposed amendments to the Ontario Regulation would extend the filing dates to February 28, 2013 and extend the time for the commencement of special payment schedules established in the report to March 1, 2013.

For purposes of the proposed amendments to the Ontario Regulation, a "public sector pension plan" means a pension plan provided in respect of,

(a) the Crown in right of Ontario, a Crown agency, a corporation, with or without share capital, that is not a Crown agency but is owned, operated or controlled by the Crown, and any other board, commission, authority or unincorporated body of the Crown,
(b) a district school board as defined in subsection 1 (1) of the Education Act,

(c) a person or entity that is a health service provider for the purposes of the Local Health System Integration Act, 2006,

(d) a college of applied arts and technology established under the Ontario Colleges of Applied Arts and Technology Act, 2002,

(e) a university in Ontario, including its affiliated and federated colleges, that receives operating grants from the Government of Ontario,

(f) a municipality as defined in section 1 of the Municipal Act, 2001, and

(g) a children’s aid society that is designated in accordance with the Child and Family Services Act.

The Ministry of Finance is accepting comments until June 11, 2012.

(F) Family Law Matters (Regulation 467/11)

On December 14, 2011, Regulation 467/11 was filed amending the Family Law Matters regulation\(^1\), effective January 1, 2012. The amendment is a temporary measure that adopts definitions of “retired member” and “former member” which are the same as those which have not yet been proclaimed under section 1.1 of the PBA. Once the new definitions in the PBA come into force, these definitions will automatically be revoked.

The Financial Services Commission of Ontario (“FSCO”) has issued a number of Q&As regarding the Family Law Matters regulation and the new family law forms. Highlights of these items are discussed below.

- The definition of a former member should not be interpreted in a way to exclude terminated members who have elected to transfer the commuted value of their pensions out of the plan but due to the transfer ratio of the plan being less than
1.0 continue to have a portion of their pension entitlement in the plan. Such members should be treated as deferred members with respect to the portion of their entitlement still in the plan.

- Plan administrators cannot develop and use their own application forms with respect to the family law regime. Plan administrators must use the FSCO forms after January 1, 2012. These family law forms are not filed with FSCO.

- A plan administrator may charge a fee for calculating a member’s family law value. The fee must not be more than $200 for a defined contribution pension plan, $600 for a defined benefit pension plan, or $800 for a pension plan that provides a combination of defined benefits and defined contribution benefits. The administrator is not required to calculate the family law value until the required fee is paid.

(G) Changes to the Pension Benefits Guarantee Fund (Regulation 466/11)

Regulation 466/11 was filed on December 16, 2011 amending the rules pertaining to the PBGF, effective January 1, 2012. Most significantly, these amendments modify the formula for annual assessments and the eligibility requirements under the PBGF.

The annual assessments for PBGF covered plans after January 1, 2012 will increase due to:

- a higher base fee per beneficiary (increased from $1.00 to $5.00);
- raising the maximum fee per beneficiary in unfunded plans from $100.00 to $300.00;
- eliminating the $4 million assessment cap for unfunded plans;

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1 O. Reg. 287/11.
• introducing a minimum assessment of $250.00 for every PBGF covered plan; and

• eliminating the exemption for pension plans that are assessed $25.00 or less.

For plans that wind up on or after December 8, 2010,

• plans established for less than five years will not be covered by the PBGF;

• all benefit improvements made less than five years before the date of plan wind up are excluded from a beneficiary’s entitlement under the PBGF (rather than the current three year exclusion).

Plans which have a year end between April 1, 2011 and December 31, 2011 may receive a PBGF assessment certificate based on the old rules. This amount should be paid prior the PBGF assessment date (nine months after the plan’s year end). FSCO will advise these plans of the additional amount that must be paid on or before September 30, 2012 as a result of the new formula. No late penalty will apply if the plan pays the initial assessment amount prior to its PBGF assessment date and the additional assessment by the end of September 2012. For plans with a December 31, 2011 year end (or later), the plan will receive a PBGF assessment certificate form based on the new assessment requirements.

Regulation 466/11 also clarifies asset allocation rules for multi-jurisdictional pension plans upon wind up. These changes apply to defined benefit pension plans registered outside of Ontario which are not exempt from PBGF coverage.

(H) Amendments to the Solvency Funding Relief for Broader Public Sector Pension Plans Regulation (Regulation 12/12)

Regulation 12/12 amends the Solvency Funding Relief for Broader Public Sector Pension Plans Regulation ("Solvency Relief Regulation"), effective February 16, 2012.
The Solvency Relief Regulation is amended by adding the following seven pension plans to the schedule of eligible plans:

- The Contributory Pension Plan for Employees of Trent University Represented by OPSEU Local 365 and Exempt Administrative Staff of Trent University;
- University of Toronto Pension Plan;
- Victoria University General Pension Plan;
- Revised Pension Plan of Queen’s University;
- University of Toronto (OISE) Pension Plan;
- Contributory Pension Plan of the Ontario Northland Transportation Commission; and
- Contributory Pension Plan for Salaried Employees of McMaster University Including McMaster Divinity College 2000.

(iii) **Ontario Policy Updates**

(A) **Mandatory Electronic Filing**

Starting January 1, 2013, electronic filing will become the only acceptable method for submitting prescribed filings to FSCO that are due on or after January 1, 2013. These filings include the Annual Information Return, Investment Information Summary, PBGF Assessment Certificate, Actuarial Valuation Report/Actuarial Information Summary, and Pension Plan/Fund Financial Statements. Plan administrators will need to sign up for FSCO’s Pension Services Portal if they have not done so already.
(B) Pension Fund Administration – Responsibilities of Fund Holders (FSCO Policy A100-100)

Policy A100-100, effective January 1, 2012, outlines the roles and responsibilities for the key players in fund holder arrangements. These key players are plan administrators, pension fund trustees / fund holders, and custodians.

The plan administrator is the individual, group, body or entity responsible for the administration of the pension plan and its pension fund. The responsibilities of the plan administrator include, among other things, selecting and monitoring third party service providers and investing the plan assets. Although the plan administrator may delegate its investment functions to a third party, the plan administrator retains ultimate responsibility for ensuring the pension fund assets are invested in accordance with the prescribed investment rules and the plan’s statement of investment policies and procedures.

The pension fund trustee or fund holder is the financial institution or party retained by the plan administrator to hold the assets of the pension fund. The plan administrator establishes the fund holder structure and delegates roles and responsibilities to the fund holder which may be a classic trustee or a directed custodian. When the fund holder is a trust company, the plan administrator, or appointed investment manager, provides investment direction. When the fund holder is an insurance company, the contract with the insurance company constitutes the investment of pension fund assets. A plan administrator may retain multiple fund holders for one plan and fund holders may further delegate their duties to a custodian, subject to the terms of the arrangement. A custodian is a financial institution that holds some or all of the pension fund’s assets. Although the custodian is not a fund holder, a fund holder may be a custodian.

The fund holder is an agent of the plan administrator and subject to the standards that apply to the plan administrator, such as the fiduciary responsibilities under the PBA, trust law (if applicable) and common law. Stakeholders are encouraged to review
Guideline No. 5 on Fund Holder Arrangements issued by the Canadian Association of Pension Supervisory Authorities (CAPSA) for further information.

(C) **Shortened Life Expectancy (FSCO Policy L100-051)**

FSCO Policy L100-051 is effective December 1, 2011 and replaces Policy L100-050. Subsection 49(1) of the PBA permits a pension plan to vary the terms of payment to a member or former member with a mental or physical disability that is likely to considerably shorten life expectancy. A variation of this type is only allowed if the plan provides for it. Subsection 49(2) of the PBA deems a plan to permit a variation in the terms of payment if certain prescribed conditions are met. FSCO Policy L100-051 sets out the conditions and process for applications under both subsections 49(1) and 49(2) of the PBA.

There is no prescribed form to be used for applications under subsection 49(1) of the PBA. If a pension plan permits this type of variation, the member or former member simply makes a written submission to the plan administrator to withdraw amounts because of shortened life expectancy. The application must meet the requirements set out by the terms of the plan and the plan administrator. The criteria for such a withdrawal may be different from the criteria specified under subsection 49(2) (e.g. a plan may provide for variation for individuals with life expectancy of less than 5 years). Certification from a physician and, if applicable, spousal consent are required to support such an application.

An application under subsection 49(2) of the PBA must satisfy the following criteria:
(1) the application must be signed by the former member and filed with the administrator; (2) the application must apply to the entire commuted value of the former member’s pension; and (3) the application must be accompanied by (a) a physician’s statement that the former member’s illness or physical disability is likely to shorten his life expectancy to less than two years; and (b) a spousal declaration signed no longer than 60 days prior to the administrator receiving it.
(D) Natural Termination of a Pension Plan (FSCO Policy W100-276)

Policy W100-276 replaces FSCO W100-275 - Plan With No Members and is effective December 1, 2011. Policy W100-276 outlines the expedited wind up process which has been developed for pension plans that have: (a) no members, former members or other plan beneficiaries; (b) all benefits settled and the related assets distributed from the pension plan; and (c) no assets or liabilities remaining in the plan. In these circumstances, the Superintendent would require the plan administrator to simply file a letter stating the plan name, registration number of the plan, effective date of wind up and the reasons for the wind up. The letter must also confirm that all benefits earned under the plan have been provided to members, all assets in the fund have been paid out and the annual information return and other regulatory filings have been filed.

In cases where all of these conditions exist except that assets remain in the plan, FSCO will consider proposals for the treatment of these assets on a case-by-case basis. Once the assets have been distributed, the simplified procedure may be used to complete the wind up.

(E) Guideline for Notice of Full or Partial Wind Up of Pension Plan (FSCO Policy W100-303)

FSCO replaced policies W100-300, W100-301 and W100-302 with FSCO Policy W100-303, effective December 15, 2012. FSCO Policy W100-303 identifies the notice requirements and procedure to be followed on the full or partial wind up of a pension plan. Notice of a wind up must be provided to (i) the Superintendent; (ii) each member, former member or other beneficiary entitled to receive a payment from the plan as a result of the wind up; (iii) each trade union that represents affected members; and (iv) the advisory committee of the plan. The notice must include the prescribed information and be delivered personally or by regular mail. Alternative methods of service may be authorized by the Superintendent.
(F) **FSCO Q&A on Overpayments and Plan Wind Up**

In December 2011, FSCO published Q&As regarding Overpayments and Plan Wind Up. Pursuant to these Q&As, if an employer makes contributions to fund a deficit on plan wind up and a surplus arises, the employer may apply to the Superintendent for consent to be reimbursed for the overpayment under section 62.1(3) of the PBA. The application must include the amount of contributions made by the employer to fund the wind up deficit, the surplus in the plan as a result of the overpayment, and the amount of the payment being requested by the employer. The application must include supporting documentation such as (i) extracts from the custodian’s fund statements showing the employer contributions remitted to the plan; and (ii) a detailed reconciliation of the plan’s assets and liabilities discharged over the period from the date of the wind up report to the date of the application. The Superintendent may then consent to a payment of funds from the pension fund to the employer for an amount equal to the lesser of (a) the assets remaining in the pension fund after settlement of all wind-up obligations; and (b) the sum of all special payments made to the pension fund by the employer to fund the deficit, plus investment earnings for the relevant period.

The general deadlines for making an application for consent to receive an overpayment from the pension fund also apply in the context of a wind up. An application must be made before the later of (a) 24 months after the date the employer made the payment, and (b) six months after the date on which the administrator, acting reasonably, becomes aware of the payment. The Superintendent does not encourage applications to be filed prior to the settlement of benefits. An employer may use the same application format as an application for reimbursement of an employer overpayment from a continuing pension plan, located in Schedules I and II of FSCO pension policy R350-103 (with applicable modifications).

(G) **FSCO Q&A on Jointly Sponsored Pension Plans**

In November 2011, FSCO answered a question regarding the information a plan administrator of a JSPP is required to provide in order to comply with section 40(u)(iv) of
the Ontario Regulation. This provision states that an annual statement for a JSPP must provide the contribution rates for both the employer and the members “for the year before, and the year after, the date of the statement”. FSCO stated that the plan administrator is required to set out the employer and the member contribution rates of the pension plan for the fiscal year to which the annual statement applies and for the following fiscal year.

(H) Eligibility for Membership in a Pension Plan (FSCO Policy M100-100)

FSCO Policy M100-100 replaces part of C100-300 (Class and Eligibility), C100-801 (Part-time Employees and YMPE Test), C100-890 (Seasonal Workers), and M100-800 (Students Generally Not Eligible), and is effective March 20, 2012. Policy M100-100 expands on the rules related to class of employment and determining the point at which an employee becomes eligible to participate in a pension plan. Of particular note, FSCO’s position is that for non-contributory plans there can be no delay in enrolling an employee in the pension plan. For example, if the employee becomes eligible in the middle of a pay period, the employee should be enrolled on the date the employee becomes eligible for the pension plan, not the next pay period. If the plan is contributory, enrolment may coincide with pay periods for administrative ease.

(b) Federal

(i) 2012 Budget Announcement

On March 29, 2012, the federal government released its 2012 budget (“Budget 2012”). Budget 2012 includes proposed changes to the old age security program (“OAS”) and guaranteed income supplement (“GIS”), new rules with respect to retirement compensation arrangements (“RCAs”) and employees profit sharing plans (“EPSPs”), as well as proposed modifications to the taxation of employer-funded group sickness or accident insurance plans.
OLD AGE SECURITY PROGRAM

Budget 2012 announced that starting on April 1, 2023 the age for eligibility for OAS and GIS will gradually increase from 65 to 67 years of age. As of January 1, 2029, individuals will need to be 67 years of age before receiving OAS or GIS.

Further, as of July 1, 2013 individuals will be permitted to voluntarily defer receiving OAS benefit for up to five years. When these individuals begin receiving OAS benefits the amount will be a higher, actuarially adjusted, pension. The government will discuss the impact of changes to the OAS program on CPP disability and survivor benefits with provinces during the next triennial review.

RCAs

An RCA is generally a plan or arrangement (usually a trust) under which an employer or a former employer makes payments to a custodian to enable benefits to be paid to an employee or other beneficiary on, after or in contemplation of the employee's retirement. Contributions made by an employer to such an arrangement are generally deductible to the employer. However, a refundable tax is imposed on the employer at a rate of 50% on contributions to an RCA, as well as on income and gains earned or realized in the RCA. The beneficiary of an RCA is taxable only when amounts are received by him/her under the RCA.

The Budget 2012 proposes to address perceived abuses by applying a modified version of the “prohibited investment” and “advantage” rules that currently apply to other tax-sheltered plans such as tax-free savings accounts and registered retirement savings plans. Budget 2012 proposes to impose a refundable tax on the custodian equal to 50% of the fair market value of any “prohibited investment” held by the RCA. The custodian will also be liable to pay a tax equal to the fair market value of any “advantage” in respect of an RCA. In certain cases, the beneficiary will be jointly and severally liable for the tax as well.
These proposals generally apply to “prohibited investments” acquired, and “advantages” extended received or receivable, by an RCA on or after March 29, 2012.

**EPSPs**

Under an EPSP, the employer makes tax-deductible contributions to a trust. These amounts must be allocated by the trustee to the beneficiaries each year. The trustee must also allocate earnings and realized gains and losses in the EPSP trust, as well as certain amounts in respect of forfeitures, on an annual basis. An EPSP beneficiary includes such allocations in employment income for the year in which the allocations are made. The employer may deduct EPSP contributions made in the first 120 days of a year in computing income for the preceding tax year. Neither employer contributions to an EPSP nor distributions to employees from an EPSP are subject to withholdings for federal tax or other federal statutory deductions, with the result that tax on amounts allocated to an EPSP beneficiary in a particular calendar year is not required to be paid until the individual files his/her tax return for that year in April of the next calendar year. There is, therefore, the possibility of tax deferral until the employee pays the tax on the amount included in income in connection with the allocation. An EPSP can effectively be used as a device to distribute its pre-tax profit to employees, reducing the overall tax on business profits as compared to the distribution of after-tax profits to shareholders by way of dividend.

In response to perceived abuses of the these rules to direct profits to family members of closely held companies, Budget 2012 introduces a special tax payable by a “specified employee” (generally an employee who has a 10% or greater interest in the employer) on the portion of the employer’s contributions to the EPSP that exceeds 20% of the specified employee’s salary received from the employer. The special tax applies at the top marginal rate.

This proposal is generally applicable to contributions to an EPSP made by an employer on or after March 29, 2012.
GROUP SICKNESS OR ACCIDENT INSURANCE PLANS

There is currently no provision in the existing law that specifically imposes tax in respect of non-periodic payments under an employer-funded group sickness or accident insurance plan, either on the amount of the benefit or the amount of the employer contribution. However, periodic payments under such a plan are fully taxable where the employer contributes any part of the cost of providing the group sickness or accident insurance benefit.

Budget 2012 proposes to include the amount of an employer’s contribution under a group sickness or accident insurance plan in the income of an employee covered under the plan to the extent that such contribution is not in respect of benefits in the form of periodic payments.

This change will apply with respect to employer contributions made after March 28, 2012. However, where contributions are made in 2012, they will not be included in the affected employees’ income until 2013.

While it is not clear that tax measures will be utilized to ensure compliance, Budget 2012 also proposes that private-sector employers in federally regulated industries, which include telecommunications, banking, and air and rail transport, among others, will be required to obtain insurance to fund employee long-term disability benefits. Under this proposal, federally regulated employers would not be allowed to self-fund such benefits.

(ii) Federal Legislation

(A) Pooled Registered Pension Plans

PRPPs are part of the federal government’s response to calls to improve Canada’s retirement income system. Following consultations with provincial finance ministers, the federal Department of Finance released a Framework for Pooled Registered Pension Plans in December 2010. The Framework envisioned PRPPs as essentially large,
capital accumulation plans administered by third-party administrators, allowing for broad-based participation from multiple employers, individuals (without requiring employer participation), and the self-employed.

On November 17, 2011, the federal government introduced Bill C-25, containing legislation designed to enable federally registered PRPPs. Bill C-25, if enacted, will create the new Pooled Registered Pension Plans Act (the “PRPP Act”). Most recently Bill C-25 was studied by the Standing Committee on Finance which recommended no amendments; it will likely proceed to third reading in the near future.

On December 14, 2011, the Department of Finance released draft amendments to the Income Tax Act and the Income Tax Regulations proposing changes applicable to the PRPP regime (the “Tax Proposals”). The draft amendments were open for comment until February 14, 2012. The government’s stated intention is to proceed at an early opportunity to implement the proposals, taking into account the comments received; however, the Tax Proposals have not yet been made law.

The implementation of both Bill C-25 and the Tax Proposals would allow for the establishment of PRPPs within the federal jurisdiction. Should the provinces wish to also allow for PRPPs in their respective jurisdictions they will have to enact legislation corresponding to the federal PRPP Act.

**Who Can Administer a PRPP?**

An administrator of a federal PRPP will have to be licensed under the PRPP Act by the Superintendent of Financial Institutions, on conditions to be prescribed. The definition of “administrator” in the Tax Proposals (which would apply to all jurisdictions, if enacted) specifies that an administrator must be a corporation resident in Canada.

It is expected that Canadian banks and insurance companies will establish and administer PRPPs. However, large public sector pension funds might also be eligible as PRPP administrators (should they wish to establish PRPPs and depending on
applicable regulations, yet to be released). Interestingly, with respect to “competition” between possible PRPP administrators, Ted Menzies, Minister of State for Finance, recently commented that the government would “level the playing field” between PRPP administrators by requiring administrators to operate as taxable corporations (large public sector pension funds typically operate as non-taxable special purpose corporations or trusts.)

Who Will Participate in a PRPP?

The PRPP Act provides for automatic enrolment for employees of an employer that offers a PRPP. However, this is subject to an opt-out option, and further, the PRPP Act allows both employers and employees in certain circumstances to set their contribution rates to zero. Self-employed and other individuals (e.g., those whose employer does not offer a PRPP) will also be able to participate in PRPPs. According to the Tax Proposals, the amount that may be contributed to an individual’s PRPP account will be limited by their registered retirement savings plan contribution limit.

Provincial PRPPs?

As discussed later in this paper, Quebec has announced its intention to implement legislation to provide for “Voluntary Retirement Savings Plans” which are similar to PRPPs. In the 2012 Ontario Budget, the Ontario government announced that it had concerns regarding the PRPP regime but that it was interested in working together with the federal government.

(B) Bill C-377 – An Act to amend the Income Tax Act

Bill C-377, a private member’s bill introduced on December 5, 2011, proposes amendments to the ITA which, if passed, would require labour organizations to publicly disclose extensive financial information. Bill C-377 received Second Reading on March 14, 2012. Bill C-377 will be discussed in another paper at this seminar.
Section 149(1)(k) of the ITA provides that no tax is payable under Part I of the ITA if a person is a “labour organization or society or a benevolent or fraternal benefit society or order”; however, there is no definition of “labour organization” in the ITA. Canadian courts have interpreted section 149(1)(k) based on the common law meaning of the term. Further, the phrase "benevolent or fraternal society or order" has been the subject of several CRA technical interpretations. Bill C-377 proposes to amend the ITA to include a definition of labour organization, and, notably, of a “labour trust.” As Bill C-377 is currently drafted, “labour trust” means “a trust or fund in which a labour organization has a legal, beneficial or financial interest or that is established or maintained in whole or in part for the benefit of a labour organization, its members or the persons it represents.” Read literally, this broad definition would capture registered pension plans in which unionized members participate.

If the definition of labour trust remains unchanged and Bill C-377 comes to pass, pension plans which are “labour trusts” will be required to file public information returns within six months of the end of each fiscal period disclosing, among other things, its financial statements, its disbursements to officers, directors, trustees, employees and contractors, and the time spent on political and lobbying activities. Failure to comply would be punishable on summary conviction to a fine of $1000 per day.

(C) Assessment of Pension Plans Regulations (SOR/2011-317)

The Assessment of Pension Plans Regulations, SOR/2011-317 (“Assessment Regulation”) was registered on December 15, 2011. The Assessment Regulation shifts the authority for the Office of the Superintendent of Financial Institutions (“OSFI”) to recover its costs of administering the Pension Benefits Standards Act, 1985 (“PBSA”) from the PBSA to the Office of the Superintendent of Financial Institutions Act (“OSFI Act”) as of December 31, 2011. To make this shift, the Assessment Regulation was filed and section 25 of the Pension Benefits Standards Regulations, 1985 was repealed. In addition to shifting the authority to make assessments, the Assessment Regulation
modifies the assessment formula effective April 1, 2012. While the total value of assessments collected by OSFI will be unaffected, larger defined benefit plans can expect to see higher assessments and defined contribution plans can expect to see lower assessments (with the exception of the smallest defined contribution plans which may see an increase due to a higher minimum assessment). These changes are intended to better reflect the resources required by OSFI to administer the plans. The regulatory impact analysis statement released by the government summarizes the changes in the formula as follows:

### Summary of old and new pension assessment calculations

<table>
<thead>
<tr>
<th>Old</th>
<th>New</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment = plan fee base × basic rate</td>
<td>No change in formula. However, plan fee base will change.</td>
</tr>
<tr>
<td>Included only active members in calculating the plan fee base.</td>
<td>Includes all plan beneficiaries (i.e. active members, deferred vested members, retirees and beneficiaries) in the plan fee base.</td>
</tr>
<tr>
<td>Above 1 000 members, each additional member increased the fee base by 0.50 until the fee base cap was reached.</td>
<td>Above 1 000 members, each additional beneficiary increases the fee base by 0.75 until the fee base cap is reached.</td>
</tr>
<tr>
<td>Fee base cap was 10 000 (i.e. 19 000 active members).</td>
<td>Fee base cap is 20 000 (i.e. 26 333 members and beneficiaries).</td>
</tr>
<tr>
<td>Minimum plan fee base was 20 (regardless of whether plan had fewer than 20 members).</td>
<td>Minimum plan fee base is 50 beneficiaries.</td>
</tr>
<tr>
<td>Minimum annual fee $440</td>
<td>Minimum annual assessment $600</td>
</tr>
<tr>
<td>Maximum annual fee $220,000</td>
<td>Maximum annual assessment $240,000</td>
</tr>
</tbody>
</table>

(D) **Regulations Amending the Canada Pension Plan Regulations (SOR/2011-299)**

The Regulations Amending the Canada Pension Plan Regulations, SOR/2011-299, were registered on December 8, 2011. These amendments implement the Post-Retirement Benefit which was added to CPP on December 15, 2009 and came into effect on January 1, 2012. The Post-Retirement Benefit provides that any worker who
is between 60 and 65 years of age (including a recipient of CPP) is required to pay CPP contributions. CPP contributions will be voluntary for those who are between 65 and 70 years of age. The additional contributions will increase the retirement pension received from CPP. The CPP Regulation provides that Post-Retirement Benefit elections and revocations must be submitted in the prescribed form to the individual’s employer to be effective.

(iii) Federal Policy Updates


OSFI issued the Draft Instruction Guide entitled Authorization of Amendments Reducing Benefits in Defined Benefit Pension Plans on January 4, 2012 (the “Draft Guide”). The Draft Guide sets out the factors and specific requirements that OSFI generally considers when reviewing an application seeking the Superintendent’s authorization of amendments that reduce benefits, as provided for in section 10.2 of the PBSA. The Draft Guide may be used while in draft form and replaces the Instruction Guide for the Authorization of Amendments Reducing Benefits in Defined Benefit Pension Plans issued in April 2006. The Draft Guide is substantially similar to the previous guide but provides further detail on the information needed in the application for authorization and the content of the notice provided to members.

It is the plan administrator’s responsibility to determine whether or not an amendment requires the authorization of the Superintendent. The types of amendments that typically require such authorization include amendments that (i) reduce the commuted value of accrued pension benefits; (ii) reduce pensions in pay; (iii) increase the pensionable age for past service; (iv) reduce a benefit for which the member has already met the eligibility conditions; or (v) introduce employer consent requirements to an existing benefit.
OSFI expects amendments to be consistent with the following general principles:

(i) plan administrators are expected to maintain accrued benefits promised by the pension plan and consider other options (e.g., increasing contribution levels or reducing future benefit accruals); (ii) amendments cannot remove benefits that are statutorily provided for in the PBSA; and (iii) the interests of all affected groups (actives, deferred vested, retirees) need to be considered and the plan administrator’s discretion applied in an even-handed manner.

When reviewing a request for authorization, OSFI considers a number of factors including whether or not (i) the amendment power in the plan permits such an amendment; (ii) the amendment is consistent with general principles set out in the Draft Guide (discussed above); (iii) appropriate notice is provided; (iv) the submission includes all information requirements; and (v) the amendment was collectively bargained or supported by affected groups. OSFI also considers the purpose and rationale for the reduction and examines any written representations it receives.

When submitting an application for authorization to reduce benefits, the plan administrator must demonstrate that all affected members, former members and other beneficiaries were provided with notice, provide actuarial information on the funding position of the plan before and after the amendment, and make submissions on the reason for the reduction and the alternatives considered.

(iv) **Draft Policy Advisory: Buy-in Annuity Products**

OSFI released draft Policy Advisory No. 2012-001 regarding Buy-in Annuity Products on January 27, 2012. A buy-in annuity product is similar to a traditional annuity with the distinction that a buy-in policy pays an aggregate amount to the pension fund instead of paying each member separately and directly. A buy-in annuity is an asset of the plan and the plan administrator remains responsible for administering the pension benefits to the retirees. The aim of a buy-in annuity is to provide a hedge against certain risks (investment, longevity and inflation).
OSFI states that it does not have any principled objections to investing in a buy-in annuity issued by a life insurance company for pensions in pay, provided such an investment is permissible under a plan’s terms. The purchase of a buy-in annuity would be an investment of the pension plan and the administrator would need to satisfy itself that the investment with the insurance company was in accordance with the prudent portfolio rule under the PBSA and in accordance with Schedule III of the PBSR. An investment in a buy-in annuity would not generally impair the solvency of the plan and would not be considered an immediate or deferred life annuity under section 26.1 of the PBSA. As a result, the purchase of a buy-in annuity would not require the consent of the Superintendent. OSFI’s view is that the value of a buy-in annuity should be excluded from the asset smoothing calculation.

(A) Draft Forms for Registration and Plan Amendments

OSFI has released draft forms to be used when applying for plan registration or registration of an amendment. There are now different forms to use depending on whether the plan provides defined benefits or defined contribution benefits. These documents may be used while in draft form and replace the existing Registration Guide and Form issued in April 2007 and Declaration of Compliance (OSFI-522) and Addendum (OSFI-521).

(B) Instruction Guide: Preparation of Actuarial Reports for Defined Benefit Pension Plans

In April 2012, OSFI released an instruction guide to inform the pension industry of the filing and reporting requirements for actuarial reports for defined benefit pension plans. The instruction guide outlines the frequency of filing, valuation dates and time limit on the filing of actuarial reports. The majority of the instruction guide outlines the required content of an actuarial report.
(c) Manitoba

(i) Legislation

(A) Amendments to the Pension Benefits Regulation (Regulation 205/2011)

Regulation 205/2011 was filed on December 2, 2011 and amended Manitoba’s Pension Benefits Regulation effective January 1, 2012. The amendment permits the use of letters of credit which meet certain prescribed requirements to secure special payments in respect of solvency deficiencies; specifies administrative penalties amounts; authorizes the Manitoba commission to establish hearing procedures; increases registration fees; and includes other technical and administrative clarifications. A number of Policy Updates, discussed below, have followed the amendment, discussing different aspects of the new rules.

(B) Special Payments Relief Regulation, 2011 (Regulation 213/2011)

The Special Payments Relief Regulation, 2011 (“Special Payments Regulation”) was registered on December 12, 2011, with an effective date of December 31, 2011. The Solvency Relief Regulation gives plan sponsors more flexibility in managing the solvency funding of pension plans by providing for a consolidation and temporary extension of the amortization period for solvency deficiencies reported in the first actuarial valuation filed between December 30, 2011 and January 2, 2014. The Special Payments Regulation permits the solvency deficiency to be amortized over a single, new, ten year period, provided that members and beneficiaries consent. The Solvency Relief Regulation does not apply to a pension plan whose initial solvency deficit has been amortized under the Special Payments Relief Regulation 190/2008 (“2008 Regulation”). The 2008 Regulation was amended on the same day (December 12, 2012) under Regulation 214/2011, introducing only minor changes.
(ii) Manitoba Policy Updates

(A) Policy Bulletin #10 – Letters of Credit

Policy Bulletin #10 was issued on December 12, 2011 and outlines the requirements for using a letter of credit to secure some or all of a plan’s solvency deficiency. These requirements include the letter of credit (i) being irrevocable; (ii) issued by a qualified issuer; (iii) in compliance with the rules of International Standby Practices and requirements of the ITA; (iv) containing specific dates for taking effect and expiry; (v) having a lifespan of no more than one year; (vi) obliging the issuer to make payment on demand by the holder; and (vii) being issued in Canadian currency.

In addition, the letter of credit must designate the beneficiary of the letter of credit to be the fund holder in trust for the pension fund, provide for unconditional payment on demand, exempt the rights of the issuer from the effects of bankruptcy or insolvency of the employer, demand 90 days’ notice for the issuer’s decision not to renew upon expiry, prohibit assignment, and prohibit amendments except on renewal or to reflect a change of holder.

The policy also sets out the required process for filing the letter of credit and statement with the Superintendent, the Superintendent acknowledging receipt, and the plan administrator providing the letter of credit to the fund holder. The policy also contains discussions on maintaining a letter of credit, the permissible amount of a letter of credit, expiry or cancellation of a letter of credit, filing requirements when a letter of credit expires without renewal or replacement or when a letter of credit is to be renewed or replaced, maintaining a letter of credit upon wind up or termination, interest on letters of credit, actuarial valuations, and timeline for remittance.

(B) Update #11-07 – Fee Increase

Update #11-07 outlines the increases in registration fees for new pension plans and in the annual assessments for existing pension plans effective January 1, 2012. Information returns for plans with 2,500 members or more are now subject to a
maximum filing fee of $18,000, and plans with fewer than 2,500 members are subject to a fee equal to the greater of (a) $7.20 per member; or (b) $120.00. This fee increase was implemented through amendments to subparagraphs 2.3(2)(d)(ii) and 3.26(1)(c)(ii) of the Manitoba Pension Benefits Regulation.

(C) Update #11-08 – Special Payments Relief Regulation 2011

The Manitoba Pension Commission released Update #11-08 on December 12, 2011. Update #11-08 describes the requirements for the Special Payments Regulation (discussed above).

An employer may choose to take advantage of the Special Payments Regulation by filing an election with the plan administrator. An employer must notify the plan administrator in advance of its intention to make such an election. The plan administrator must inform members and beneficiaries of the plan of the employer’s intention to make the election by providing the prescribed written notice. Members and beneficiaries are then provided with a period of time to object. The plan administrator must be satisfied that less than one-third of members not receiving a pension object to the proposal and less than one-third of members receiving a pension and other beneficiaries object. After the election is made, the plan administrator must file the prescribed documents with the Superintendent within 60 days of providing notice to members. For the period the election is in effect, the plan cannot be amended to decrease employee contributions or improve benefits if the improvement would affect the solvency or funding of the plan (or create an unfunded liability), unless such benefits are fully funded.

An election may be revoked by the employer at any time more than five years after the plan’s deficiency date, subject to the rules in the Special Payments Regulation. If the employer revokes an election, it must then pay the entire amount of the special payments within 30 days after the end of the month in which it revoked the election,
including interest and adjustment for certain costs. An election does not affect the requirements related to special payments in the event of a plan termination or wind up.

(D) Policy Bulletin #4 - Commutation of Small LIRAs or LIFs

Under the Pension Benefits Regulation, Sections 10.65 to 10.67 of Division 6 of Part 10 allow an owner to apply for a withdrawal of his or her small balances held in locked-in retirement accounts (“LIRAs”) and life income funds (“LIFs”) and paid to the owner in a lump sum subject to certain requirements. Policy Bulletin #4 was updated on January 4, 2012 to include examples of how to calculate the small amount limit in 2012. Policy Bulletin #4 also states that if the total of all balances in an owner’s locked-in vehicles is greater than the small benefit limit (even by a few cents), the owner will not be permitted to unlock any of the balances.

(d) British Columbia

(i) Legislation

(A) Family Law Act, S.B.C. 2011, c. 25

On November 24, 2011, the Family Law Act received royal assent; however, it is not yet in effect. Among numerous other changes, the Family Law Act clarifies the law regarding pension division on separation. The most significant change with respect to pensions is that for the purposes of Part 6 - Pension Division, the Family Law Act defines ‘spouse’ to include a person who has lived with another person in a marriage-like relationship and has done so for a continued period of 2 years. This expanded definition of spouse means that common-law couples (who meet this definition) are now entitled to a pension division under the Family Law Act. Under the previous legislation common-law couples were not statutorily entitled to a division of pension assets upon separation.
(B) **Bill 38 - Pension Benefits Standards Act**

The British Columbia government introduced a new *Pension Benefits Standards Act* (the “New PBSA”) for first reading on April 30, 2012 and it received second reading on May 2, 2012. The Minister of Finance described the New PBSA as incorporating the recommendations made by the Alberta/British Columbia Joint Expert Panel on Pension Standards. The New PBSA will replace the existing act in its entirety, substituting a principles-based regulatory approach for a rules-based approach which has the objective of reducing administrative costs, enhancing the rights of members (through, among other items, providing for the immediate vesting of pension benefits), providing private-sector employers with increased design options, such as the facilitation of target benefit plans and requiring the adoption of governance and funding policies by defined benefit or target benefit plans. In addition, the enabling legislation would also amend the relevant family law statutes which prescribe the rules for pension division on marital breakdown.

(e) **Alberta**

(i) **Legislation**

In the coming months, the Alberta government is expected to introduce legislation that is largely similar to the New PBSA in British Columbia, following through with the Joint Expert Panel’s support for greater legislative and regulatory harmonization between the two jurisdictions.

(f) **Saskatchewan**

(i) **Legislation**

(A) **Bill 4 — The Pension Benefits Amendment Act, 2011**

Saskatchewan Bill 4 - *The Pension Benefits Amendment Act, 2011* (“Bill 4”) passed first reading on December 8, 2011 and second reading on March 19, 2012. Bill 4 will authorize the government to enter into agreements respecting multi-jurisdictional pension plans.
(B) **Bill 29 — The Enforcement of Maintenance Orders Amendments Act, 2011**

Saskatchewan Bill 29 passed first reading on December 14, 2011 and second reading on April 2, 2012. Bill 29 proposes wide ranging amendments to the enforcement of maintenance orders, including under new section 34 that “notwithstanding any other Act respecting pensions or other allowances, any pension payments, allowances or benefits that are authorized to be paid pursuant to any Act or any program pursuant to any Act are seizable for the purpose of enforcement of maintenance orders”.

(ii) **Saskatchewan Policy Updates**

(A) **Consultation Paper on New Funding Regime for Public Sector Plans**

The Saskatchewan government is interested in establishing new funding rules for all public sector and publicly funded plans registered under *The Pension Benefits Act, 1992*, and published a discussion paper on January 26, 2012 to solicit feedback from interested parties. The government requested comments by April 30, 2012.

The regulator solicited comments on the following items: (i) the definition of public sector plans that will be subject to the new rules; (ii) the principles used to develop the new funding rules; (iii) the appropriateness of a ten year period for amortizing solvency deficiencies; (iv) strengthening going concern valuation by requiring more conservative assumptions; (v) the appropriateness of a ten year amortization period for amortizing unfunded liabilities; (vi) the appropriate best estimate assumptions and appropriate margins for adverse deviations; (vii) restricting benefit improvements in an insolvent plan based on a threshold solvency ratio of 0.90; (viii) no longer accepting plan amendments that provide different benefits on plan termination than on a going concern basis; (ix) transferring amounts held back due to a transfer deficiency within five years; (x) requiring annual valuations for all defined benefit plans, if the solvency ratio falls below a prescribed amount; and finally (xi) the choice between extended solvency amortization or enhanced going concern options.
(g) New Brunswick

(i) Legislation

(A) Amendments to General Pension Regulation (Regulation 2011-71)

New Brunswick filed Regulation 2011-71 on December 8, 2011, which amended the general pension regulation regarding pension plan funding. The amendments introduce the requirement to file an annual actuarial report if an actuarial valuation report with a review date on or after April 1, 2011, indicates that the transfer ratio is less than 0.9. In addition, solvency deficiencies can be consolidated with an extended amortization period.

(h) Nova Scotia

(i) Legislation

(A) Bill 96 - Pension Benefits Act

Nova Scotia’s new Pension Benefits Act received royal assent on December 15, 2011 and was discussed in our previous Regulatory Round-Up. The new PBA has not yet been proclaimed into force, nor have the underlying regulations been published. Draft Pension Benefits Funding Regulations were published on December 7, 2011, and were open for comment until January 31, 2012.

(i) Newfoundland and Labrador

(i) Legislation

(A) Amendments to the Pension Benefits Regulations (Regulation 103/11)

Regulation 103/11 was filed on November 22, 2011 and addresses payments upon plan termination. The Pension Benefits Regulation is amended by adding section 25.1 which sets out the process for making payments on plan termination when the plan has a deficit. New section 25.1 stipulates that equal payments must be made, at least
quarterly, over a period not longer than 5 years from the date of plan termination and requires the plan administrator to continue to file annual information returns and actuarial valuation reports until the termination amount has been paid in full.

(j) Quebec

(i) Legislation

(A) An Act to amend the Act respecting the Quebec Pension Plan and other legislative provisions, 2011, chapter 36

An Act to amend the Act respecting the Quebec Pension Plan and other legislative provisions received royal assent on December 9, 2011. As part of the amendments, Quebec introduced the ability to qualify for a retirement pension under the Quebec Pension Plan at the age of 60. The amendments also added a benefit for disability after retirement. Further, the reduction for pension entitlements that have not been applied for by a person over 65 has been reduced to 12 months from 60. To qualify for a disability pension at 60, a person must have paid contributions for four years out of the preceding six years.

(B) Quebec Budget 2012-2013, Voluntary Retirement Savings Plan (“VRSP”)

The Quebec government has announced its intention to implement VRSPs as part of its 2012-2013 Budget. VRSPs will provide workers with access to a group pension plan, extending coverage to around two million workers who currently do not have access to an employer sponsored pension plan. The government will table the necessary legislation to be effective as of January 1, 2013 and companies required to offer VRSPs will have two years to comply. A company will be required to offer a VRSP if it has five or more employees with at least one year of uninterrupted service and it does not already offer all its employees the possibility of contributing to a retirement savings plan through payroll deductions. Companies providing a VRSP will have its employees enrol automatically, but the employer will not be required to contribute to the fund. Small businesses with less than five employees with at least one year of uninterrupted service
are exempt from providing a VRSP. The default employee contribution rate will be 2% from January 1, 2013 to December 31, 2015; 3% from January 1, 2016 to December 31, 2016; and 4% as of January 1, 2017. Employees will be able to opt out of contributing or change their contribution rate. Employee contributions will be deductible for income tax purposes and may be withdrawn before retirement; however, these amounts will be subject to applicable taxes. Employees who have been automatically enrolled will have 60 days to withdraw. Finally, administration of a VRSP will be by third parties licensed by Autorité des marchés financiers under the oversight of the Régie des rentes du Québec, with management fees being the same for all participants.

(C) An Act to amend the Supplemental Pension Plans Act in order to extend certain measures to reduce the effects of the 2008 financial crisis on plans covered by the Act, 2011, chapter 32

An Act to amend the Supplemental Pension Plans Act in order to extend certain measures to reduce the effects of the 2008 financial crisis on plans covered by the Act received royal assent on December 2, 2011. The amendments provide relief in the form of a two year extension to the application of the provisions related to plans’ funding obligations when faced with insufficient assets in the context of wind up, termination, or withdrawal of employer.

(k) Canadian Association of Pension Supervisory Authorities (CAPSA)

On May 3, 2012, CAPSA released an updated Frequently Asked Questions relating to the implementation of the Agreement Respecting Multi-Jurisdictional Pension Plans (the “Agreement”). The update includes the following question regarding the determination of benefits:
“QUESTION

Does the application of section 7 of the Agreement (Determination of Benefits by Final Location) require that all of a plan member’s accrued benefits be calculated as if the plan member was always employed in the final jurisdiction?

ANSWER

No, section 7 of the Agreement only deems that the final jurisdiction’s pension legislation applies to the treatment of all of the plan member’s accrued benefits after the value of those benefits have been determined in accordance with the plan terms. If the terms of the plan specify that different amounts of benefits or different benefit formulae apply to members employed in different jurisdictions, then the amount of a plan member’s benefits must be first determined in accordance with the plan terms, and then the treatment of all of the plan member’s benefits so determined will be subject to the final jurisdiction’s pension legislation.

For example, suppose that a pension plan provides that Saskatchewan members of the plan accrue a defined benefit of $45 per month per year of service, while Alberta members accrue a defined benefit of $50 per month per year of service. If a member of the plan initially works for two years in Saskatchewan and then five years in Alberta, at which point the member terminates employment, the member’s total accrued benefit would consist of $45 per month for each of the two years of Saskatchewan service and $50 per month for each of the five years of Alberta service, for a total monthly benefit of $340 (i.e., ($45 \times 2) + ($50 \times 5) = $340). The application of section 7 of the Agreement does not mean that the final Alberta rate of benefit accrual set out under the plan terms applies to the member’s Saskatchewan service. However, how the member’s total monthly benefit of $340 will be paid and treated upon termination of employment will then
be subject to rules of Alberta’s pension legislation, without any influence from Saskatchewan’s pension legislation.”

(I) United States

(i) Foreign Account Tax Compliance Act (FATCA)

On February 8, 2012, the United States Treasury Department and Internal Revenue Service (“IRS”) issued proposed regulations for the next major phase of implementing the Foreign Account Tax Compliance Act (FACTA). FACTA is legislation that was passed in 2010 which is designed to prevent “US persons” from evading US tax using financial accounts held outside of the US. FACTA requires foreign financial institutions to report to the IRS information about financial accounts held by US taxpayers. It appears that registered pension plans (and other funded retirement savings arrangements such as RRSPs, DPSPs, RIFs, RCAs and PRPPs) in Canada may be classified as foreign financial institutions under FACTA, subject to any exemptions in the proposed regulations. The reporting requirements under FACTA would require a sponsor or custodian of a retirement arrangement with US holdings to report to the IRS on the beneficiaries who are US citizens or taxpayers. Meeting these reporting requirements would be onerous, costly and potentially problematic from a privacy law perspective. A failure to comply with the reporting requirements results in US investments held by the retirement arrangement being subject to a 30% withholding on all such US investments. The proposed regulations include an exemption for registered pension plans generally, however, small plans that have a beneficiary who is entitled to +5% of the plan’s assets may not be caught by the exemption. Further, as currently drafted, the proposed regulation may not exempt RRSPs/DPSPs, RIFs or RCAs. It is important for plan sponsors and custodians to be aware of FACTA and the new regulations because if their plans do not fall within an exemption then they will need to be prepared to comply with onerous reporting requirements.
2. RECENT CASE LAW UPDATES

(a) Appeal Updates

(i) **Sun Indalex Finance, LLC, et al. v. United Steelworkers, et al.**

The Supreme Court of Canada will hear the appeal of the Ontario Court of Appeal’s decision in *Indalex Ltd. (Re)* on June 5, 2012.

(ii) **Canadian Jewish Congress v. Polger, 2011 QCCA 1169**

The earlier decisions in this case have been covered in previous roundups. The Quebec Court of Appeal found that the Canadian Jewish Congress had not established a binding practice for granting discretionary benefits on retirement. The Court of Appeal, however, did not rule out the possibility that prior practice could bind employers to provide benefits beyond what is agreed upon in the employment contract. In recent developments, application for leave to appeal to the Supreme Court of Canada has been dismissed with costs and without reasons.

(iii) **Buschau v. Rogers Communications Inc., 2012 FCA 100**

The latest instalment in the long-running dispute between Rogers Communications Inc. (“Rogers”) and its former employees over surplus entitlement pertained to an assessment of costs. The assessment related to three different proceedings in which Rogers had been awarded costs. The assessment officer was critical of many of the fees and disbursements claimed by Rogers. Rogers initially asked for costs of $14,316.55, $12,756.79, and $14,440.85. The costs were assessed and allowed at $10,881.38, $9,521.16, and $5470.71.

(iv) **Waterman v. IBM Canada Limited, Docket No. 34472; leave to appeal granted April 5, 2012 (S.C.C.)**

The Supreme Court of Canada recently granted leave to hear the appeal of the British Columbia Court of Appeal’s decision in *Waterman v. IBM Canada Limited*. The central
issue in the case is whether pension benefits can be deducted from an award of damages for wrongful dismissal.

Richard Waterman was employed at IBM for over 40 years. In May 2009, IBM dismissed Waterman without cause and without notice. Waterman, who was 65 at the time, began receiving full pension benefits from IBM’s Defined Benefit Pension Plan (the “Plan”). Waterman declined to accept the severance package IBM offered him; instead he successfully sued IBM for damages for wrongful dismissal. IBM then sought an order that pension benefits paid during the 20 month notice period be deducted from Waterman’s award of damages.

The British Columbia Supreme Court concluded that pension benefits are collateral benefits which cannot be considered income or deducted from damages for wrongful dismissal. The British Columbia Court of Appeal agreed but for different reasons. In analysing the parties’ intentions, the Court of Appeal raised an interesting policy concern: if pension benefits could be deducted from salary in cases such as these, employers facing economic hardship would have incentive to terminate senior employees with vested pension rights instead of more junior employees, since laying off the senior employees would result in a significant offset of pension against salary in estimating the damages for wrongful dismissal.

(b) Retiree Benefits

(i) Dell’Aniello v. Vivendi Canada Inc., 2012 QCCA 384

This was an appeal of the 2010 decision of the Superior Court of Quebec not to certify a class action regarding the modification of health insurance benefits by a successor employer. The appeal was granted and the class certified.

In 1977, The Seagram Company Limited (“Seagram”) instituted a post-retirement medical benefits plan (the “Plan”) for its salaried employees and executives across Canada. Over the years, Seagram issued a number of communications regarding the terms and conditions of the insurance coverage. Through a series of transactions in the
early 2000s, Vivendi Canada Inc. (“Vivendi”) became the successor of Seagram. In late 2008, Vivendi informed retirees and beneficiaries that certain amendments to the Plan would come into effect on January 1, 2009. These changes included an increased deductible, a restricted scope of prescription drug coverage, and the imposition of a lifetime coverage cap of $15,000.

Michel Dell’Aniello, a retired former executive of Seagram, commenced a class action in July 2009 seeking to have the amendments to the Plan nullified and claiming damages for the additional expenses incurred since January 1, 2009. The class included all retired employees and management of Seagram who were eligible for benefits under the Plan, as well as all other eligible persons within the meaning of the Plan. Class members spanned six provinces.

The Superior Court of Quebec dismissed the certification motion. The trial judge found that a class action was not the appropriate procedure in the circumstances, as there were too many individual issues to address. The trial judge identified five sub-classes of Plan members who had received different communications about the Plan depending on their retirement date and their jurisdiction of employment. In addition, the trial judge noted that the class members had worked in six different jurisdictions which made a proper assessment of the issues more complicated.

The Quebec Court of Appeal overturned the Superior Court’s decision and granted leave to institute the class action. The Court of Appeal held that the trial judge erred in making his decision based on the merit of the case. The fact that damages might have to be determined individually was not a proper basis for dismissing the certification motion. At the certification stage, the court need only have considered whether the issue of the legality of the employer’s modifications to the Plan was common to all class members. The Court of Appeal found that the legality of the amendments was a common issue that raised identical, similar or related questions of law or fact, and was therefore sufficient to authorize a class action.
This is an appeal from a summary judgment decision of the British Columbia Supreme Court dismissing a class action against the Crown regarding changes to provincial health care premiums and extended healthcare benefits coverage. The Court of Appeal dismissed the appeal and upheld the lower court’s decision.

Since the 1950s, British Columbia has provided a medical services plan ("MSP") and extended health benefits ("EHB") insurance for employees and pensioners. From 1978 to 2003, the government fully subsidized MSP and EHB premiums. In January 2003, legislative amendments came into effect requiring retirees to pay a portion of their MSP premiums, to restrict the range of EHB coverage provided, and to increase the EHB deductible.

In 2005, a class action was certified on behalf of more than 27,000 retired government workers who had elected to receive MSP and EHB insurance during their retirement. On appeal, the Court created a sub-class of employees who worked for the government of British Columbia (as distinct from Crown corporations or other Crown-related entities). The sub-class sought a declaration that the Crown owed a fiduciary duty to the sub-class regarding the provision and administration of retiree benefits and that the Crown had breached that duty. The sub-class also alleged breach of contract, asserting that the Crown repeatedly promised that retirees would receive the benefits on a premium-free basis.

With respect to the contract issue of the sub-class, the lower court found that there never existed within the contract of employment a promise from the government to keep the retiree benefits premium-free. While the plaintiffs pointed to numerous booklets, pamphlets, letters and other external documents as evidence of this contractual promise, the lower court found that the representations in these documents could not form part of the contract of employment since, in most cases, the representations were made well after employment began, and could not have been reciprocated by
consideration. More importantly, however, the British Columbia Supreme Court found that the benefits were provided under a statutory authority which granted discretionary power to the Minister to set the benefits and change them from time to time.

On appeal, the appellants did not dispute the trial judge’s findings concerning fiduciary duties. Rather, the issue on appeal was whether the trial judge erred in concluding that the retirees had no vested contractual or statutory rights to premium-free insurance.

In respect of the contractual issue of the sub-class, the trial judge’s conclusion that there was no consideration for the government’s promises was based on findings of fact to which appeal courts have a high degree of deference. Based on the evidence before her, the trial judge found that the communications about post-retirement health benefits occurred “when retirement was imminent or had already begun.” The logical corollary of this factual finding was that continuing to work until retirement could not be consideration for the promise of post-retirement benefits. On the same basis, the Court of Appeal did not see fit to interfere with the trial judge’s finding that the communications were “representations” as opposed to “promises.” The evidence was sufficient to support this finding, and the trial judge had not made a “palpable and overriding error.”

The Court of Appeal then turned to the question of whether the class had vested statutory rights to premium-free MSP and EHB which could not be divested by subsequent legislative amendments. The Court of Appeal affirmed the trial judge’s approach to statutory interpretation and agreed with her conclusion: “in conferring discretion on the Lieutenant Governor in Council to prescribe premium contributions from time to time, the Legislature clearly did not intend that once a premium contribution was prescribed for a group of retirees it became immutable for retirees in that group.”

(iii) Lacey v. Weyerhaeuser Co., 2012 BCSC 353

The dispute in this case was strikingly similar to that in Bennett v. British Columbia. Here, however, the court reached a different result.
As part of its benefits package for employees, MacMillan Bloedel Limited (“MB”) voluntarily offered fully-funded retirement health benefits. The benefits were described in various publications and presentations to MB’s employees over the years. In 1999, MB was acquired by Weyerhaeuser Company Limited (“Weyerhaeuser”), who stepped into MB’s shoes as successor employer. Subsequently, there were efforts to integrate MB and Weyerhaeuser’s existing plans, but current retirees continued to receive the benefits that were in place at the time of their retirement. In 2009, Weyerhaeuser announced that “in order to sustain the viability and affordability of our retiree plans,” the company would freeze its contributions at 50% and any future premium increases would be borne solely by the retirees.

The plaintiffs in this action are a group of former employees who retired at various times between 1991 and 2000. They brought a claim for breach of contract, arguing that the benefits were a form of deferred compensation, that the employer did not reserve a right to terminate the benefits, and that the right had vested. The defendant argued that the provision of retirement benefits was entirely at the employer’s discretion, was not a contractual right, and was not a vested right. The employees did not have written employment contracts, and it was, therefore, up to the court to determine, based on an objective view of the parties’ conduct, whether lifetime fully-funded retirement health benefits were provided as part of the employees’ compensation.

At the British Columbia Supreme Court, the parties placed an ample volume of evidence before the court to support their respective arguments, including: 1973 and 1975 submissions to the federal government regarding an advance tax ruling on the deductibility of the insurance premiums; benefits handbooks distributed to employees in 1985 and 1994; testimony of the company’s former human resources director and the company’s former employee benefits supervisor; the company’s accounting treatment of the post-retirement benefits as a form of deferred compensation; Human Resources Committee documents; and the specific releases signed by certain plaintiffs upon their early retirement. Based on the evidence and on an analysis of the relevant Canadian
case law, the British Columbia Supreme Court found that MB contracted to pay the post-retirement benefits at its sole cost for the life of the retirees.

Although the advance tax ruling evidence showed that MB considered its payments of insurance premiums to be voluntary and gratuitous, this did not assist the defendants’ argument because, as the former HR director and benefits supervisor testified, there was no evidence of this subjective intention ever being communicated to employees or to human resources representatives within the company. There was no evidence of any communication from the company to employees that their entitlement to the post-retirement health benefits was not legally enforceable. The communications to employees created a common understanding among the employees that the benefits were to be provided “for life,” and that they were one of the employees’ “entitlements” within the company’s comprehensive compensation package. This conclusion was supported by the fact that the benefits handbooks referred to the employer’s right to “modify, amend or terminate” the pension benefits but did not include this explicit reservation of rights with reference to the post-retirement medical benefits.

Having found that the employer was contractually obligated to provide the post-retirement health benefits, the Court then turned to the question of whether the right had vested. The case law establishes that the right under a common law contract of employment to deferred compensation upon retirement is a right which vests. The Court distinguished the British Columbia Supreme Court’s decision in *Bennett v. British Columbia* on the basis that the principle of inter-generational equity has no application to common law contracts of employment.

The plaintiffs were therefore entitled to have the defendant continue paying the premiums, damages in the amount of the premiums they paid since their benefits were reduced, and a refund of premium assessments paid. The plaintiffs were also awarded costs. Weyerhaeuser filed an appeal with the British Columbia Court of Appeal on April 2, 2012.
(c) **Plan Amendments**


S.E.I.U, Local 2 (the “Union”) filed a grievance against the Royal Ontario Museum (the “Employer”) for making unilateral changes to the terms of the Royal Ontario Museum Pension Plan (the “Plan”) during the term of the collective agreement. In particular, the Employer (a) capped credited service at 35 years, (b) changed the method used to calculate average earnings, and (c) changed the formula for the early retirement reduction. The arbitrator denied the grievance because the collective agreement provided that employees were subject to the terms and conditions set out in the plan, which included the provision in the Plan authorizing the Employer to modify or terminate the Plan.

Specifically, the collective agreement provided the following:

> “30.01 The Employer shall arrange for the provision of the under noted coverage with the Employer/Employee share of the costs involved as noted. Employees are subject to the terms and conditions set out in the plans governing the provision of these benefits. Participation is compulsory for all Employees except as herein noted otherwise.

> ...

> 30.03 Eligible Employees will be enrolled in the Royal Ontario Museum Pension Plan. Participation is compulsory at age 35, except under the conditions noted in the Plan. The Employees shall contribute an amount equal to 3.25% of that part of salary up to the Canada Pension Plan’s Yearly Maximum Pensionable Earnings (YMPE) amount, and 5% of salary that is in excess of that amount. The Employer shall pay the amount in addition to the Employee’s contribution required to provide the pension as per the pension calculation.”

The arbitrator found that the changes to the Pension Plan did not violate the terms of the collective agreement because there is no provision in the collective agreement prohibiting the employer from changing the benefits in the Plan. The collective agreement specifically provided that employees were subject to the terms and
conditions set out in the plan and this included the amendment and termination provisions. The collective agreement did not need to expressly provide that the employer was permitted to change the Plan since it was clear from the terms of the Plan that it may be modified.

(ii) **Synertech Moulded Products c. Quebec, 2011 QCCS 4770, 92 C.C.P.B. 216**

Synertech Moulded Products (the “Employer”) applied for judicial review of a decision of the Administrative Tribunal of Quebec (“Tribunal”) which upheld the Régie des rentes’ (the “Régie”) refusal to approve pension plan amendments which reduced benefits. The application for judicial review was granted and the Régie was ordered to approve the amendments.

The Employer established individual pension plans for two employees in 2001. After the economic crisis in 2008, the Employer and the employees agreed to amend the benefit formula under the plans in order to eliminate the plans’ deficits. These amendments would result in a significant reduction of the members’ accrued benefits. The Régie refused to register the proposed amendments because they adversely affected the rights of employees in a significant way, in contravention of the *Supplemental Pension Plans Act of Quebec* (“SPPA”). The Tribunal upheld this decision, affirming the Regie’s discretion to refuse registration of the amendments.

On judicial review, the Superior Court of Quebec found that the retroactive amendments did not contravene the SPPA and ordered the Régie to register the amendments. The Court found that benefit reductions are permitted under the SPPA, so long as the affected members agree to the amendment and the Régie authorizes the amendment. In this case, the affected members consented to the amendments. The proposed amendments in this case were to make the plans solvent which is consistent with the SPPA. The Court stated that when relying on its discretionary power under the SPPA, the Régie must not act arbitrarily, unfairly or unreasonably.
(d) Bankruptcy & Insolvency

(i) Re Timminco Ltd., 2012 ONSC 506
Re Timminco Ltd., 2012 ONSC 948

On January 3, 2012, Timminco Limited and Béancour Silicon Inc. (collectively, the “Timminco Entities”) applied for and obtained relief under the Companies Creditors Arrangement Act (“CCAA”). These decisions refer to Indalex (Re) and provide some comfort to parties who seek protection for liabilities incurred during the course of insolvency proceedings. In particular, a provider of debtor in possession financing to a company under CCAA protection may still be given a super priority by a court for monies advanced during the course of the CCAA proceedings, at least where the order is made on notice to those with potential deemed trust claims and the issue of paramountcy of CCAA over provincial statutes like the PBA is specifically raised.

In Re Timminco Ltd. 2012 ONSC 506, the Timminco Entities requested that certain items, the “Administration Charge” and the “Directors and Officers Charge” (“D&O Charge”) be granted super priority and rank ahead of the existing security interest of Investissement Quebec (“IQ”) and all other trusts, liens, charges, and claims of secured creditors, including any deemed trust under the PBA or the Quebec Supplemental Pension Plans Act (“SPPA”). The Timminco Entities also requested an order suspending its obligations to make special payments to the three pension plans they sponsor (the “Plans”). All three Plans were significantly underfunded. This requested order was opposed by the Communications, Energy and Paperworkers’ Union of Canada (“CEP”).

The Court made its decision in the context that it had already determined that the Timminco Entities were clearly insolvent and not capable of meeting their ongoing funding obligations to the Plans. The Court also took note that the directors and officers of Timminco would not have continued their service without the D&O Charge.
The Court cited the Ontario Court of Appeal’s decision in *Indalex Ltd. (Re)*, as confirmation of the Court’s ability to override provincial statutes (such as the PBA and SPPA) where the application of the provincial legislation would frustrate the company’s ability to restructure and avoid bankruptcy. As such, the Court had the ability to grant a super priority charge in appropriate circumstances. In this case, the Court was satisfied that the application of the funding obligations under the PBA and SPPA would frustrate the Timminco Entities’ ability to restructure and avoid bankruptcy. The Court found that the employees and former employees would not be prejudiced by the requested relief because the likely outcome should these proceedings fail would be bankruptcy, which would not be a better result for them. Because the requested relief would avoid bankruptcy, to the benefit of both the Timminco Entities and the beneficiaries of the Plans, the requested relief did not favour the interests of the corporate entity over its obligations to its fiduciaries.

In *Re Timminco Ltd.* 2012 ONSC 948, the Timminco Entities requested super priority over all of the assets, property and undertaking of the Timminco Entities, including any deemed trust created under the PBA or SPPA, in favour of the debtor in possession lender (the “DIP Lender”). In accordance with its earlier decision, described above, the Court determined it had the jurisdiction to override the provisions of the PBA and SPPA in these circumstances.

The CEP argued that the Timminco Entities had fiduciary duties with respect to the Plans that needed to be considered during the negotiation of the DIP financing. The CEP argued that the Timminco Entities failed to consider these obligations in the negotiation of the DIP financing and that a super priority charge should not be granted. The Court disagreed. A review of the relevant factors outlined in the CCAA led the Court to conclude that the DIP facility was necessary to avoid bankruptcy and to satisfy the requirements of the CCAA. The Court found that the alternative of obtaining DIP financing without a super priority charge was not realistic, and that it was also unrealistic to expect that any commercially motivated party would make advances to the Timminco
Entities for the purpose of making a special payment or other payments under the Plans. In order to ensure that the objectives of the CCAA were fulfilled, the Court found it necessary to invoke the doctrine of paramountcy such that the provisions of the CCAA override those in the PBA and SPPA.

(ii) \textit{Re Catalyst Paper Corp., 2012 BCSC 451}

This application concerned the appropriate representation of pension plan members in a bankruptcy proceeding. On January 31, 2012, Catalyst Paper Corporation (the “Petitioners”) obtained a protection order (the “Order”) under the CCAA. The Order directed the Petitioners to make all normal employer cost contributions to its defined benefit (“DB”) and defined contribution (“DC”) pension plans. Furthermore, it authorized but did not require the Petitioners to make special payments to certain pension plans as set out in a December 2011 letter from the Superintendent of Pensions (the “Extension Letter”). The Extension Letter provided that if the Petitioners filed for CCAA protection, it would be rescinded and all contributions and payments under the DB plans would be due and owing in accordance with section 6 of the \textit{Pension Benefits Standards Act} (British Columbia).

The Catalyst TimberWest Retired Salaried Employees Association (the “RSEA”) came to an agreement with the Petitioners, the DIP lenders, and other interested parties to address the consequences of the CCAA filing. The essential points of the agreement were that the Petitioners agreed to make additional payments to the DB plan on specified dates, and the Superintendent of Pensions waived its right to rescind the Extension Letter. It was implicit in the agreement that the DIP lender’s security would rank in priority to any rights of the pension beneficiaries.

On February 7, 2012, the court amended the Order to give effect to this agreement. The February 7th order recognized RSEA as the authorized representative of the “pension beneficiaries of the Company’s Salaried Plan.” On February 14, 2012, the Petitioners applied for, and were granted, a final order giving the DIP lender a priority charge over
the working capital assets of the Petitioners and over any deemed trust under the PBSA, any claim in respect of breach of fiduciary duty, and any future charge that might arise under sections 81.5 and 81.6 of the Bankruptcy and Insolvency Act (Canada).

The Catalyst Salaried Employees and Pensioners Committee (the “CSE&P Committee”) brought an application seeking an order allowing it to make representations on behalf of all Canadian employed or resident persons. The CSE&P Committee submitted that the Court should approach the application as a hearing *de novo* of the representation issue, despite having recognized the RSEA as representative in its February 7th order. The court was not persuaded that the CSE&P should be designated as the authorized representative of the beneficiaries of the DB plans. The court found that the current pensioners had the most pressing and immediate interest in the future of the DB plans, and that a majority of such pensioners wished to have RSEA continue to represent their interests.

The application was allowed in part, however, since the Court agreed that the group which the RSEA was authorized to represent was inadequately defined in the February 7th order. “Pension beneficiaries of the Company's Salaried Plan” did not capture all persons with a direct interest in the DB plans. The definition was therefore amended to encompass “plan former members, persons entitled to or in receipt of survivor benefits and designated beneficiaries of former members.”

(iii) **White Birch Paper Holding Company (Arrangement relatif à), 2012 QCCS 1679**

The Quebec Superior Court recently rendered a decision which is of interest to lenders. This decision discusses the possible application of the Ontario Court of Appeal decision in Indalex Limited (Re) to defined benefit pension plans registered in Quebec. In Indalex, it was decided, amongst other things, that the deemed trust provisions found in the PBA applied to the deficit of a wound up defined benefit pension plan and that in the circumstances of that case the assets deemed to be held in trust were not available to a
party who had paid out the debtor-in-possession ("DIP") lenders pursuant to a guarantee.

On April 20th, 2011, Justice Mongeon of the Quebec Superior Court rendered a decision in the context of the plan of arrangement with respect to White Birch Paper Holding Company ("White Birch"), an enterprise that filed procedures under the CCAA. In this decision, the Court discussed the scope and possible application of the deemed trust provisions found at Section 49 of the SPPA. Section 49 of the SPPA reads as follows:

49. Until contributions and accrued interest are paid into the pension fund or to the insurer, they are deemed to be held in trust by the employer, whether or not the latter has kept them separate from his property.

The initial order approved by the Court on February 24, 2010 suspended the payment of any past service contribution to the defined benefit pension plans maintained by the relevant companies and also provided that none of the companies, partnerships or directors involved would have any obligations as a result of the failure to make any contributions other than current service cost contributions. Both the union representing a group of White Birch employees and 2 groups of retirees asked the Court to review the initial order with respect to the contributions to be paid into the pension plans and submitted arguments to the Court to the effect that the deemed trust provisions found in the SPPA created a distinct patrimony that was not available to the other debtors.

The union and the group of retirees both referred to Indalex in support of their position. They also submitted that the deemed trust provisions under the PBA and the SPPA had the same objective, namely the protection of plan members’ benefits.

The Court rejected the arguments submitted by the union and the retirees and concluded that the initial order should not be modified. The Court’s findings can be summarized as follows:
1. The deemed trust under Section 49 of the SPPA, if it was found to exist, would cover only accrued and unpaid current service and special contributions, plus interest;

2. *Indalex* does not apply in Quebec because, among others:
   - the common law trust and the civil law "fiducies" are different;
   - under the SPPA, the employer does not administer the pension plan and accordingly has no fiduciary duty;
   - there can, accordingly, be no constructive trust created because of a failure by the employer to fulfill its legal obligations towards the plan members and beneficiaries;
   - in any event, the concept of “constructive trust” does not exist in civil law;

3. The deemed trust created under Section 49 of the SPPA cannot be characterized as a “fiducie” as defined in the Civil Code and is accordingly not a valid trust;

4. Even though one came to the conclusion that said deemed trust is a valid trust, it would not apply in the context of a restructuring under the CCAA;

5. A deemed trust could only apply in the context of a restructuring under the CCAA if Section 37 of the CCAA referred to it specifically, which is not the case for the deemed trust created under Section 49 of the SPPA.

The Court also refers to the "tardiness" of the representations made by the union and the retirees who did not raise this issue in a timely manner, according to the Court. The Court also mentions that the DIP financing was provided on the basis that only current service contributions would be paid and that no other trust would be recognized in respect of the various relevant companies’ assets. The Court concludes that said financing would not have been granted if the special contributions payable in respect of
the pension plans had benefited from a super-priority and thus be excluded from the companies’ patrimony. In the Court's opinion, it would accordingly be inappropriate to modify the previous orders in a way that would negatively affect the rights of the DIP lender.

This decision is definitely reassuring for creditors, as the Court analyzes very thoroughly the various arguments raised by the parties (the decision is 77 pages long). The Court’s conclusion with respect to the non existence of a deemed trust in civil law is not surprising (there are other decisions to the same effect rendered in different situations) but, in our view, is not totally satisfactory. As for the scope of the deemed trust created under Section 49 of the SPPA, it was not discussed by the Court as the retirees and the union limited their claim to accrued and unpaid special contributions.

It remains to be seen if the union and the group of employees will appeal this decision and if the Court’s reasoning will be affected by the decision to be rendered by the Supreme Court of Canada in Indalex.

(e) Family Law / Designated Beneficiaries

(i) Briere v. Saint-Pierre, 2012 ONSC 421

Briere brought a motion to request access to his own LIRA due to financial hardship. The respondent, Saint-Pierre, sought an order requiring Briere to pay Saint-Pierre a lump sum amount out of the LIRA in satisfaction of Briere’s spousal support obligation. Briere’s motion was dismissed and Saint-Pierre’s motion was granted.

After cohabitating for 24 years, Briere and Saint-Pierre separated in February 2007. In exchange for not pursuing a claim for unjust enrichment, Saint-Pierre agreed to receive monthly spousal support payments from Briere. In 2009, it was ordered, on consent, that Briere pay Saint-Pierre $2,000 per month prior to March 1, 2009 and $1,900 for each month thereafter. As of November 2011, Briere was $46,860 in arrears. In 2009, Briere terminated his employment and transferred his pension entitlement to a LIRA.
Briere did not disclose this information to Saint-Pierre, nor did he provide notice to Saint-Pierre of this motion to access his locked-in funds.

The Ontario Superior Court found that due to Briere’s pattern of behaviour, there was a real risk that Saint-Pierre would not receive periodic support. As such, the Court found that a lump sum award for spousal support was appropriate in these circumstances. In support of its authority to order a lump sum payment of spousal support from a LIRA, the Court cited *Belton v. Belton*, 2010 ONSC 2400. The Court in *Belton* considered whether such an order would contravene section 51 of the PBA which limits the amount of pension that can be transferred to a spouse to 50% of the pension. *Belton* confirmed that section 51 of the PBA deals with equalization of property and is silent on support. As a result, the Court is not prevented from ordering one-half of the pension to be transferred to satisfy property claims, with the remaining one-half transferred in satisfaction of a support obligation.


Mr. Kopp brought a motion to terminate his spousal support obligation, based on a re-calculation of his post-retirement income that excluded his pension income. The motion was dismissed.

Mr. Kopp and Ms. Kopp separated in 2005 after 29 years of marriage. Mr. Kopp’s pension was included in the division of property calculation. The initial amount of spousal support granted to Ms. Kopp was based on Mr. Kopp’s income from part time and full time employment. Subsequently, Mr. Kopp asked for and received a reduction in the monthly spousal support amount, citing an intention to quit the part time job for health reasons. In fact, Mr. Kopp took early retirement from his full time job at age 56, alleging health reasons, and kept his part time position. Mr. Kopp argued that the post-retirement income calculation should exclude his pension because the pension had already been considered at the time the familial assets were divided. Based on his income from the part-time job, Mr. Kopp argued he no longer owed spousal support.
Mr. Kopp and Ms. Kopp’s separation agreement specifically contemplated retirement as a material change in circumstances that would provide Mr. Kopp with a right to apply for a reduction in spousal support. However, the separation agreement clearly stated that early retirement would only give rise to an automatic reduction in spousal support if it was taken because of health reasons. The Court rejected Mr. Kopp’s assertion that he retired early for health reasons and found that he quit his full time job voluntarily. Given all the relevant facts, the Court found that Ms. Kopp was entitled to an unchanged level of spousal support, calculated by including the husband’s pension income. Mr. Kopp was free to take early retirement, but he was not free to unilaterally impose the consequences of that choice on Ms. Kopp.

(iii) **Orpin v. Littlechild, 2011 ONSC 7695**

This was an application by Louise Orpin, the estate trustee, for the opinion, advice or direction of the court for determination of rights under the will of Frederick Littlechild with respect to an RRSP.

In the years prior to his death, Mr. Littlechild made a series of changes to the will and to the designated beneficiary of his RRSP. Mr. Littlechild executed a will in 2005 in which he designated Ms. Orpin as the beneficiary of his estate and his RRSP. In 2009, Mr. Littlechild transferred his RRSP from TD Waterhouse to London Life Insurance Company (“London Life”) and designated Ms. Orpin as the beneficiary of the RRSP with London Life. Mr. Littlechild executed another will on March 14, 2011 in which he left his estate to his sons. The following day, he changed the beneficiary designation of his RRSP with London Life to be his sons. On March 25, 2011, Mr. Littlechild executed what turned out to be his final will and left his estate to Ms. Orpin. There was no change in the beneficiary designation for the RRSP with London Life after March 25, 2011. Mr. Littlechild died on April 5, 2011.

Mr. Littlechild’s will from March 25, 2011 included a general reference to his investments, leaving Ms. Orpin “all money ... in any registered savings plan, registered
retirement saving fund, registered pension plan, registered investment fund or any other similar device.” The question before the Court was whether this statement included the RRSP with London Life or whether the beneficiary designation prevailed.

First, the Court determined whether the RRSP with London Life was properly characterized as an RRSP or whether it should be treated as an insurance policy. Ontario’s Succession Law Reform Act typically applies to RRSPs, whereas an insurance policy is subject to the Insurance Act (Canada). The Court found that due to the structure of Mr. Littlechild’s RRSP with London Life, the product was a segregated fund policy based on the life of the deceased and was correctly categorized as an insurance contract, despite it also qualifying as an RRSP.

Based on this categorization, the court found that the Insurance Act applied to Mr. Littlechild’s RRSP with London Life. Section 190 of the Insurance Act provides that the insured may alter or revoke the designation of a beneficiary by a “declaration” which is defined under section 171 of the Insurance Act as an “instrument that identifies the contract”. The definition of “instrument” includes a will. The question facing the Court was whether the language used in Mr. Littlechild’s March 25, 2011 will included the RRSP with London Life, despite the absence of a specific reference to that policy.

The Court found that, although the specific words “insurance policy” were not used, the reference in the March 25, 2011 will to a registered retirement savings plan was crucial because the insurance policy in question also qualified as a registered retirement savings plan. The Court found that the March 25, 2011 will should be construed as an instrument identifying the insurance policy and, accordingly, held that Ms. Orpin was the appropriate beneficiary.
(f) Partial Wind-Ups


Mr. Boys requested a hearing with the Ontario Financial Services Tribunal (“FST”) to review a notice of intended decision (“NOID”) issued by the Superintendent. The NOID indicated that the Superintendent intended to refuse to make the order requested by the applicant to have his pension entitlement under the Pension Plan for Executives of Shoppers Drug Mart Inc. (the “Shoppers Plan”) treated as a deferred pension. The FST granted Mr. Boys’ request and determined he was entitled to a deferred pension.

On February 4, 2000, Shoppers Drug Mart Corporation (“Shoppers”) was established and Shoppers took over the Shoppers Drug Mart business previously carried on by Imasco Ltd. The Shoppers Plan was established as a successor plan to the Imperial Tobacco Corporate Pension Plan (the “Imasco Plan”). There was no asset transfer, but pursuant to a “wraparound agreement”, the Shoppers Plan was designed to provide benefits substantially comparable in the aggregate to the Imasco Plan. Members were told that “Your total benefit from the [Shoppers Plan] and the [Imasco Plan] will equal the pension you would have received if you had stayed in the [Imasco Plan] for your entire career with Shoppers.” As a result of this corporate transaction, Mr. Boys ceased to be a member of the Imasco Plan and became a member of the Shoppers Plan.

Mr. Boys was terminated from his position with Shoppers on February 11, 2000. Mr. Boys’ termination was eight days after the corporate transaction described above. Since Mr. Boys only belonged to the Shoppers Plan for eight days, his pension entitlement under the Shoppers Plan qualified as a “small pension” under the PBA. Shoppers required Mr. Boys to commute and transfer his small pension out of the Shoppers Plan, despite Mr. Boys’ preference to keep it as a deferred pension.

Subsequent to Mr. Boys’ termination, Shoppers agreed to partially wind-up the Shoppers Plan (the “Partial Wind-Up”). As a result of the Partial Wind-Up, Mr. Boys
became entitled to grow-in benefits of $89,087. Mr. Boys wished to have this money treated as a deferred pension. Although this amount was above the small pension threshold, Shoppers insisted that Mr. Boys transfer out the lump sum because Shoppers argued that it must be treated in the same manner as his original payout. Shoppers’ argument was supported by a Canada Revenue Agency (“CRA”) ruling it received with respect to a previous issue in which CRA took the position that Shoppers was prohibited from paying out grow-in benefits as additional lifetime retirement benefits where the initial entitlement had been transferred out of the plan.

The FST found that Shoppers did not violate Mr. Boys’ rights in 2002 with respect to the required commutation and transfer of the small pension. However, as events transpired Mr. Boys’ rights changed and after the Partial Wind-Up was declared his entitlement was no longer a “small pension”. Under the new circumstances, the PBA provided Mr. Boys with the right to insist his entitlement be treated as a deferred pension.

With respect to the issue of whether there is a conflict between the PBA and the ITA to permit such a remedy, the FST remained seized of this issue of remedy in case Shoppers determines that it requires approval to carry out the FST’s order and such approval is not forthcoming.

(ii)  

*Lacroix v. Canada Mortgage and Housing Corporation, 2012 ONCA 243*

This class action appeal concerned the scope of the court’s remedial authority under subsection 8(11) of the federal PBSA. The question was whether that provision gave the Court the power to order a partial termination of a pension plan.

The Canada Mortgage and Housing Corporation (“CMHC”) laid off half of its employees between 1995 and 2000. After it downsized, CMHC used the surplus in its pension plan to enhance benefits of plan members. Former employees who had elected to leave the plan when they were laid off were not eligible for the enhanced benefits. These former employees instituted a class action against CMHC claiming, among other things, that
CMHC contravened the conflict of interest provisions in the PBSA by failing to partially terminate its pension plan. As a remedy, the plaintiffs asked the Court to order a partial termination.

The motions judge declined to certify the common issues and held that the issues relating to the partial termination claim did not give rise to a viable cause of action. The Divisional Court dismissed the plaintiff’s appeal, and also held that a court has no jurisdiction to order CMHC to effect a partial termination of its pension plan or to award damages based on a partial termination. The plaintiffs’ appeal to the Ontario Court of Appeal focussed primarily on this issue.

The Ontario Court of Appeal reviewed recent jurisprudence regarding a court’s power to make orders under the PBSA. The Court also examined sections 8 and 29 of the PBSA in light of the scheme and object of the act and concluded that it was plain and obvious that Parliament did not intend to give courts the authority to order employers to partially terminate their pension plans. Under section 29 of the PBSA, the Superintendent or the administrator may terminate a pension plan. Two aspects of section 29 were important to the court’s analysis: first, Parliament gave supervisory authority over plan terminations to the Superintendent, which has expertise in complex and technical pensions matters; and second, Parliament did not give plan members the right to initiate termination. Parliament thus could not have intended that courts, which have less specialized expertise than the Superintendent, would have jurisdiction to terminate a plan at the instance of employees.

Since the court did not have jurisdiction to order a partial termination, the plaintiffs’ claim did not disclose a cause of action, and the claim could not be certified. Moreover, since the court had no jurisdiction to order a partial termination of the pension plan, it also had no jurisdiction to award damages based on a failure to declare a partial termination. The Court of Appeal also upheld the motion judge’s decision not to award the appellants’ costs out of the CMHC pension fund, as they did not meet the test from Nolan v. Kerry (2009 SCC 39).
(g) Disability Benefits

(i) LeBlanc v. Atlantic Blue Cross Care, 2011 NBQB 348

This decision considered whether Atlantic Blue Cross Care ("Blue Cross") was a proper defendant in LeBlanc’s action for entitlement to long term disability benefits under the Long Term Disability Plan for the Employees of the Province of New Brunswick (the “Plan”). The Plan is self-insured by the Province of New Brunswick and Blue Cross provides certain administrative services pursuant to an administrative services only contract (the “ASO Contract”). The Court found Blue Cross to be a proper defendant in the case.

LeBlanc became disabled and ceased working in September 2002. She received disability benefits from the Plan until December 2004 when Blue Cross determined she was not disabled and discontinued payments. LeBlanc brought action against Blue Cross to reinstate her disability benefits.

The Province of New Brunswick established the Standing Committee on Insured Benefits (the “Committee”) to manage the Plan. The ASO Contract was between Blue Cross and the Committee. The terms of the ASO Contract provided that Blue Cross shall adjudicate claims, ascertain the amount payable and issue benefits. Blue Cross had the right to recover any overpayment. Blue Cross agreed in the ASO Contract to perform its services and obligations in good faith and in a similar manner as if the benefit claims were in an insurance contract rather than an administrative services agreement. The Committee retained liability for the funding of the benefits. Blue Cross’ position was that it was retained to provide administrative services only and LeBlanc should have sued the Committee or the Province of New Brunswick.

The Court rejected Blue Cross’ position. The Court found that the facts in this case were sufficiently different from those in the very limited case law available that considered administrative services only contracts. The Court found that LeBlanc had an action against Blue Cross because the ASO Contract required Blue Cross to administer
the ASO Contract as if it were an insurance contract not an administrative services only contract and to pay all claims out of a Blue Cross bank account with Blue Cross cheques. Blue Cross was the party with whom Leblanc had all her dealings and Blue Cross determined that the disability benefits should be terminated.

(ii) **White v. Manulife Insurance Company, 2011 BCSC 1615**

Manulife Insurance Company (“Manulife”) applied to the Court to dismiss the plaintiff’s action regarding entitlement to long term disability benefits on the ground that the limitation period had passed. The application was dismissed.

White was insured for long-term disability benefits (“LTD”) under a Group Benefit Policy of Insurance (the “Policy”) issued by Manulife to White’s employer. Under the terms of the Policy, Manulife could request additional medical information as proof of disability. The limitation period for bringing actions under the Policy was two years after the last day on which proof of a claim would be accepted under the terms of the Policy. Manulife could request an independent medical examination (“IME”), the results of which would be used to determine eligibility for benefits.

White asserted that she was disabled from performing the regular duties of her job on April 7, 2006. White’s application for LTD benefits was initially rejected in July 2007. When she requested a further review, Manulife scheduled an IME in March 2008, and required a second IME which was scheduled for May 2009. Manulife upheld the original denial based on the second IME report with a note that White could appeal the decision within 60 days. White commenced this action in August 2009.

Manulife argued that the Policy’s limitation period for launching an action had expired. Manulife argued that the required proof of claim mentioned in the Policy’s limitation period was limited to the initial assessment. The last day such assessment could be submitted was 180 days after the end of the qualifying period, at which point the clock on the limitation period started running, hitting the two year mark in January 2009.
The Court found that a proof of claim as mentioned in the Policy regarding limitation periods would include the result of an IME. Adopting Manulife’s position would lead to the absurd conclusion that Manulife had the right to ask for an IME without suspending the limitation period, which would result in the limitation period expiring while the plaintiff was still undergoing medical examinations that were required to determine her eligibility. The IMEs were part of the proof of claim initially required for determining eligibility, and not an “appeal” of the initial decision. As such, the limitation period only began to run after the second IME was received by Manulife.

(h) Miscellaneous

(i) *Ratansi et al v. Superintendent of Financial Services and Ontario Pension Board, FST File No. P-0473-2011*

The Applicants were former Ontario public servants whose jobs with the Ministry of Revenue were transferred to the CRA due to the implementation of the Harmonized Sales Tax. As a result, the Applicants would no longer be Ontario public servants, and would no longer be considered “mandatory members” under the terms of the Public Service Pension Plan (the “Plan”). The Applicants sought confirmation from the administrator (the Ontario Pension Board) and the Superintendent that they could commence receiving their pensions upon leaving the Ontario public service. When their requests were rejected, the Applicants filed a request for hearing with the FST.

The issue before the FST was stated as follows: “In view of the application of section 80 of the PBA, can the Applicants who are eligible for an early unreduced pension by February 29, 2012 start receiving pensions from the Plan effective March 1, 2012 under the terms of the Plan and/or PBA?”. Section 80 of the PBA sets out the scheme for dealing with the pension rights of employees in “sale of business” scenarios. Subsection 80(3) provides that where a sale occurs, “the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.” The administrator and the
Superintendent argued that “deemed employment” under s.80(3) operates as a statutory bar to the Applicants’ claim to commence a pension. The Applicants relied on the terms of the Plan, which, they argued, were not affected by s.80(3) of the PBA.

The FST acknowledged that it had taken an inconsistent approach in previous decisions on successor employer scenarios, and decided to take a “fresh look” at s.80(3) and its role in the scheme of s.80 and the PBA as a whole. The FST found that section 80 is a protective provision designed to enhance employees’ pension rights in a sale of business situation. Since pension plans are often drafted such that termination of employment results in automatic termination of active plan membership, s.80(3) prevents administrators from expelling employees from pension plans when they lose their employment as the result of a sale. However, the FST found that nothing in s.80(3) prevents employees from withdrawing from the former employer’s plan on their own volition and in accordance with the plan terms after their employment has been de facto terminated. The FST found that section 80 does not require employees to give up rights they would otherwise have in successorship situations in exchange for the rights conferred by section 80.

In response to the argument that an employee could not continue to be employed and collect a pension at the same time, the FST noted that “the PBA itself does not reflect any automatic equation between employment status and plan membership.” Moreover, s.80(3) specifies that predecessor employment is deemed not terminated only for the purposes of the PBA, not for the purposes of a particular plan.

In this case, clause 3(c) of the Plan provided that a non-mandatory member could file a written election indicating that he or she no longer wished to be a member of the Plan. Since the Applicants were no longer Ontario public servants, they were no longer mandatory Plan members, and were entitled to elect to cease membership even if their employment status was deemed to continue by virtue of s.80(3).
The FST clarified that its decision applied only to those Applicants who qualified for unreduced pensions effective March 1, 2012. Those who were not immediately eligible would need to have their claims addressed in due course.

(ii) *Telecommunication Employees Assn. of Manitoba Inc. v. Manitoba Telecom Services Inc.*, 2012 MBCA 13

Manitoba Telecom Services (“MTS”) appealed a trial court decision which ordered MTS to pay $43,340,000 to its employees and retirees for breaching the Memorandum of Agreement (“MOA”) that was entered into during the privatization process for MTS. MTS was successful in its appeal and the trial judge’s order was set aside.

Effective January 1, 1997, MTS ceased to be a Crown corporation and was continued as a publicly traded corporation under the Manitoba *Telephone Systems Reorganization and Consequential Amendments Act* (the “Reorg Act”). Pursuant to the Reorg Act, the employees and retirees of MTS were required to cease participating in the statutory pension plan governed by *The Civil Service Superannuation Act* (the “Prior Plan”) and commence participation in a new pension plan sponsored by MTS (the “New Plan”). A transfer of the assets and liabilities related to the employees and retirees of MTS was completed. Based on the funding model for the Prior Plan, approximately $43,340,000 in assets was transferred that related to actuarial surplus derived from employee contributions to the Prior Plan (the “Initial Surplus”).

Section 15(2) of the Reorg Act required that the New Plan provide “benefits” which, on the implementation date, were equivalent to the “pension benefits” under the Prior Plan. Before the Reorg Act was passed by the Manitoba legislature, the employees of MTS and MTS agreed upon a variety of items in the MOA, including matters pertaining to governance and the Initial Surplus. The Reorg Act was amended accordingly. The Reorg Act was amended to provide that nothing in Section 15 of the Reorg Act was to be interpreted as nullifying the effect of the MOA. Section 15(2) of the Reorg Act was not amended as a result of the MOA.
The trial judge found that “benefits” under paragraph 15(2)(a) of the Reorg Act included the use of surplus, both initial and ongoing, as well as governance. The trial judge essentially found that the Reorg Act required the terms of the New Plan to be equivalent to the terms of the Prior Plan. The Court of Appeal rejected this position, and applied basic principles of statutory interpretation that requires the provisions of the legislation to be read in their entire context and in their grammatical and ordinary sense. Further, the Court of Appeal noted that legislative provisions should be read in a manner that is consistent with the terms of other statutes, especially when the statutes are related. In this case, “pension benefits” was defined in The Civil Service Superannuation Act (Manitoba) as the “aggregate monthly or other periodic payments of superannuation allowance to which an employee is or may become entitled under this Act upon retirement ...” and was relevant for interpreting the Reorg Act. The Court of Appeal found that the definition of “pension benefits” under the Reorg Act refers to the pension payments an employee is entitled to receive, and not to other rights that the employee may have under the terms of a pension plan (i.e. “pension benefits” does not include issues pertaining to surplus or governance).

Section 3 of the MOA stated that the Initial Surplus would be allocated to the New Plan’s trust fund to fund future cost of living adjustments. The Trial Judge found that MTS had used the Initial Surplus when it took a contribution holiday. The Manitoba Court of Appeal disagreed. The Court of Appeal found that MTS had allocated the Initial Surplus to the New Plan’s trust fund as required by the MOA and that subsequently taking a contribution holiday was not a breach of the MOA.

The Telecommunication Employees Association of Manitoba Inc. - International Federation of Professional Engineers Local 161 applied to the Supreme Court of Canada for leave to appeal on April 10, 2012.
Canada (M.N.R.) v. Ontario, 2011 FCA 314

The Minister of National Revenue (the “Minister”) appealed a decision of the Tax Court of Canada (“TCC”), in which the TCC found that working for the Ontario Judicial Application Board (“Board”) did not constitute engaging in pensionable employment under the Canada Pension Plan. The appeal was allowed.

The mandate of the Board is for its members to recruit, interview and recommend individuals to the Ontario Attorney General who are qualified to be appointed judges of the Ontario Court of Justice. Members of the Board are not employees but holders of an office and their remuneration consists of receiving a fixed amount for each day served in a year. The total annual remuneration for a member of the Board cannot be calculated at the beginning of the year, since it is not possible to know how many days each Board member will serve in a given year. The TCC found that this arrangement did not constitute pensionable employment because it was not “fixed or ascertainable”.

The question before the Federal Court of Appeal (“FCA”) was whether the phrase “fixed or ascertainable” in Section 2 of the Canada Pension Plan included the remuneration arrangement for members of the Board. The FCA found that, within the relevant statutory context, the phrase “fixed and ascertainable” does not require an advance determination of remuneration in a particular year. A legal entitlement to a per diem rate of remuneration is sufficiently “fixed and ascertainable” to meet the statutory test.

Industrial Alliance Insurance and Financial Services Inc.

On August 29, 2011, charges were laid for 6 counts of failing to notify the Superintendent that contributions were not remitted to the Pension Plan for the Employees of Colonial Cookies Corporation. After appearances on September 29, 2011, October 27, 2011, November 24, 2011, and December 8, 2011, Industrial Alliance Insurance pleaded guilty to 1 count and a fine of $60,000 plus 25% victim surcharge was imposed. The remaining five counts were withdrawn.
The plaintiffs were pension funds that had launched a class action against Northern Trust (“NT”) for breach of fiduciary duty and breach of contract, arising from their investment in NT’s Securities Lending Program (“SLP”). Through SLP, NT arranged loans of securities owned by its customers to preapproved borrowers, in return for a pledge of collateral equal to 102% of the market value of the loaned securities in cash. The collateral was then invested in commingled pools operated by NT.

The subject of the present decision was the third party complaint brought by NT asserting claims for contribution and equitable and implied indemnification against the board of trustees of the pension plans. The court granted the plaintiffs’ motion to dismiss the third party complaint.

NT’s main argument for the third party complaint against the boards of the pension plans was the allegation that “it was the boards that chose to participate in the SLP, selected their own investment guidelines, knew precisely how defendants were implementing the guidelines and made the affirmative decision to stay the course.” NT therefore was arguing that any harm allegedly suffered by the plans was caused by the boards and not NT. The court, having interpreted NT’s position as such, decided that a third party claim was not the proper venue for advancing this theory, which was in fact a defense to the class action.

Specifically regarding the claim of contribution, the court found that any duty the board may owe to the plaintiff plans arose from the board members’ position as trustees, whereas the duty owed by NT to the plans arose from their contractual relationship. As such, there could be no suggestion of a joint obligation by the boards and NT to the plaintiff plans.
Pension Plan Issues in Corporate Transactions

Presented by:
Jeffrey Sommers

May 16, 2012

Overview

• Types of transactions
• Impact of unproclaimed provisions of the Pension Benefits Act (Ontario) (PBA)
• Income tax considerations

Overview (cont’d)

• Focus on transactions where Seller maintains one or more registered pension plans
• Focus on plans registered under the PBA
Types of Transactions

• Share purchase/sale
  – normally Seller’s plans move with the shares
  – however, may need to carve employees out of a plan sponsored by an affiliate of Seller (works much like an asset purchase/sale from a pension perspective)

• Merger/amalgamation
  – may involve post-transaction integration of plans

Types of Transactions (cont’d)

• Asset purchase/sale
  – buyer may establish successor plan(s)
    • future service only (i.e., no asset transfer)
    • transfer assets and liabilities to successor plan, or
    • provide a “wrap-around” benefit
  – assignment and assumption of Seller’s plan(s)
  – buyer does not offer a pension plan

Unproclaimed PBA Provisions

• Bill 236 and Bill 120
  – s. 79.2 – overarching rules for asset transfers
  – s. 80 – sale of a business
  – s. 81 – adoption of a new plan

• Ontario 2012 budget announcements
  – partial wind-up, grow-in and immediate vesting rules to change effective July 1, 2012
  – draft asset transfer regulations expected later this spring
Unproclaimed Deeming Provisions

- s. 79.2(10) – transferred assets “cease to be identified as assets of the original pension plan”
- s. 79.2(11) – transferring members have no further claim against the original pension plan
- s. 79.2(14) – discharge for exporting plan administrator where transfer made on the consent of the members

Unproclaimed Provisions: Superintendent’s Approval

- Under new s. 80, the Superintendent shall approve an asset transfer where:
  1. Transfer agreement between employers
  2. Member consent obtained (if required by agreement)
  3. Agreement on valuation of assets to be transferred
  4. If benefits differ under the plans, commuted value must be the same, determined as of the effective date
  5. If the original plan has a surplus as of effective date, must include portion of surplus in the asset transfer
  6. Any criteria prescribed by regulations (unknown at this time)
- Appears to deal with Transamerica decision

Expected Effect of Unproclaimed PBA Provisions

- Strategic impact on Buyers and Sellers of:
  - elimination of partial wind-ups;
  - expanded grow-in benefits; and
  - immediate vesting
- Effect of select asset transfer provisions:
  - deeming provisions
  - Superintendent approval requirements
Income Tax Considerations

- Tax issues arising in certain corporate transactions
  - asset deal where Seller’s plan is assigned to Buyer
    - ability of Buyer to contribute in respect of former members
    - dealt with by proposed s. 147.2(8) of the ITA
  - share deal where transferred employees’ pension liabilities left behind in a plan of Target’s affiliate
    - ability of Target’s affiliate to contribute in respect of transferred employees not explicitly addressed in s.147.2(8)

Questions?
Pension Plan Considerations in Corporate Transactions

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>1. Scope</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>2. Primer of Basic Transactions</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>(a) Share Purchase or Sale</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>(b) Asset Purchase or Sale</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>(c) Merger or Amalgamation</td>
<td>4</td>
</tr>
<tr>
<td>II.</td>
<td>GENERAL ISSUES RELATING TO PENSION ASSETS AND LIABILITIES</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>1. Share Transactions</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>2. Mergers and Amalgamations</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td>3. Asset Transactions</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>(a) Where There is no “Successor” Pension Plan</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>(b) Where There is a “Successor” Pension Plan</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>(c) Collective Agreement Issues</td>
<td>18</td>
</tr>
<tr>
<td>III.</td>
<td>STRATEGIES FOR DEALING WITH PENSION ASSETS AND LIABILITIES IN ASSET TRANSACTIONS</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>1. Buyer Establishes Plan for Future Service Only</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>2. Wrap Around Arrangements</td>
<td>23</td>
</tr>
<tr>
<td></td>
<td>3. Transfer of Assets and Liabilities to a “Successor” Plan</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>4. Buyer Assumes Plan Assets and Liabilities</td>
<td>29</td>
</tr>
<tr>
<td>IV.</td>
<td>FUNDING CONSIDERATIONS: IMPACT ON PURCHASE PRICE</td>
<td>31</td>
</tr>
<tr>
<td>V.</td>
<td>SETTLING THE AGREEMENT OF PURCHASE AND SALE</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>1. Due Diligence Review</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>2. Information Requirements of Buyer</td>
<td>34</td>
</tr>
<tr>
<td></td>
<td>3. Information Requirements of Seller</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>4. Covenants, Conditions, Representations and Warranties</td>
<td>37</td>
</tr>
<tr>
<td>VI.</td>
<td>CONCLUSIONS</td>
<td>38</td>
</tr>
</tbody>
</table>

Appendix A – Due Diligence Checklist

Appendix B – Representations and Warranties
Pension Plan Considerations in Corporate Transactions

Jeffrey Sommers, Blake, Cassels & Graydon LLP

I. INTRODUCTION

1. Scope

The purpose of this paper is to identify the major pension law issues that should be addressed when considering the purchase, sale or merger of a business.

This paper focuses on corporations and businesses that are subject to Ontario law and pension plans that are subject to the Pension Benefits Act (Ontario) (the “PBA”). Many of the issues discussed in this paper (but not all) will be applicable to pension plans which are subject to pension benefits legislation in other jurisdictions.

Ontario is currently in a period of ongoing pension reform and thus pension considerations relating to business transactions are continually evolving. In particular, Bill 236 and Bill 120 (jointly, the “Pension Reform Legislation”), which received Royal Assent on May 18, 2010 and December 8, 2010 respectively, have introduced substantial changes to the PBA. While certain provisions of the Pension Reform Legislation came into force as of the date of Royal Assent, other provisions will come into effect on specified dates or upon proclamation of the Lieutenant Governor and the Ministry of Finance has made it clear that the new provisions will be implemented on a staggered basis. Moreover, as many of the associated regulations have yet to be released, the intricacies of the legislation are somewhat unclear at this time. As such, in the context of corporate transactions, Ontario's pension law is in a state where a mixture of pre- and post- Pension Reform Legislation rules apply, and where it is

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1 S.O. 2010, c. 9.
expected that, in due course, the pre-Pension Reform Legislation rules will be replaced by their currently un-proclaimed counterparts.

As a consequence of the state of Ontario’s pension law, this paper will discuss pension issues in transactions under the current state of the law as well as the anticipated impact of forthcoming changes.

2. **Primer of Basic Transactions**

It is useful to briefly review different types of business transactions in order to understand the consequential impact on pension plans. This is not always obvious. For example, in the case of a share transaction it may not be practical to continue with the existing pension plan and pension fund structure which is applicable to the target company. The target company employees may participate in a larger pension plan which includes employees that have nothing to do with the target company. In this simple example, it will be necessary for the buyer to negotiate a separate pension arrangement in order to deal with the target company’s workforce. Even in the case where the target company sponsors its own stand alone pension plans, the target company’s pension plans may be invested in a private pooled fund (e.g., a master trust) established by the seller as an investment vehicle for numerous pension plans including those sponsored by the target company. In this case, it will likely be necessary to extricate the investment of the target company’s pension plan from the master trust and to establish a new pension fund investment structure.

(a) **Share Purchase or Sale**

In a share purchase or sale, (which applies to incorporated businesses only), the buyer acquires the shares of the employer corporation on an “as is” basis. In purchasing shares, the buyer accepts all of the corporation’s pension liabilities and responsibilities. For the corporation’s employees, there is no change in employer. Therefore, as part of its due diligence, the buyer needs to obtain as much information on the corporation’s pension plan(s) as possible and will seek as many seller guarantees (i.e., “representations and warranties”) concerning the pre-purchase
administration and funding of the pension arrangements as it can obtain. The seller should be prepared to disclose to the buyer as much information about its pension plan(s) as it can reasonably provide. However, the seller must be careful to limit the representations and warranties it gives concerning the pre-purchase administration and funding of the pension plan, especially if it lacks actual knowledge of some of the plan’s history. This issue is discussed in more detail in Part V below.

(b) Asset Purchase or Sale

In an asset purchase or sale transaction (which can apply to both incorporated and unincorporated businesses), the buyer acquires some or all of the assets, and usually some or all of the employees, of the seller’s business. Subject to any collective agreement covering affected employees, which generally would be binding on the buyer as a “successor employer”, the buyer and seller are free to negotiate which, if any, pension liabilities and corresponding assets will be assigned to the buyer and which, if any, will remain with the seller. For non-unionized employees of the seller who “transfer” to employment with the buyer as part of an asset transaction, there is a termination of employment with seller and an offer of employment made by buyer which is accepted by the employee.

Typically, if a successor pension plan is provided, the transferred employees will be treated as if their service had not been interrupted for purposes of plan membership and vesting. In fact, this is a requirement under the PBA. Therefore, the buyer needs to obtain as much information as possible about the seller’s pension plan(s), as early in the negotiations as it can, so that it can make an informed decision as to which, if any, pension liabilities and corresponding assets it will assume. If liabilities and assets are to be assumed, the buyer will typically seek as many seller representations and warranties concerning the pre-purchase administration and funding of the pension arrangements as it can negotiate.

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Ontario’s 2012 Budget provided that the government intends to implement immediate vesting effective July 1, 2012.
As with the share transaction, the seller should co-operate as much as reasonably possible with the buyer in providing information concerning the pension plan, but must be careful to limit or word appropriately the representations and warranties it gives concerning the pre-purchase administration and funding of the pension plan, especially where the plan’s history is not entirely known. The seller should also think through its position on what risk, if any, it will face if the purchaser does not establish a registered pension plan in which case, under current PBA provisions, the seller could be required to partially wind up its pension plan as it relates to the “transferred” employees. However, it is expected that, effective July 1, 2012, partial plan wind-ups will be eliminated from the PBA where the effective date of the wind-up would fall on or after that date. The quid pro quo of the elimination of partial plan wind-ups is that immediate vesting will be a requirement and Ontario’s unique grow-in rules will apply to almost all involuntary employment terminations – not only terminations as a result of full or partial plan wind-up. Nevertheless, it is also expected that transitional rules introduced by the Pension Reform Legislation would be proclaimed, which would allow for partial wind-ups where the effective date of such wind-ups is before July 1, 2012.

In the context of an asset sale, the seller will also need to assess its exposure to potential dismissal liabilities if the buyer is unwilling to provide comparable retirement income benefits.

(c) Merger or Amalgamation

In a merger or amalgamation (which, for purposes of this paper, applies to incorporated businesses only), two or more companies are combined to continue as one legal entity. As a general rule, and much like the share transaction, the pension liabilities and responsibilities of the merging companies will continue in the successor corporation. Mergers and amalgamations are documented by written agreements which, especially where two unrelated corporations merge, will contain representations and warranties regarding the pre-merger administration and funding of the relevant pension arrangements. The parties to the transaction should co-operate in providing
each other with information concerning their respective pension plans, but must carefully draft and perhaps limit the representations and warranties, especially where their plan’s history is not entirely known.

II. GENERAL ISSUES RELATING TO PENSION ASSETS AND LIABILITIES

1. Share Transactions

From a pension perspective, a share transaction is frequently (but not always) less complex from a documentation point of view than an asset transaction, but typically requires a more rigorous due diligence review. The major reason for this is that the employer does not change; rather, the buyer is essentially “stepping into the shoes” of seller with respect to the purchased business; hence, the employment contract remains the same.

As the buyer is only buying the shares of the company which represents the purchased business, it usually takes the company “as is” including its pension plan obligations and liabilities. In order to be aware of what obligations are being assumed, as part of its due diligence review, the buyer will want to closely examine all aspects affecting the employment relationship including the following:

- any collective agreements between the purchased company and a union or employees’ association;
- all non-pension benefit programs offered to both unionized and non-unionized employees;
- all bonus and profit sharing schemes;
- all retirement programs, both registered and unregistered (including any golden parachutes, group registered retirement savings plans, registered pension plans, supplementary pension arrangements, etc.);
- lists of employees including their job classifications, salaries and wages;
lists of employees on leaves of absence, disability, etc.

In a share transaction, the buyer generally is not able to pick and choose which employees or which benefit plans (including obligations with respect to terminated or retired employees) will be excluded from the purchase. However, in some cases, the buyer can negotiate to have the seller arrange for the retirement or resignation of certain employees (sometimes senior executives) prior to the closing of the sale and to provide the buyer with an indemnity against any wrongful dismissal claims which might arise as a result of the discharges.

Unless specific provisions are made in the business transaction agreements, all of the pension plan assets and liabilities of the purchased company remain with that company following its sale, including all liability and responsibility for past service of current employees, deferred vested employees, retirees, spouses and beneficiaries of former employees. This means that careful review of pre-purchase administration is required to determine whether the plans have been administered in accordance with their terms, particularly having regard to the language relating to contributions holidays, plan expenses and surplus, whether there are any invalid amendments, whether there are any un-reported or un-approved partial wind ups (particularly in light of the Monsanto case), transfers of assets, plan conversions or amendments and, generally, whether the plan(s) in question are in overall compliance with the PBA and the Income Tax Act (Canada) (the “ITA”).

As noted above, if the acquired company participates in a pension plan maintained by an affiliated company, then specific provisions will be required in the business transaction agreements to deal with accrued pension liabilities and corresponding assets relating to the target company’s employees. In this case, the issues will be very similar to those of an asset transaction, discussed below. It is also possible that the acquired company has its own pension plan which is invested in a master trust or other pooled funding medium in which other pension plans are invested. In this situation, the buyer of the acquired company and the seller will have to negotiate specific provisions to deal with the extrication of the acquired company’s pension plan.
from the seller’s pooled funding medium and the transfer of the acquired company’s pension fund to a new and separate funding medium.

Particularly in the case of a private company in respect of which a non-market based valuation of shares is required, if assets in the company’s pension plan exceed the actuarial liabilities of the plan and the company’s entitlement to the surplus is clearly established, the seller may seek a recognition of the value of this surplus from the buyer through a purchase price increase. If assets in the company’s pension plan are less than the actuarial liabilities of the pension plan, the buyer may seek a recognition of the additional liability from the seller by way of a purchase price reduction. Part IV of this paper goes into more detail concerning the impact of the funded status of a pension plan on the negotiation of the overall business transaction.

Once the purchase has been completed, the buyer may attempt to integrate the purchased company’s existing pension and non-pension benefit plans with its own benefit programs. For example, the buyer may sponsor a single pension plan for its associated corporate group in which it wishes its newest acquisition to also participate. This may prove difficult, with respect to unionized employees, if collective agreements prevent such integration or if the benefits provided by the purchased company’s pension plan are far more generous than those of the buyer’s pension plan. To avoid unforeseen complications, this sort of benefits reorganization should be considered at the initial stages of any transaction, in conjunction with the due diligence review.

Where a parent company is selling the shares of an affiliated company, employees of which participate in a pension plan sponsored by the parent, and the pension obligations relating to the employees of the affiliated company remain an obligation of the parent after the transaction (i.e., there is no pension asset and liability transfer), the parent should be aware of certain tax related issues. In particular, there is an issue as to whether future contributions made by the parent to its pension plan (such as special payments to amortize a funding deficiency in a defined benefit plan) in respect of employees of its former affiliate (which has since been sold to the buyer) would be eligible contributions and permissible contributions under the ITA, assuming
such individuals were never employees or former employees of any employer that continues to participate in the parent’s pension plan. The Department of Finance has proposed adding new subsection 147.2(8) to the ITA which address certain successor employer situations; however, it does not provide explicit guidance in the situation where the parent sells the shares of an affiliate.

2. **Mergers and Amalgamations**

Corporations which merge or amalgamate in accordance with applicable business corporations statutes generally operate within the limits of the applicable statutes with regard to the extent to which corporate assets and liabilities of distinct legal entities are permitted to come together and continue as one. Much like a share transaction, the rights and obligations of merging or amalgamating corporations continue in the successor corporation. However, the pension plans of the merging or amalgamating corporations are not, as a result of the joining of their sponsors, automatically merged. The general rule is that, in the absence of specific provisions to the contrary in the relevant transaction document, the pension plans and pension funds of the merging or amalgamating corporations continue as separate plans and funds within the successor corporation. This makes sense particularly if one remembers that a pension fund is almost always a legally distinct and separate entity from the corporate sponsor of the pension plan and does not, therefore, constitute part of the corporate sponsor’s assets.

As part of the merger or amalgamation proceedings, the pension plans of the merging companies should be reviewed, and amended where necessary. The plans should be assessed in light of the new corporate structure which will emerge after the merger or amalgamation. For example, what was formerly a company may now be a division and references in a plan text to “all employees of the company” may no longer be appropriate. This can be of particular significance in the case of collectively bargained plans since an unintended result of a corporate merger or amalgamation could be that employees in the merged corporation have a right to participate in more than one plan and could acquire legal rights to be covered in a more generous plan than
the plan in which they participated prior to the corporate merger. In addition, it is prudent as part of the merger or amalgamation documentation to expressly provide that the pension plans continue unaffected post-merger or amalgamation.

Following the merger or amalgamation, the successor corporation may wish to merge its pension plans for ease of administration, uniformity of pension benefits among employees and cost reductions. A merger may also be attractive where one of the pre-merger plans is underfunded and the other pre-merger plan contains a substantial actuarial surplus. However, before the merger is undertaken, the successor corporation must first ensure that the plan texts and applicable funding agreements do not themselves prohibit the merger of their funds with those of another plan; that merger is not precluded by the surrounding circumstances; and that adverse consequences will not result if the merger is permitted. The successor corporation must also ensure that the merger complies with the requirements of the regulatory authorities.

Although there have been several cases that examined the ability to effect plan mergers and asset transfers, the decision in *Aegon Canada Inc. and Transamerica Life Canada v. ING Canada Inc.* ("Transamerica") has had the most far reaching implications for pension plans registered in Ontario. In *Transamerica*, the Ontario Court of Appeal concluded that there could be no merger of the assets of two pension plans where trust language applicable to one of the plans required that assets be kept for the members' “exclusive benefit”, and undertakings entered into in accordance with that language required that those assets be maintained separately. The Supreme Court later dismissed the application for leave to appeal. The *Transamerica* decision led to significant changes in the way the Financial Services Commission of Ontario ("FSCO") examines proposed asset transfers, including a stringent requirement for review of all historical plan documentation, including the language in historical funding agreements.

The unproclaimed provisions of the PBA introduced by the Pension Reform Legislation relating to asset transfers, which will be further discussed in the Asset Transactions portion of this paper below, appear likely to change the strict asset transfer requirements applied by FSCO in light of the *Transamerica* decision. However, despite
the likely change in requirements, plan sponsors should ensure they are aware of all the consequences of a plan merger once the new rules come into effect.

The *Transamerica* decision, will be discussed further in this paper as it pertains to pre-transaction due diligence and the negotiation of representations and warranties.

3. **Asset Transactions**

From a pension perspective, the asset transaction can be the most complex of the three types of transactions examined by this paper, both to structure and to document. Unlike the share transaction and mergers or amalgamations, the asset transaction does not automatically result in the assignment of the seller’s or target company’s pension liabilities, and corresponding assets, to the buyer. The general rule in an asset transaction is that, where the business transaction agreement is silent, the pension obligations for affected employees remain with the seller.

Therefore, absent any collective agreement or employment contract forcing the employer to provide a pension plan, the buyer has absolute discretion in determining whether to provide a successor pension plan to affected employees. The discussion below assumes that there is no applicable collective agreement.

**(a) Where There is no “Successor” Pension Plan**

If the buyer does not provide a successor plan for affected employees, their pension liabilities remain with the seller’s pension plan but, by virtue of paragraph 69(1)(f) of the PBA, the Superintendent of Financial Services (the “Superintendent”) currently has the discretion to declare the seller’s pension plan to be wound up, in whole or in part, as a result of the sale. As previously noted, while the PBA currently allows for full and partial wind-ups, it is expected that effective July 1, 2012, partial wind-ups will no longer be permitted.

As a transitional matter, it appears that partial wind-ups will still be permitted if the effective date of the partial wind-up is prior to July 1, 2012 (see the unproclaimed section 77.1 regarding transitional partial wind-up rules). The grounds for such partial
wind-ups are essentially unchanged from the current rules, including the provision which caused the *Monsanto* effect, discussed below.

Currently, the wind-up of a pension plan results in full and immediate vesting of participants without regard to age and service (see subsection 73(1) PBA), and affected employees having age plus service equal to at least 55 may qualify for any benefit enhancements provided under the terms of the plan in respect of early retirement beyond those which would otherwise be available on termination of employment (see sections 74 of the PBA, and *Firestone Canada Inc. v. Ontario Pension Commission* (1990), 1 O.R. (3d) 122). The decision by the Supreme Court of Canada in *Monsanto Canada v. Superintendent of Financial Services* ("*Monsanto*") established that affected members are generally entitled to the same rights and benefits in respect of the surplus on partial wind up that they would have if the plan was fully wound up as of the date of the partial wind up. As such, currently, the PBA partial wind-up obligations can have significant cost implications for a seller where the buyer has not agreed to provide a successor pension plan.

As a result of the elimination of partial wind-ups upon proclamation of the applicable provisions of the Pension Reform Legislation, no partial plan wind-up valuations will be required on a going forward basis, and the Monsanto effect will have been eliminated, as surplus will no longer be required to be distributed in circumstances where partial wind-ups would have previously been ordered. However, as previously noted, two other consequences of partial plan wind-up will apply broadly with potentially significant cost implications for some plan sponsors, that is: (i) grow-in benefits, and (ii) immediate vesting. The Pension Reform Legislation provides that grow-in benefits will apply to all members with age and service totaling at least 55 who are terminated for any reason, except for cause or other reason as prescribed by regulation. Immediate vesting will apply to all benefits, although the amount for small pension payouts will be increased to allow additional lump sum payouts. Multi employer pension plans ("MEPPs") and jointly sponsored pension plans ("JSPPs") will be able to elect not to
provide grow-in benefits. The regulations related to the grow-in rules were released on April 30, 2012, and are open for comment until June 1, 2012.

It is important to keep in mind that an asset transaction entails a termination of employment with the seller and new employment with the buyer, and thus where the buyer does not provide a pension plan, the seller could face wrongful dismissal claims from affected employees, as the overall compensation package offered by the buyer may be less valuable to an affected employee. However, this may not be the case if other components of the buyer’s overall compensation or benefits package sufficiently offset the affected employee’s lost pension coverage. For this reason, many business transaction agreements involving asset transactions provide that affected employees must receive an overall compensation package which, in the aggregate, is no less valuable than that received from the seller immediately prior to the sale.

The strategy of an asset transaction with no successor pension plan may be considered where the buyer does not intend to employ this group for the long term, considers that it is too expensive to establish a successor plan due to the size of the group of transferred employees, or determines that it is inappropriate to have a pension plan for a group with the demographics of the transferred employees. In either of the latter cases, the buyer may decide, for example, that a group registered retirement savings plan (“RRSP”) is more suitable. Under both the current provisions and the unproclaimed provisions of the Pension Reform Legislation, the seller may agree to this approach where limited grow-in rights are triggered as a result of either a partial wind-up or due to the new grow-in provisions, and where the risk of successful claims for wrongful dismissal for failure to maintain substantially similar terms of employment are remote due to the implementation by the buyer of a group RRSP or improvements in other components of the total compensation package. Under the current rules, another factor is whether seller wishes to avoid triggering a partial wind-up of its plan due to obligation to distribute any surplus assets in the fund.
(b) **Where There is a “Successor” Pension Plan**

Current section 80 (and in the case of a share sale where the buyer establishes a successor pension plan after the sale, section 81) of the PBA address the relevant pension issues upon the purchase or sale of a business. The following brief review of the requirements under Section 80 of the PBA is intended to provide the background to a discussion of some of the considerations relating to the negotiation of pension arrangements in an asset transaction.

When an employer sells all or part of its business, current section 80 of the PBA provides that the following rules shall apply to any employee of that business who was a member of the seller’s pension plan and who in conjunction with the sale became an employee of the buyer and a member of the buyer’s pension plan:

(i) the employee continues to be entitled to the benefits provided under the seller’s pension plan accrued to the effective date of the sale unless the buyer assumes responsibility for the accrued pension benefits of affected employees from the seller’s pension plan;

(ii) the employee is entitled to credit in the buyer’s pension plan for the period of membership in the seller’s pension plan for the purpose of determining eligibility for membership in, or entitlement to benefits under, the buyer’s pension plan (e.g., for right to join and vesting purposes);

(iii) the employee is entitled to credit in the seller’s pension plan for the period of employment with the buyer for the purpose of determining entitlement to benefits under the seller’s pension plan (e.g., for eligibility or vesting purposes); and

(iv) the employee shall be deemed, for purposes of the PBA, not to have an employment termination by reason of the transaction.

It should be noted that, currently, subsection 80(2) of the PBA does not specifically state that the seller’s pension plan is completely discharged from all pension liabilities assumed by the buyer in the course of the transaction. As such, in relation to
the current rules, the seller should prudently recognize that in two Ontario cases, which are discussed more fully below, former employees have attempted to argue that the seller’s pension plan retains some liability in the event of a shortfall in the buyer’s pension plan upon a future termination.

Where the buyer has assumed liability and responsibility for the accrued pension benefits of affected employees, and assets are to be transferred from the seller’s pension plan to the buyer’s pension plan, the PBA currently provides that such transfer is subject to the Superintendent’s consent based in part on the transfer complying with prescribed terms and conditions. To-date, no terms or conditions have been prescribed under the PBA for purposes of such a transfer; however, FSCO has issued Policy No. A700-200 (former Policy Statement No. 2, dated July 28, 1988).

In summary, therefore, under the current rules, where liability and responsibility for the affected employees’ pensions are to be assigned along with the corresponding assets from the seller’s pension plan to the buyer’s successor pension plan, the requirements of sections 80 or 81 of the PBA, as applicable, must be taken into account as well as the various filing and disclosure requirements of FSCO. In addition, both parties should agree on the allocation of responsibilities for filings, interim administration and investment of the earmarked assets, dispute resolution relating to determination of the transferred liabilities and on contingency alternatives in the event regulatory approvals are not received. The topic of alternative pension structures in the event regulatory approval is not granted is discussed briefly in Part III below.

In an effort to facilitate asset transfers, the Pension Reform Legislation contains extensive changes to sections 80 and 81 of the PBA relating to plan mergers, plan splits or divisions and the transfer of assets between pension plans on the sale of a business. These changes are not yet in effect, however, the 2012 Ontario Budget indicated that draft regulations relating to the asset transfer provisions may be released in the spring of 2012.
Upon proclamation of the provisions of the Pension Reform Legislation related to asset transfers, all pension asset transfers (e.g., plan merger, transfers in connection with the sale of a business or a plan split) in Ontario will be subject to a common set of overarching rules to be set out in new section 79.2. In addition to these general rules, further specific rules will apply if a transfer is occasioned by the sale or other divestiture of an employer’s business (section 80) or alternatively where the buyer establishes a successor plan after the sale (section 81).

Under these provisions, different “pension and other benefits” will be permitted in the importing pension plan, provided the commuted value of the benefits of the transferring plan members is protected. Additionally, if the assets to be transferred relate to the provision of defined benefits in the original plan, the transferred assets must be used to provide defined benefits in the successor plan. As with the current provisions of the PBA, the prior consent of the Superintendent will be required. However, unlike under current provisions, the Superintendent will be required to consent to transfers if certain criteria are satisfied. In the case of an asset transfer on the sale of a business (section 80), the criteria include the prescribed criteria (i.e., criteria that will be set out in yet to be released regulations) and the following:

i. The original and successor employer must have entered into an agreement to transfer assets, and provided the Superintendent notice;

ii. If the agreement requires consent for the transferring of members or others entitled to benefits under the plan, notice of their consent must be provided to the Superintendent;

iii. The administrators of the two plans must have agreed upon the valuation of assets to be transferred, and provided the Superintendent notice;

iv. If benefits under the successor plan are not the same as under the exporting plan, the commuted value of the benefits must not be less than that provided under the original plan (as adjusted for payments made to a prescribed retirement savings arrangement or to directly to member);
v. The commuted value of benefits in (iv) is determined as of the effective date (which is to be determined by regulation); and

vi. If the original plan has a surplus as of the effective date of the asset transfer, the value of the assets transferred must include a portion of the surplus, as determined in accordance with the regulations.⁴

In the context of unproclaimed section 81 of the PBA, the requirements are the same, except for (i) and (ii) above. As such, depending on the content of any regulations, the new consent requirements should create increased certainty in terms of planning and structuring pension asset transfers.

Unlike under the current provisions of the PBA, the Pension Reform Legislation also provides significant deeming and discharge provisions aimed at clarifying the legal obligations of the various parties to an asset transaction.

First, once proclaimed, subsection 79.2(10) will provide that where assets have been transferred in accordance with the new legislation, “the transferred assets become part of the assets of the pension fund of the successor pension plan and they cease to be identified as assets of the original pension plan”. As previously noted, this deeming provision may help address the requirements that arise on asset transfers and mergers as a result of the Transamerica decision. In essence, the provision appears to provide that the historic terms of the exporting plan and any related trust are not carried forward into the successor plan.

Second, subsection 79.2(11) will provide that where a transfer is made in accordance with the applicable legislation, and where the sponsor of the successor pension plan assumes responsibility for providing pension and other benefits under the original pension plan to the transferred members, transferred former members and transferred retired members, those persons will have no further claim against the original pension plan.

⁴ Note that such regulations have yet to be released.
Third, subsection 79.2(14) will provide, that where a transfer of assets is made on the consent of the transferred members, retired members, or other persons, the administrator of the exporting plan is discharged. Thus the parties to an asset transaction will have to consider whether it is likely that such consent can be obtained, and factor obtaining such consent into the timing and cost of the transaction. It is noteworthy, however that the legislation provides that a transfer does not prevent claims under the importing plan.

The Pension Reform Legislation also provides for a number of new technical requirements that will, for the most part, apply to both an asset transfer that arises in connection with a business sale (section 80) or a plan merger after the fact (section 81). In each of these cases, the transfer of pension assets between plans will be subject to prescribed funding requirements to be set out in the regulations. However, the Superintendent will have the discretion to waive such prescribed funding requirements.

The Pension Reform Legislation also introduced special transitional rules for transfers upon the sale of a business that may be of assistance to broader public sector pension plans previously affected by privatization. Until July 1, 2015, the legislation will permit pension plans affected by past restructurings to enter into agreements that allow individual plan members to enter into agreements, where the employers agree, that would allow the plan members to consolidate their pension entitlements in a single pension plan, i.e., the successor employer’s plan, with a likely increase in the value of their pension entitlement due to the effect of final earnings on the pension entitlement. Given that this will result in cost increases it is not clear how many such agreements will actually take place, but this was an issue that caused a large number of submissions to be made to the Expert Commission and apparently the Government has attempted to respond to the concern.

In summary, in the context of a transaction where liability and responsibility for the affected employees’ pensions are to be assigned along with the corresponding assets from the seller’s pension plan to the buyer’s successor pension plan, the provisions of the Pension Reform Legislation should greatly simplify the current
process. However, many of the unproclaimed requirements rely on regulations which have yet to be released and, as such, their precise impact is difficult to assess with precision at this time.

It should also be noted that for plan administrators and sponsors with pending asset transfer applications that have already been filed with FSCO, it may be the case that the new asset transfer rules contained in the Pension Reform Legislation will be in effect before the time that the application for the transfer of assets is reviewed by the Superintendent in any event, and as such, the current rules may no longer apply going forward.

(c) Collective Agreement Issues

In any transaction where unionized employees are concerned, it will be important before the transaction is negotiated to clearly determine what pension obligations are imposed under a collective agreement. A key issue that needs to be resolved early on is whether an existing pension plan is incorporated by reference into the collective agreement or whether the collective agreement simply requires a level of pension benefit which could be provided under a different pension plan. Where the pension plan is clearly incorporated into the collective agreement it may make sense in the circumstances for the successor employer to assume sponsorship of that plan in its entirety. On the other hand, if the successor employer is acquiring only part of a business to which a collective agreement applies it may be completely impractical to transfer sponsorship of an entire plan and in this circumstance negotiation with the bargaining agent may be required to provide for the transfer of unionized employees into a separate purchaser pension plan.

It may also be the case that the buyer could be required to become a participating employer in a MEPP as a consequence of succeeding to collective agreement obligations. A detailed review of the issues relating to participation in a MEPP is beyond the scope of this paper. In brief, a buyer will want to obtain as much information on the MEPP as it can including its contribution obligations under the MEPP
(which could be documented in a collective agreement, a separate participation agreement or in an industry master contribution agreement). The buyer will also want to understand the terms of the governing documents relating to the MEPP (specifically the MEPP trust agreement) so that it is aware of its rights and obligations as a participating employer. For example, the buyer might have the right to select a trustee under the MEPP in which case that person, along with the other trustees, will become an administrator of the MEPP and thus subject to administrator obligations and duties under the MEPP. In light of the funding difficulties that some MEPPs now face (see, for example, the situation in the Participating Co-operatives case), and possible withdrawal liabilities under a MEPP (particularly where members of the MEPP are employed in Quebec) a buyer may be well advised to have an understanding of the funded status of the MEPP before it joins the MEPP. Even if accrued benefits under a MEPP can be reduced (in accordance with the PBA), the buyer could be faced with labour relations complications if the workforce in the purchased business is being affected by a reduction in accrued pension benefits.

III. STRATEGIES FOR DEALING WITH PENSION ASSETS AND LIABILITIES IN ASSET TRANSACTIONS

Within the legal parameters (e.g., those imposed by any applicable collective agreement and the PBA), the parties are free to develop their own strategies for dealing with the pensions of the affected employees. Four basic strategies are discussed below and all are subject to the limitations discussed in the previous part of this paper.

1. **Buyer Establishes Plan for Future Service Only**

Under this strategy, the buyer assumes no pension liabilities from the seller and accepts liability for future service pension benefits only (if in fact a successor pension plan is to be offered to affected employees at all). The seller retains responsibility for past service pension benefits in its pension plan. The obvious advantages of this approach are: (a) simplicity, the fact that responsibility for pension programs lies with the respective employer for the relevant employment period, and (b) the absence of any
need for asset and liability valuation or compliance with the statutory requirements relating to pension asset transfers.

Of course, if the buyer assumes no pension liabilities from the seller it is always free to establish its own successor pension plan for affected employees or to allow them to join a previously existing pension plan which it sponsors or in which it participates. In fact, this may be a term of the business transaction agreement. While such a successor plan would not recognize the affected employees’ past service with the seller for purposes of benefit accrual, as discussed above the PBA requires such past service to be recognized for purposes of determining eligibility for membership in, and benefit entitlement under, the successor pension plan.

The seller may like this strategy because it is relieved of any concerns regarding the buyer’s ability to provide past service benefits and to continue the plan for its former employees; however, the strategy creates four major concerns for the seller:

a) To avoid wrongful dismissal claims from affected employees, the seller will want assurances from the buyer that it will provide affected employees with an overall compensation package of substantially equivalent value to what the seller had provided immediately prior to the sale, for a guaranteed period after the sale. The seller will also want appropriate indemnities from the buyer for any wrongful dismissal claims from any of the affected employees due to the buyer’s failure to provide the pension and non-pension benefits as agreed or will, at least, want to ensure that it has appropriate covenants to this effect in the business transaction agreement.

b) If a successor plan is not established by the buyer, FSCO may declare a full or, for the time being, a partial wind-up of the seller’s pension plan with the associated costs, employee relations problems and possible surplus issues.
c) The seller may face administrative problems in obtaining up-to-date and satisfactory information from the buyer when plan members eventually terminate employment from the buyer.

Even if the buyer establishes a plan, the seller may still be at risk in the event that the buyer winds up the successor plan at some point in the future. In Re Gencorp Canada Inc. and Superintendent of Pensions for Ontario et. al. (39 O.R. (3d) 38, Court of Appeal for Ontario), Gencorp sold its tire manufacturing business to General Tire in 1987. General Tire agreed to establish a pension plan to provide the transferred employees with future service only. General Tire closed the plant in 1991 (almost five years after the sale) and wound up its pension plan; however under that plan, wind up benefits were only provided for the period of service with General Tire. The Superintendent ordered that the Gencorp plan should be partially wound up in respect of the employees transferred to General Tire in 1987. The decision was made on the basis that although General Tire became the de facto employer of the transferred employees, Gencorp continued as their employer for purposes of the Gencorp plan. It was also held that the termination of actual employment by General Tire terminated the “deemed” continued employment with Gencorp. For a similar decision in another jurisdiction where there are grow-in benefits, see Imperial Oil Ltd. v. Nova Scotia (Superintendent of Pensions) (1995), 7 C.C.P.B. 225. These decisions make it clear that the seller cannot be certain that the future actions of the buyer will not impact on its pension plans, where pension liabilities are retained.

Some sellers will attempt to negotiate an indemnity which deals specifically with the risk of partial wind ups which result from actions taken by the purchaser following the acquisition of the business. While this concern should diminish significantly once partial wind-ups are eliminated, for the time being, a buyer will want to deal with this very carefully. The buyer will be concerned about agreeing to constraints on its ability to manage the workforce in the acquired business and to make significant plan design decisions of its own. A buyer will also be concerned about the potentially significant liability that might flow from a broadly worded indemnity. If, for example, a seller is
required to distribute a pro rata share of surplus as a consequence of the partial wind-up, this could become part of the claim that the seller makes against the buyer under the indemnity.

The buyer may like the “future service only” strategy because it offers maximum flexibility including avoiding negotiating a pension asset transfer and related delays to obtain regulatory approvals; however, it could create discontent among affected employees with corresponding employee relations problems. For example, if the seller’s plan was a defined benefit plan under which benefits are determined by reference to average or final salary and years of service, affected employees will suffer a loss in their overall potential pension benefit, even if the buyer establishes an identical successor plan, since their past service benefit (remaining in the seller’s plan) may not reflect future wage increases.

However, the buyer must be careful about exactly what is agreed to in terms of providing a plan for future service only. In Cabot Canada Ltd. v. Cabot Canada Ltd. (Deloro Satellite Division, Pension Plan ([1993] O.J. No. 42, January 12, 1993), the employer agreed to employ the employees on “the same terms and conditions” as they had previously and to provide pension benefits that were no less favourable than those to which the employees were formerly entitled. The predecessor employer’s pension plan provided that employees were entitled to surplus; therefore, it was held by the court that in spite of the fact that the buyer’s plan provided that the employer was entitled to surplus, the employees were, in fact, entitled to the surplus by virtue of the agreement.

2. **Wrap Around Arrangements**

To address affected employees’ concerns regarding a loss in their overall potential pension benefit under the strategy described above, the buyer could agree to create a “wrap around” successor pension plan under which past service with the seller would be recognized for purposes of determining the benefit payable under the buyer’s plan, with an express offset for the benefits payable under the seller’s plan. It is
important that the offset be based on benefits payable rather than paid, so that a failure of the seller’s plan to pay the benefit does not increase the buyer’s liability.

This strategy has the advantage of avoiding the pension asset transfer requirements under the PBA and asset and liability valuation; however, due to the recognition of past service with the seller, the buyer’s “wrap around” plan will create additional initial unfunded liabilities which the buyer must fund. This strategy may also create additional complications for a purchaser under the ITA if as a consequence of the past service benefit provided in the purchaser’s pension plan there would be a need to calculate, report and then deal with past service pension adjustments (“PSPAs”). This strategy also creates administrative and possibly employee relations problems since pension benefit cheques will be issued from two sources in respect of identical service periods. Finally, this necessitates a duplication of administrative functions and continued co-operation between the seller and buyer. This strategy may be adopted where the buyer’s long term priority is to maintain a plan for the transferred employees that ensures the continuity of benefits for all years of service, where the buyer and seller have a good relationship (perhaps they may be affiliates or participants in a joint venture) for on-going co-ordination of benefits or where the buyer’s existing plan (into which the transferred employees will be placed) has a large surplus, rendering the issue of additional funding requirements immaterial.

3. Transfer of Assets and Liabilities to a “Successor” Plan

Under this strategy, the buyer assumes all of the seller’s liability and responsibility for the affected employees pensions which, together with corresponding assets, are transferred to the buyer’s “successor” plan. The successor plan may be an existing plan, which the buyer may agree to amend to accept such assets and liabilities, or it may be a new plan specifically established by the buyer for the affected employees. Whether affected employees are added to an existing plan may depend on the future service benefits which they are to receive. If they differ greatly from those provided by
the buyer’s existing plan, the buyer may prefer to establish a separate plan for affected employees. Under the current PBA asset transfer rules, the decision as to whether the “affected” employees are covered under an existing buyer’s plan or under a new separate plan could also be affected by FSCO’s position on pension asset transfers following the Transamerica case. It may well be the case that FSCO would not approve the pension asset transfer except where the buyer’s plan was a plan established specifically for the employees in the purchased business who transferred from the seller’s pension plan. However, as previously discussed, upon proclamation of the new asset transfer provisions of the Pension Reform Legislation this issue should be alleviated, as the Superintendent will be required to consent as long as all requirements are met.

This strategy may have to be employed even where the buyer wants to assume all of the seller’s liability for affected employees (including former employees) as described in the previous section where the seller is participating in a large pension plan as a division or subsidiary within an associated corporate group, or where the seller is selling a division of its business which participates in a single company pension plan and it cannot transfer assets and liabilities for the entire plan.

Subject to the statutory and regulatory guidelines governing the valuation and transfer of assets and liabilities between pension plans, this strategy offers the parties the greatest degree of flexibility in dealing with the assumption of pension obligations by the buyer. However, because the buyer is not assuming the seller’s entire plan, there must be a “carve-out” of that part of the plan’s assets and liabilities, which relate to the affected employees, which the parties have agreed to transfer to the buyer’s successor plan.

When this strategy is employed, the time needed and complexity involved in negotiating the pension section of the business transaction agreement is significantly increased. Expert advice from actuaries, lawyers and accountants should be sought in negotiating this type of pension arrangement. As well, regulatory approval for the “carve-out” will take substantially longer because of the greater complexities involved.
Before a pension asset and liability transfer is negotiated, the seller and the buyer should carefully consider the applicable regulatory regime. In Ontario, for example, under the current legislation, the parties will need to consider whether the FSCO is likely to approve the proposed transfer. This process could involve a review by the seller of the historic terms of its pension plan relating to the ability to merge part or all of the plan with other plans, the ability to add new participating employers to the pension plan and whether the plan is subject to a trust. Where there is any question on these issues, it will be important to consider whether an alternative mechanism can be built into the business transaction agreement to deal with the possibility that regulatory consent might not be provided to a transfer of assets and liabilities.

However, even under the Pension Reform Legislation it is important for the purchaser to take great care. While it appears that a review of whether the transferring plan was subject to a trust will not be necessary in the context of the asset transfer, it may be relevant in the context of surplus withdrawal on plan wind-up.5

Should the seller and the buyer decide to proceed with a transfer of assets and liabilities, the issues which should be discussed by the parties and addressed in the business transaction agreement include the following:

- the valuation assumptions to be used by the actuaries in establishing transfer values (usually included as a schedule to the agreement);
- if the valuation assumptions are to be settled by agreement between the parties’ actuaries, an appropriate arbitration clause (to be invoked if the actuaries fail to agree);
- provision for interest or a rate of return to be credited to the transferred assets for the period between the date of the sale and the date assets are actually transferred to the buyer’s successor plan;

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5 Subsection 77.11(4) of the PBA, which governs an employer’s entitlement to surplus on plan wind-up under a successor plan, requires both the original plan documents and the successor plan documents to provide for payment of surplus to the employer.
• assignment of responsibility for investment of the “carved-out” assets and the method of paying benefits and receiving employee contributions while awaiting regulatory approval;

• a precise description of the liabilities being assumed by the buyer;

• which affected employees are to be allowed to participate in the buyer’s successor plan;

• the level of benefits to be provided and the guarantee period (if any) during which the successor plan benefits must be provided to affected employees;

• whether future benefits in respect of service with the buyer will wrap around the transferred liabilities;

• method of selection of assets to be transferred to the successor plan and responsibility for obtaining third party consents (where necessary) if assets are to be transferred “in specie”;

• allocation of responsibility for obtaining consent of the regulatory authorities;

• provisions for purchase price adjustment if regulatory authorities impose additional requirements on the valuation or transfer process;

• contingent provisions for rejection of transfer application by regulatory authorities (if under the current rules); and

• contingent provisions should future claims against the transferred assets arise.

Because of its complexity, this strategy would typically be used where the buyer intends to maintain the plan for a long period of time and wants to provide benefits for
all years of service or where the transferred employees participate in a plan with employees of the seller who are not part of the transaction. The seller would employ this strategy where its primary objective is to be discharged from liability with respect to the pension obligations relating to the transferred employees. In that regard, under the current asset transfer provisions, the seller should be aware of the findings in two Ontario cases where there has been a shortfall in the buyer’s pension plan and former employees have attempted to argue that the seller’s plan has some ongoing liability to fund the deficit. The first case, *Micallef et al. v. Gainers Inc. et al.* (Ontario Court of Justice - General Division, Court File No. 16833/87), involved the sale by Gainers Inc. of its Ontario and Eastern Canada divisions to an employee group organized under the auspices of Maybank Foods Ltd. Under the terms of the purchase agreement, assets were to be transferred from the existing Gainers pension plans to a new pension plan established by Maybank for the transferred employees. When Maybank made an assignment in bankruptcy two years later, it became evident that there was a significant shortfall in the Maybank pension plan. It also became apparent that there was a significant surplus in the Gainers pension plans. Litigation ensued in which the Maybank employees claimed entitlement to some $3 million in the Gainers pension plans. The case was eventually settled for substantially less than the amount claimed by the employees.

The second case in which the issue of ongoing seller liability has been considered is the unreported decision of the Pension Commission of Ontario (as it then was) in *Allan and the Superintendent of Pensions, Price Waterhouse and Massey Ferguson Industries Limited* (released June 18, 1992). The decision in the *Allan* case provides useful commentary on the ability of a seller to effectively transfer accrued benefit liabilities from its pension plan to a buyer’s pension plan. In that case, the Massey Ferguson combines business was transferred to Massey Combines Corporation pursuant to an agreement of purchase and sale dated November 1, 1985. Under the terms of the agreement, the buyer assumed pension liabilities in respect of the transferred employees and acquired pension assets to fund those liabilities. The agreement specifically provided that the seller
“shall not be obliged to pay or cause to be paid any additional or other amounts to or for the benefits of the trust fund of the Salaried Plan in connection with the Transferred Salaried Persons ...”

When the buyer subsequently became insolvent and it became apparent that the buyer’s pension plan had an unfunded liability of $8.5 million, a claim for the shortfall was made against the seller and its pension plan. In finding for the seller, the PCO, in its consideration of the current PBA, stated that:

“Section 80(2) specifically excludes any continuing obligation for benefit funding on a former employer where a successor employer “assumes responsibility for the accrued pension benefits of the employer’s pension plan and the pension plan of the successor employer shall be deemed to be a continuation of the employer’s plan with respect to any benefits or assets transferred.” In our view Section 80 clearly recognizes the ability of an employer to transfer liability to a successor employer on sale or transfer....In addition, the result of the Applicant’s position would be to impose perpetual contingent liability on any employer who contributes to a pension plan. This is particularly untenable where a fund has been transferred, as in the present case, and the prior employer...has no control over the investment of the assets or the imposition of new liabilities.”

The decision of the PCO in the Allan case will be encouraging to a seller who has negotiated and executed the transfer of pension assets and liabilities from its pension plan to a buyer’s pension plan in accordance with the requirements of the PBA and the terms of its pension plan particularly if FSCO has approved the transfer and the buyer’s pension plan was fully funded by the asset transfer in respect of liabilities to the date of the business sale. Under the new asset transfer provisions of the Pension Reform
Legislation, the position is further clarified in providing that the seller’s obligation is discharged.

4. **Buyer Assumes Plan Assets and Liabilities**

Under this strategy, the buyer assumes all of the assets and liabilities of the seller’s pension plan, much as it would in a share transaction. This strategy is attractive to employees as there is no break in their service for all purposes of their pensions including benefit accruals. This strategy is also attractive to the seller because the buyer assumes all of the pension obligations under its plan, including responsibility for former members.

The procedures under this strategy are relatively straightforward and regulatory approval for assignment of responsibility for the plan should be easily obtained pursuant to either the current PBA provisions or the provisions of the Pension Reform Legislation, once in effect. In certain situations, particularly where maintenance of a particular pension plan is required under a collective agreement, a full assignment and transfer of a pension plan from the seller to the buyer may be the most appropriate pension transaction.

In the case of an assignment of a pension plan and its related pension fund in their entirety, prior approval of FSCO should not be necessary. Instead, plan amendments which document the change of sponsorship of the plan should be filed with FSCO for registration under the PBA. In addition, the ITA requires that Canada Revenue Agency be notified of a change in name and address of the pension plan administrator.

The issues that should be addressed by the parties in the business transaction agreement would include the following:

- transfer of sponsorship and responsibility as administrator from the seller to the buyer;

- whether the seller remains responsible for any pre-assignment liabilities;
• assignment of responsibility for plan administration and pension fund investments (including regulatory filings and instructions to the funding agent and other service providers) during the period after the closing of business transaction until change in sponsorship has been completed; and

• notification to relevant third parties of change in sponsorship (e.g., trustee, benefits administrator or other funding agent).

As will be discussed later in this paper, when this strategy is adopted, the buyer will wish to obtain satisfactory representations and warranties from the seller regarding its pre-purchase administration and funding of the plan. The seller will also want to carefully consider what representations it is prepared to give.

IV. FUNDING CONSIDERATIONS: IMPACT ON PURCHASE PRICE

In a transaction where the buyer assumes liability and responsibility for affected employee defined pension benefits, the funded status of that plan may have an impact on the purchase price. For example, if the buyer assumes responsibility for the entire plan and the plan is in a substantial deficit funding position, the buyer is assuming the responsibility for funding the deficit. Therefore, the buyer should take into account the after-tax (contributions to pension plans are generally tax deductible) cost of funding the deficit when determining the purchase price. As the deficit is usually paid down over a number of years, the time value of money should enter into the purchase price calculations as well. If the plan is in a significant surplus position on an on-going basis and clearly entitles the employer to the surplus or, perhaps more importantly, to take surplus into consideration for purposes of taking contribution holidays, the seller will wish to take into account the after-tax value of the surplus to the buyer when determining the purchase price. The time value of money may also enter into the purchase price calculations if it is assumed that the surplus assets will be used to take contribution holidays over a number of years. From the perspective of the buyer, it is important that the terms of the current and historic plan documents concerning surplus
entitlement and contribution holidays, as well as the applicable pension benefits legislation, be carefully reviewed and considered before the buyer agrees to pay for the surplus.

More sophisticated valuation models exist for determining the premium or discount which should be applied to a purchase price to acknowledge the benefit or liability of a pension plan surplus or deficit. The above examples are meant to make the reader aware of some valuation variables. Other considerations might include the tax status of the buyer, the investment mix and maturity terms of pension fund assets and management philosophy regarding the use of surplus pension assets. These and other variables may be considered in determining the impact of a pension plan surplus or deficit on the purchase price.

V. SETTLING THE AGREEMENT OF PURCHASE AND SALE

1. Due Diligence Review

As noted earlier, from a pensions perspective the share transaction is usually much less complex than an asset transaction to structure and document. One reason for this is that the employer does not change and the employment contract, which includes pension and non-pension benefits, generally remains the same. Therefore, unless specifically excluded by the business transaction agreement, pre-purchase liabilities of the purchased company will remain with that company after its sale. For this reason, it is important that the buyer obtain full disclosure of company obligations, promises, policies, etc., which could not otherwise be ascertained through only document review. This would also be the case if the proposed pension transaction involves the assignment of a pension plan and its related pension fund to the buyer.

A buyer may be prevented from seeking reimbursement from the seller in respect of liabilities which it could have ascertained by simply asking the seller. To protect itself from “hidden” liabilities, the buyer in a share transaction (and in many instances also in an asset transaction) must undertake a due diligence review of the affected business. Such a review should include a thorough consideration of the pension and non-pension
benefits offered to affected employees of the seller’s business and should be carried out at the initial stages of negotiations. Addressing the pension and non-pension benefit issues early in any transaction will reduce the number of unwelcome surprises as negotiations proceed. Correspondingly, a seller may need to engage in its own due diligence if it is expected that it will have to negotiate relatively comprehensive representations and warranties with a prospective purchaser.

Although not within the scope of this paper, the reader should be aware of the existence of alternate funded and non-funded pension arrangements, which should be uncovered in the course of the due diligence review. Such arrangements include supplemental pension plans, retirement compensation arrangements, salary deferral arrangements and many variations on these. The buyer must become aware of the existence of these arrangements, must determine how they are funded (and the magnitude of the underlying liabilities) and should seek advice of counsel and actuarial advisors regarding their legal, tax and cost implications.

The due diligence review should also uncover any other non-pension benefit or compensation arrangements provided to employees of the affected business. Such benefits or arrangements may include stock compensation plans (including stock appreciation or phantom arrangements), profit sharing plans, supplementary unemployment benefit plans, group registered retirement savings plans, long and short-term disability benefit plans, health and dental plans, accidental death and dismemberment insurance and life insurance plans. As with the alternate pension arrangements, these benefits or arrangements may be unfunded and may represent substantial non-balance sheet liabilities of the affected business. Such arrangements may also provide change-in-control benefits or accelerated funding in the event of a change-in-control, which should be reviewed and “costed” before the transaction occurs. In all cases, questions must be asked, policies reviewed and analysis completed on the financial and other liabilities which arise due to the existence of these benefits or arrangements.
The preceding comments pertain to a transaction between arm’s length parties. In contrast, in a non-arm’s length transaction the need (and desirability) for the scope of due diligence described above and the extent of the representations and warranties described below may be significantly less compelling. In fact, in certain corporate reorganizations the various affiliated parties may decide to proceed with all of the pension and group benefit transactions on an “as is” basis with limited or no “due diligence” and few pension and benefit representations and warranties.

The circumstances of a particular transaction may affect the approach to due diligence. For example, in a competitive bid situation due diligence may be even more critical because the seller may be unwilling to give (and the buyer may be unwilling to request for competitive reasons) extensive and comprehensive representations and warranties.

In the case of a takeover of a public company, due diligence will often be particularly important (both at an initial stage and later on if the target company has executed a lock-up or support agreement). In this case, the more a buyer can discover in the early stages of the transaction the better since it could ultimately own the company that provided the representations and warranties.

2. **Information Requirements of Buyer**

As noted earlier, the buyer will typically wish to obtain, as early in the transaction as possible, as much information concerning the pension, supplemental pension and non-pension benefits offered to employees of the affected business. To the extent that they were not obtained during the due diligence review, the buyer should obtain the following before finalizing the pensions section of the business transaction agreement:

- Copies of all plan documents, annuity contracts, trust agreements and investment management agreements, including current and past documents and all amendments thereto (needed to determine legality of current provisions).
• Copies of all relevant collective agreements, employee benefit booklets and memoranda, and confirmation that no oral commitments have been made to employees regarding benefit improvements (needed to compare what affected employees have been “told” with actual plan documents).

• Copies of relevant actuarial valuation reports, cost certificates and information returns filed with the regulatory authorities, together with a current asset valuation (i.e., at least the two most recent reports or certificates should be obtained and reviewed).

• Confirmation that no changes have been made to the plan or actuarial assumptions (if a defined benefit plan) since the last actuarial valuation report (needed to update materials received).

• Confirmation that current administration practices correspond to actual plan provisions (needed to identify hidden obligations).

• If this is a share transaction or another type of transaction under which the buyer is assuming a pension plan in its entirety, information with respect to what inactive obligations (i.e., deferred vested former employees) and corresponding administrative responsibilities are “attached” to the plan. If the seller has been downsizing the business, the administrative responsibilities and costs associated with inactive obligations may exceed the buyer’s expectations. In other words, the buyer could be assuming a significant and costly burden from the seller with little or no corresponding benefit.

• Confirmation of the continuing good standing and registered status of the plan with the relevant regulatory authorities.

• Copies of relevant accounting statements regarding the plan (i.e., at least the two most recent accounting or financial statements).
• Information regarding the seller’s ability to honour any indemnity which it may give to the buyer in respect of representations and warranties in the business transaction agreement.

• Information with respect to the extent to which the benefits of the affected employees can be integrated with the buyer’s own benefit plans. The buyer must consider the benefits philosophy of the seller, costs, restrictions on amendments, merger or conversion and surplus withdrawal or contribution holidays. The buyer should also consider the impact of the affected employees’ benefits on any of its existing employees.

3. **Information Requirements of Seller**

   The seller should assess the impact of the buyer’s proposed pension and non-pension arrangements for affected employees before finalizing the pensions section of the business transaction agreement. The seller should consider the following:

   • The solvency of the buyer, including its ability to honour any indemnity which it may give as part of the business transaction agreement and its ability to sustain the pension and non-pension benefits it agrees to continue or provide.

   • The buyer’s employee relations record and its ability and commitment to meet and administer the pension and non-pension benefit obligations which it is assuming or undertaking to provide. A failure by the buyer in this regard could affect the seller’s own employee or public relations for the future.

   • If this is an asset transaction, is any strategic advantage foregone by the seller by assigning all or part of its pension liability and corresponding assets to the buyer? For example, does the seller forego its ability to use pension surplus to offset termination benefits?
• Any procedural problems in transferring pension assets from long-term investments or pooled investment funds.

• The interim pension and non-pension benefit arrangements which must be made to accommodate the buyer while it establishes successor pension and benefit plans, obtains regulatory approval or negotiates benefit insurance contracts.

• The ramifications of the sale on any collective agreement or other employment contract which may give rise to special benefits or payments on the sale of the affected business.

• Under current provisions, the prospects for regulatory approval of a transfer of pension assets and liabilities.

4. **Covenants, Conditions, Representations and Warranties**

Once the buyer has completed its due diligence review and assessed all information received, the parties and their professional advisors will settle the terms, conditions, representations, warranties and covenants which form the pension and non-pension benefits section of the business transaction agreement. The representations and warranties included in the business transaction agreement will depend on the pension and non-pension benefit arrangements agreed to, consideration of other aspects of the transaction including the overall purchase price and, to some extent, the respective bargaining strengths of the buyer and seller.

The *Transamerica* decision also reinforces the importance of careful negotiation of representations and warranties. In *Transamerica*, both the Ontario Supreme Court and the Court of Appeal concluded that the vendor was liable for damages arising out of breaches of certain pension related representations contained in a share purchase agreement. The vendor represented, among other things, that the financial statements for the target company (NN Life) correctly reflected the pension assets and liabilities including pension surplus. The court concluded that the target company had not made
the correct amount of contributions to its pension plan and as a consequence the pension assets on the NN Life balance sheet were overstated and the unfunded liability in the NN Life pension plan had not been reflected in the financial statements. Consequently, the target company financial statements were not accurate and there was a breach of the warranties set out in the share purchase agreement.

VI. CONCLUSIONS

The pension considerations which arise on the purchase, sale, merger or amalgamation of a business are many and in some instances require very specialized analysis. This is especially true in a period of ongoing pension reform, where the rules are in constant flux, and new rules can be either more or less beneficial than prior ones. The pension information that must be reviewed, compiled and analyzed in large acquisitions or mergers is often substantial. The issues which arise, especially in asset transactions, can be complex, very substantial in relative financial terms and can have an impact on the successor business’ bottom line.
Federal Plans

• Introduction
  - Federal Plans
    - PBSA 10.1(2)
      Unless the Superintendent authorizes the amendment, an amendment is void or, in Quebec, null if
      (a) it would have the effect of reducing
        (i) pension benefits accrued before the date of the amendment or pension benefit credits relating to
        pension benefits accrued before the date of the amendment, or
        (ii) an immediate or deferred pension benefit to which a member, former member or any other person was entitled
        before the date of the amendment;
      (b) the solvency ratio of the pension plan would fall below the prescribed solvency ratio level;
      (c) the amendment would reduce the solvency ratio of the pension plan and the solvency ratio would be below the prescribed solvency ratio level once the amendment is made; or
      (d) the solvency ratio of the pension plan is below the prescribed solvency ratio level and the amendment would increase pension benefits or pension benefit credits.
Accrued

• OSFI view:

What is an Accrued Pension Benefit (Includes Basic and Ancillary Benefits)?

An accrued pension benefit is a pension benefit to which a member, former member or other beneficiary is entitled to or will become entitled to at pensionable age (based on the member’s period of employment and salary at the date of determination) and any additional benefits, payable prior to pensionable age, to which members, former members or other beneficiaries are entitled once any eligibility conditions have been met.

Accrued (cont’d)

• Common Law Meaning of “Accrued”

In Black’s Law Dictionary (8th Edition), “accrue” is defined as “to come into existence as an enforceable claim or right” or to “accumulate periodically”. An amount that has been earned but is not yet due or paid.

Accrued (cont’d)

The term “accrued” has received similar interpretation by the courts.

In R. v. Puskas, for example, the SCC held that a right can only be said to “accrue” at the point when a person can actually exercise the right.

Similarly, in Berkeley v. R., the TCC held that the term “accrued” denotes something earned or accumulated, but not yet received.

In Toronto-Dominion Bank v. Usarco Ltd, the OCJ defined “accrued” as a right that is “completely constituted.”

Likewise, in a much earlier case, Ontario Hydro-Electric Power Commission v. Albright, the SCC held that “accrued” in the context of a right or liability means “completely constituted,” even though the right may only be exercisable or enforceable at some point in the future.
In the pension context, the concept of vested or accrued rights has been considered in only a limited number of cases. A leading case is Dinney v. Great West Life Assurance Co. in which the MCA indicated that the terms “accrued right” and “vested right” were interchangeable and cited with approval Black’s Law Dictionary to the effect that when used in the context of “rights”, the words “accrue” or “vested” refer to rights that have matured.

In the earlier decision of Hockin v. Bank of British Columbia, the BCSC found "the actual accrued benefit of an employee, according to all accepted actuarial definitions of the term, is the amount to which an employee is entitled at any particular moment according to the plan based on his earnings and service to that date".

OSFI Guideline Requirements

- In January 2012, OSFI released a draft instruction guide entitled Authorization of Amendments Reducing Benefits in Defined Benefit Pension Plans.

OSFI Guideline Requirements (cont’d)

- Factors
  - purpose
  - notice
  - complete application
  - amendment power
  - support by affected groups
  - written representations
OSFI Guideline Requirements
(cont'd)

• Principles
  – pension plan sponsors are expected to maintain accrued benefits promised by the plan text and consider other options prior to adopting the Reducing Amendment, for instance, increasing contribution levels or reducing future benefits
  – a Reducing Amendment cannot remove a benefit that is required by the PBSA to be provided to a member, former member or beneficiary and cannot reduce benefits already received or due to be received
  – subject to the terms of the plan, the plan administrator should consider the different interests of all affected groups (active, deferred vested, retirees) and apply its discretion in an even handed manner in deciding on reductions

OSFI Guideline Requirements
(cont'd)

• Authorization submissions
  – written submissions
  – action plan
  – an actuarial valuation
  – information plan

• Required notice to members, former members, retirees and beneficiaries
  – draft notice can be provided to OSFI for comment

Provincial Plans

• Ontario
  Section 14.(1) PBA
  An amendment to a pension plan is void if the amendment purports to reduce,
  (a) the amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;
  (b) the amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or
  (c) the amount or the commuted value of an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.
Provincial Plans

• However, the prohibitions against the reduction of benefits under section 14(1) of the PBA do not apply to:
  – a multi-employer pension plan that is established by a collective agreement or trust agreement
  – defined benefit pension plan where an employer’s obligation to make contributions is limited to a fixed amount set out in a collective agreement or
  – a member of a defined benefit pension plan who is a significant shareholder, where the member and the employer providing the pension plan file a written consent that waives section 14(1) requirements

Provincial Plans (cont’d)

Q: What about amendments that reduce accrued benefits, which must be filed with FSCO to avoid revocation of the registration of the pension plan under the Income Tax Act (Canada) by the Canada Revenue Agency? Will these amendments be considered as void under section 14(1) of the PBA?
A: Section 47(11) of the Regulation provides that section 14(1) of the PBA does not apply to amendments that are required to avoid revocation of registration of the pension plan under the Income Tax Act (Canada). The process for filing such amendments is explained under FSCO Policy A400-500 (Reduction of Accrued Benefits and/or Refunds or Payments to Avoid Revocation by Canada Revenue Agency of Registration of a Pension Plan).

Important Timing Issue

• FSCO view:
  Effective Date of a Plan Amendment that Reduces Benefits – Questions and Answers
  Q: When is the earliest date that an amendment to a pension plan that reduces benefits can be made effective?
  A: The effective date of an amendment that is intended to reduce the amount or commuted value of a pension benefit, pension, deferred pension or ancillary benefit cannot be earlier than the date that the amendment is filed with FSCO for registration. An amendment is considered to be filed with FSCO when the amendment, an Application for Registration of a Pension Plan Amendment (Form 1.1), notice to members and former members (as applicable), plus any other required documents have been received by FSCO.
Important Timing Issue
(cont’d)

Q: What would be the impact if an amendment that intends to reduce the amount or commuted value of benefits has an effective date that precedes the date the amendment is filed with FSCO for registration?

A: Section 14(1) of the PBA provides that an amendment to a pension plan is void if it reduces the amount or commuted value of:
- a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment
- a pension or deferred pension accrued under the pension plan or,
- an ancillary benefit for which a member or former member has met all eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

Employment Law Issues (Pension and Non-Pension Benefits)

- Right to amend
- Notice
- Constructive dismissal
  - Threshold
  - Wronko
- Breach of contract

Collective Bargaining Issues

- Actives
- Deferred vesteds and pensioners
- Spousal rights
- Designated beneficiaries
Disabled

• Can you change the benefits of employees on LTD?
  – LTD payment
  – right to amend
  – notice
  – frustration of contract

Retirees

• Right to amendment
• Dayco (Canada) Limited v. CAW - Canada, [1993] 2 SCR 230

Conclusion

• Variety of issues to be considered
  – common law
  – minimum standards – pensions and employment
• Significant consequences
  – damages
  – void amendments
Overview of Presentation

- Where Are We at on Reform of the Pension Fund Investment Regulations?
- Target Date or Life Cycle Funds-some legal considerations
- Foreign Account Tax Compliance Act (FATCA): New Regulations
- Federal Bill C-377

Where Are We at on Reform of the Pension Fund Investment Regulations?

- Recall that in May 2010, the federal Department of Finance announced its intention to amend various aspects of the federal pension fund investment regulations (contained in Schedule III of the federal Pension Benefits Standards Regulations) including:
  - changing the 10% diversification limit to a market-value test (rather than book value)
  - revising the related party rules including restrictions on investment in employer securities
Where Are We at on Reform of the Pension Fund Investment Regulations? (cont'd)

- To date, no draft legislation released
- OSFI has stated (and Schedule III may be clarified) that, in their view, the 10% diversification limit in Schedule III applies at the member account level, not just at the plan level.
- Need to consider implications for DC investment options where member can invest more than 10% of his/her account balance in a single option (e.g., default option).

Where Are We at on Reform of the Pension Fund Investment Regulations? (cont'd)

- Consider current exception to 10% diversification limit – “segregated fund or mutual or pooled fund that complies with the requirements applicable to a plan that are set out in this Schedule”.
- Implications for monitoring – who and how?
- Informal discussions with federal Department of Finance suggest that government’s focus will be first on developing further investment rules for Pooled Registered Pension Plans (in addition to the various restrictions contained in proposed section 147.5 of the Income Tax Act, which include a 10% diversification limit) and then focusing on amendments to Schedule III.

Target Date or Life Cycle Funds: Some Legal Considerations

- Target date fund or portfolio (sometimes called Life Cycle) – a fund or a portfolio that provides an asset allocation mix based on the participant’s age, target retirement date (e.g., normal retirement age under the pension plan) or life expectancy in which the asset mix changes to become more conservative as the participant ages.
- A target date fund (TDF) may be structured as a single pooled, mutual or insurance company segregated fund under which the portfolio assets are changed over a period of time based on the fund’s target retirement date. Other structures are possible including actual portfolios of securities that are managed with a target date strategy or a family of funds.
Target Date Funds: Some Legal Considerations

• Basic proposition – one-time investment decision by participant or member that does not require the member to adjust his/her portfolio over the period between date of investment and retirement (the TDF provides a “glide path” portfolio).

Target Date Funds: Some Legal Considerations (cont’d)

• Towers Watson DC Plan Survey (2010 quoted in Benefits Canada – April, 12, 2012):
  – “46 percent of all Canadian DC plan sponsors said they were considering changing their default option and of that proportion, 66 percent said they would seriously consider a TDF as the default option”

• In the United States, a TDF is a permitted type of default investment option under the member-directed DC investment option safe harbour rules implemented under the U.S. Pension Protection Act of 2006. New regulations are being developed by the U.S. Department of Labour.

Target Date Funds: Some Legal Considerations (cont’d)

• Vanguard Target Date Fund Survey in 2011 – U.S. survey (quoted in Benefits Canada – April 12, 2012):
  – “nearly one in four of 401(k) plan participants invested solely in TDFs, making this a six-fold increase in the last five years.”
Target Date Funds: Some Legal Considerations (cont'd)

- TDFs continue to evolve in design and strategy. More recent developments include:
  - provision for extended glide paths ("through retirement funds") in recognition that a person's investment horizon could extend more than 30 years beyond retirement date
  - within the frameworks permitted under pension legislation and the Income Tax Act provision for managing asset mix while the member has the option of withdrawing funds on a monthly basis (e.g., locked-in RRSP or Life Income Fund)
  - for DC pension plans, provision to convert TDF balances into an annuity potentially accessing preferred group annuity pricing

What do plan administrators need to think about for TDFs:
- what is the primary objective of the particular TDF?
- is the TDF glide path appropriate for the needs of the plan members?
- evaluating the ability of the service provider/manager or TDF implementation model, e.g., active versus passive investment, the specific portfolio asset classes or type of investments employed and the various risks associated with each available TDF fund

To date, no Canadian pension or securities regulatory guidance or requirements relating specifically to TDFs, although like any other investment option, it is necessary (or advisable) for the DC plan administrator to comply with:
- standards of care imposed under pension legislation (e.g., section 22 of the Pension Benefits Act (Ontario) or section 8(4.1) of the federal PBSA)
- common law fiduciary obligations (prudence, duty of loyalty, avoiding conflicts of interest, duty of "even-handedness" among plan members, duty not to profit from fiduciary position without clear disclosure and consent)
- Capital Accumulation Plan Guidelines including provisions that refer to default investment options
Target Date Funds: Some Legal Considerations (cont’d)

• Given the very significant growth in DC (401(k) plan) assets invested in TDFs (particularly where a TDF is the default investment option) in the U.S over the last five years, the U.S. experience offers some useful guidance to plan administrators and plan sponsors in Canada.

Target Date Funds: Some Legal Considerations (cont’d)

• TDFs are a permitted form of default investment option under the U.S. member DC investment option safe harbour rules, and the U.S. Department of Labour has publicly stated that it endorses the concept behind a TDF ....

• “TDFs avoid extreme asset allocations that we often observe in retirement accounts”, and

• “Having a ‘set it and forget it’ investment option is vital for [members] concerned that they won’t get the asset mix right near retirement”

(Target Date Funds and Other Similar Investment Options: Public Hearing Before the United States Securities and Exchange Commission, United States Department of Labour (June 18, 2009)).

Target Date Funds: Some Legal Considerations (cont’d)

• The U.S. regulators (SEC, Department of Labour) have expressed concerns that in the U.S. some TDFs are misleading to investors because they are allowed to be managed in ways that are not consistent with reasonable expectations that are created by the titles of such funds and the use of TDF fund names.
Target Date Funds: Some Legal Considerations (cont’d)

• U.S. Department of Labour is currently working on revised regulations that will amend the safe harbour requirements for the status of TDFs as a permissible default option. Those regulations could include a requirement that plan members be provided with a description of the TDF that includes:

1. An explanation of the fund’s asset allocation, how the allocation will change over time and at what point the fund will reach its most conservative asset allocation.
2. If the TDF is named or described with reference to a particular “target date”, the description must explain the age group for which the fund is designed, the relevance of the target date and any assumption about a plan member’s contribution and withdrawal intentions on and after the target date.
3. The description must state that the plan member may lose money by investing in the default option, including losses near and following retirement and that there is no guarantee that the fund will provide adequate retirement income.

Target Date Funds: Some Legal Considerations (cont’d)

• In Canada, it will be interesting to see if any of the CAPSA partners or members of the Joint Forum of Financial Market Regulators adopt any of these concepts in the future including possibly through amendments to the CAP Guidelines.
Foreign Account Tax Compliance Act (FATCA): New Regulations

• In 2010, U.S. legislation called the Foreign Account Tax Compliance Act was implemented. The legislation is intended to increase enforcement of U.S. income tax reporting not only by increased monitoring of individual U.S. taxpayers’ non-U.S. assets but also through requiring non-U.S. foreign financial institutions (FFIs) to find any U.S. taxpayers holding assets in a non-U.S. fund.
• The penalties set out in the legislation for non-compliance by the FFI are potentially severe. If the FFI does not comply with the required reporting requirements, all U.S. source income and payments to the fund held by the FFI (including gross proceeds on the sale or maturity of U.S. securities) are subject to a 30% withholding tax.

Foreign Account Tax Compliance Act (FATCA): New Regulations (cont’d)

• There has been widespread international concern about the application of FATCA to non-U.S. pension plans. It appears, for example, that a Canadian registered pension plan would be an FFI under the new legislation as well as other types of funded retirement income arrangements including RCAs, DPSPs, RRSPs and PRPPs.

Foreign Account Tax Compliance Act (FATCA): New Regulations (cont’d)

• Proposed regulations were released in February 2012 (apparently to be finalized in the summer of 2012), which are intended to provide relief from the FATCA rules for various types of foreign pension plans.
• It is important to note that notwithstanding the exemption for the foreign pension plan (i.e., the FFI), the IRS will require reporting by U.S. taxpayers who participate in the foreign pension plan (Form 8938). Even in the case of Canada (which has a tax treaty with the U.S. under which there are various forms of relief from taxation on contributions and accruals), a U.S. individual tax payer could in certain circumstances have U.S. taxable income attributable to his/her participation in the Canadian pension plan.
Foreign Account Tax Compliance Act (FATCA): New Regulations (cont’d)

• Under the February 2012 proposed FATCA regulations, a foreign pension plan may be deemed compliant with FATCA, which essentially means that such plan can then be treated as an "exempt beneficial owner" under the FATCA rules.
• There will be two forms of relief for foreign pension plans; namely (1) general relief and (2) relief for certain types of foreign pension plans recognized under tax treaties (Corresponding Plans).

Foreign Account Tax Compliance Act (FATCA): New Regulations (cont’d)

• The general form of relief applies where:
  1. The plan is organized for the purposes of providing pension or retirement income benefits under the law of each country in which it was established or operates.
  2. Contributions must consist only of employer, employee and government contributions and must be limited by reference to earned income.

Foreign Account Tax Compliance Act (FATCA): New Regulations (cont’d)

3. No single member or beneficiary may have a right to 5% or more of the plan’s (or FFI’s) assets.
4. Contributions to the plan are deductible or excluded from gross income of the member, or the plan’s investment income must be exempt from tax under the tax laws of the home country due to its status as a pension or retirement plan or the plan must receive 50% or more of its contributions from employers or the government.
Foreign Account Tax Compliance Act (FATCA): New Regulations (cont’d)

• A plan which meets the general rule must certify its status as a "deemed compliant FFI" by providing the financial institution acting as withholding agent for the plan’s U.S. assets with supporting documentation confirming its status.

Foreign Account Tax Compliance Act (FATCA): New Regulations (cont’d)

• Corresponding Plans are plans which are recognized under a U.S. tax treaty will also be treated as an exempt beneficial owner under FATCA if:
  1. the plan is established in a country that has a tax treaty with the U.S. and the plan is exempt from taxation in that country
  2. the plan is operated principally to provide retirement or pension benefits, and
  3. the plan is entitled to benefits under a tax treaty on income that satisfies any applicable limitation on contributions or benefit requirements.

Foreign Account Tax Compliance Act (FATCA): New Regulations (cont’d)

• Despite general foreign pension plan and Corresponding Plan exemptions, other pension or retirement income plans may get caught by the FATCA Foreign Financial Institution (FFI) rules.

• April 30, 2012, Submission from ACPM to Internal Revenue Service – expresses concern that smaller RPPs (e.g., small DC pension plans), RRSPs, DPSPs, RIFs and RCAs could still be caught by the FFI rules under FATCA and are asking to have all such plans together with any Pooled Registered Pension Plan included in the general foreign pension plan exemption from FATCA.
Federal Bill C-377

- Private Member Bill passed Second Reading on March 14, 2012, and is going to the Standing Committee.

- Proposed amendments to the Income Tax Act that will require any "labour organization" and any "labour trust" to provide detailed financial information to CRA, which is then subject to public disclosure.

- Failure to comply could result in a fine of $1,000 for each day that the labour organization or labour trust fails to make the filing.

Federal Bill C-377 (cont'd)

- The "labour trust" definition has been drafted very broadly:
  - "labour trust" means a trust or fund in which a labour organization has a legal, beneficial or financial interest or that is established or maintained in whole or in part for the benefit of a labour organization, its members or the persons it represents.

- A "labour trust" is required to file a return that includes matters such as a listing of all sales and purchases of investments (including description, cost, book value and price paid), a statement of all disbursements (including salary paid to directors, officers and trustees and all payments to contractors) and a record of the percentage of time dedicated to political activities and lobbying activities.

Federal Bill C-377 (cont'd)

- The definition of "labour trust" on its face might catch a wide range of pension funds and other employee benefit plan funds (and various types of related investment vehicles, e.g., trusts or partnerships) simply because such pension or benefit plans provide benefits to employees or former employees who happen to be unionized.

- Given that this is a Private Member's Bill, the policy objective is not entirely clear (this was not legislation proposed in the usual manner by the Department of Finance).
Federal Bill C-377 (cont’d)

• Significant concerns have been expressed to the Department of Finance and through other channels by various stakeholder groups including some of the private-sector multi-employer pension plans as well as various labour organizations.

• The fate of the Bill remains to been seen including whether it will proceed and, if it does, whether the types of entities to which the filing requirement would apply will be narrowed considerably.
Introduction

• Jointly sponsored pension plans (JSPPs) in Ontario
  – what is a JSPP?
  – JSPP governance
    • Structure and operational considerations
  – some current issues for JSPPs
    • Solvency relief
    • Budget consultation
    • Opting out of new grow-in requirements

What is a JSPP?

• In general, a pension plan under which the members and employer(s) share responsibility for funding and governance
• Under the PBA, in order for a plan to be a JSPP:
  – it must provide defined benefits
  – it must be contributory
What is a JSPP? (cont'd)

- Under the PBA (cont'd)
  - members must be required under documents that create and support the plan to contribute in respect of going-concern unfunded liabilities and solvency deficiencies
  - under the plan terms, member contributions in respect of a year cannot exceed employer contributions in respect of the year

What is a JSPP? (cont'd)

- Under the PBA (cont'd)
  - accrued benefits cannot be reduced except on wind-up
  - employer(s) and members (directly or through representatives) are jointly responsible for making decisions about plan terms and amendments

What is a JSPP? (cont'd)

- Under the PBA (cont'd)
  - employer(s) and members (directly or through representatives) are jointly responsible for making decisions about appointment of plan administrator or selection of members of a body acting as administrator
  - members' benefits and contributions must be directly related to members' pensionable earnings
What is a JSPP? (cont'd)

- Pension plan documents must set out methods by which joint decisions of employer(s) and members will be made
- Administrator must file statement with FSCO certifying that plan satisfies the JSPP criteria on or before first valuation report following the date on which plan meets JSPP criteria is due (or by date of next valuation report due after June 1, 2011, for JSPPs in existence on that date)

Joint Governance

- Jointly governed is not necessarily the same as jointly sponsored
- S. 5.6 of Ontario Regulation 909 under the PBA identifies four types of "jointly governed" plans:
  - JSPP
  - MEPP established pursuant to a collective agreement or a trust agreement

Joint Governance (cont'd)

- S. 5.6 of Ontario Regulation 909 (cont'd)
  - plan administered by a pension committee made up of member representatives
  - plan administered by a pension committee at least 50% of whom represent members
Joint Governance (cont'd)

• Joint governance is not necessarily the same as joint administration
  – JSPPs require joint decision-making with respect to appointment of administrator and plan design but not plan administration
  – pension committee may act as administrator but may not establish funding policy or control plan design

Joint Governance (cont'd)

• JSPPs must have joint governance and must have established a decision-making process set out in documents that create and support the plan
  – plan text
  – funding agreement
  – collective agreement
  – legislation

Joint Governance (cont'd)

• Body that makes plan design and funding decisions may take different forms
  – corporation
  – trust
  or may be that joint decision making is provided for by agreement
Joint Governance (cont’d)

• Decisions by governing body of JSPP need to be appropriately documented
  – may entail plan amendments, member notices

• Decisions by governing body of JSPP must be communicated in a timely fashion to plan administrator who may need to implement new administrative processes or investment arrangements in connection with such decisions

Current JSPP Issues

• Solvency relief under the PBA
  – effective June 1, 2011, certain large JSPPs are exempt from solvency funding requirement
  – this relief is only available for stipulated JSPPs that were in existence on August 24, 2010

Current JSPP Issues (cont’d)

• Solvency relief under the PBA (cont’d)
  – must still determine funded status of plan on a solvency basis
  – JSPPs that are not exempt from solvency funding may still benefit from an extended 10-year liquidation period for new solvency deficiencies
Current JSPP Issues (cont'd)

Budget Consultation
• March 27, 2012, the Ontario Budget proposed the following changes to public-sector JSPPs:
  – move to 50-50 cost sharing between employers and members for all JSPPs
  – make reductions in future or ancillary benefits mandatory prior to any increase in employer contributions

• March 27, 2012, Ontario Budget (cont'd)
  – increases in member contributions before a decrease in benefits could be allowed where members contributing less than employers
  – third party dispute resolution process where no agreement on benefit reductions

• March 27, 2012, Ontario Budget (cont'd)
  – budget provided for consultations before changes to JSPP rules
  – consultation process was announced April 25, 2012
Current JSPP Issues (cont’d)

Budget Consultation
• March 27, 2012, Ontario Budget (cont’d)
  – appears that input is being sought from the major Ontario Public Sector JSPPs:
    • OMERS
    • Teachers
    • TTC
    • HOOPP
    • CAAT
    • PSP
    • OPSEU

• March 27, 2012, Ontario Budget (cont’d)
  – comments will be accepted from other interested parties but they are not being actively solicited
  – government has indicated that its objective is to “improve” plan funding without adding to employer and taxpayer costs

Current JSPP Issues (cont’d)

• Opting out of new grow-in rules
  – grow-in will generally apply to all employer-initiated terminations of employment on or after July 1, 2012, unless the termination is a result of wilful misconduct, disobedience or wilful neglect of duty by the member
Current JSPP Issues (cont’d)

• Opting out of new grow-in rules (cont’d)
  – historically, grow-in applied only a full or partial wind-up
  – new rule converts extension of grow-in rights from an extraordinary event to an everyday occurrence

• Opting out of new grow-in rules (cont’d)
  – s. 74.1 of the PBA provides that JSPPs (and MEPPs) may elect to exclude the plan and its members from the grow-in rules in section 74 within a prescribed time and subject to satisfaction of prescribed requirements
  – only one election may be made in respect of a plan

• Opting out of new grow-in rules (cont’d)
  – draft regulations prescribe the time frame for making an election to opt-out of the grow-in rules and certain related requirements
  – timing of opt out election:
    • JSPPs in existence on July 1, 2012, must elect within one calendar year (i.e., by July 1, 2013)
    • New JSPPs must elect within one year after the plan administrator files statement certifying that plan meets criteria to qualify as a JSPP
Current JSPP Issues (cont’d)

- Opting out of new grow-in rules (cont’d)
  - notice of the election must be given to:
    - plan members on the effective date of the election in their next annual statement
    - new members must receive notice of the election at the same time as they receive the description of the plan required under s. 25(1) of the PBA

- Opting out of new grow-in rules (cont’d)
  - notice of the election must be given to:
    - each trade union representing members within 30 days after election is filed
    - any advisory committee within 30 days after election is filed

- Opting out of new grow-in rules (cont’d)
  - JSPP administrator must provide certifications to the Superintendent that notices to existing members, unions and any advisory committee have been provided within 60 days after the relevant notice is required to have been given
  - s. 74.1(6) of the PBA permits the rescission of an election to opt out of the grow-in rules
Current JSPP Issues  (cont’d)

- Opting out of new grow-in rules  (cont’d)
  – notice of rescission must also be provided to members, trade unions representing members and an advisory committee at the time of rescission
  – decision to opt out of grow-in (or to rescind opt out election) is to be made by employer(s) or their representatives and the members or their representatives

Conclusion

- Ontario government seems in favour of JSPPs
  – Budget included statement that government will support efforts to convert existing single-employer plans in the broader public sector to JSPPs
  – however, government is clearly looking to modify the existing JSPP regime to achieve better cost containment

Conclusion

It is unclear whether the JSPP model will be available to private-sector plans after the government implements its new legislative framework for JSPPs. Even if the JSPP structure is possible for private-sector plans, it is unclear whether it will find acceptance among private-sector plan sponsors.