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Submission in Response to the Department of Finance's Consultation on "Strengthening the Legislative and Regulatory Framework for Private Pension Plans Subject to the Pension Benefits Standards Act, 1985".

Dear Ms. Lafleur:

Thank you for providing the undersigned with the opportunity to provide comments and views on the issues arising out of the government's concerns re the strengthening of the legislative and regulatory framework for private pension plans subject to the *Pension Benefits Standards Act, 1985* (the "PBSA").

I - COMPETING INTERESTS

In the past decades pension plans and their potentially huge financial holdings and/or surpluses have become too attractive and lucrative a target for employers, administrators, investors eyeing lucrative take-overs, politicians and the Canada Revenue Agency itself, to ignore.

The pension rights and interests of plan members have taken a distant second place, if any place at all, to the interests of those third parties having an eye to appropriating all or part of the funds of a pension plan, surplus or otherwise, even if this means stripping the plan members and former members themselves of their statutory pension rights and entitlements. Fiduciary duties and obligations, and duties of care, have effectively proven to be "*lettre-morte*" and are being undermined by those very entities whose competing interests have ensured that the pension rights of the intended beneficiaries of pension plans have become more uncertain over time, and put to increasingly greater risk than ever before.

In actual fact, and in most cases, individual plan members, former plan members, or plan members as a group, do not have the required knowledge, skill sets, or financial resources necessary to mount the required court challenges mentioned by the Minister of Finance's Discussion Paper on Private Pensions, in any real or timely fashion, in the event that their interests are being jeopardized and put at risk by competing corporate or governmental interests. In certain cases, the members or former members are being, and have been denied, the required standing necessary to fight for their interests in certain fora, including *inter alia*, in matters of revocation: The PBSA standing required vis-à-vis the Superintendent of Financial Institutions,

the standing required for subsequent appeals to the Federal Court, and *Income Tax Act* ("ITA") appeals to the Federal Court of Appeal.

Litigation before the courts should always be considered as a last remedy, even in those cases where members and former members could somehow manage to overcome both the lack of expertise and the prohibitive costs of lengthy, complex and protracted litigation. Litigation should never be contemplated as the first and only real line of defence for workers seeking to protect their pension rights and entitlements.

As it now stands, the pension entitlements of pension plan members and former plan members are completely vulnerable in the face of the competing interests of other stakeholders. The system lacks an appropriate administrative oversight body having the power to enforce the provisions of applicable pension statutes enacted to provide protection to the pension rights and benefits of members and former members against the pecuniary assaults upon those benefits and entitlements by those very entities designated to protect them.

II - Standard of Care Changes (Good Faith is not a Standard of Care)

It is inaccurate to conclude that because defined contribution plans impose a different set of responsibilities on plan administrators, that their obligations are limited to ensuring that contributions are made, and that the plan complies with the legislative and regulatory framework. This reasoning and conclusions drawn do not reflect the reality and complexity of pension plan administration and legislative compliance in Canada.

While many people bandy about the term "fiduciary", few understand what this legal concept entails, or the social context in which it evolved. Flanagan explains it well when he writes:

"In the fiduciary context, the operative social norm is the desire to inhibit opportunism. When actors undertake to act for others, they are often exposed to opportunities to benefit themselves or their associates. They may divert value away from their beneficiary or extract a coincident benefit. The permutations of this mischievous conduct are innumerable. We do not condone this self-advancement in the absence of the fully-informed consent of the beneficiary, and we impose strictures on those who are in a position to work this kind of mischief. Further, we recognize that the mechanisms of opportunistic conduct are often unappreciated or undetectable and we therefore make the fiduciary constraint a strict one."¹

Fiduciary duties and obligations are standards that have evolved over time in commercial

¹Robert Flanagan. *Commercial Fiduciary Obligation*. Alberta Law Review, Vol. 36(4), 1998, p.906.

and other contexts that involve some type of access to the assets of others. The objective of imposing a standard of fiduciary responsibility is to ensure that the rights of individuals are not compromised by the self-interest of the fiduciary. These self-interests do not disappear in the context of defined contribution plans.

The proposed change to what is referred to as a “standard” of good faith for employers will inevitably result in a unconscionable reduction of accountability of employers and administrators vis-à-vis the plan and former plan members, and in an accompanying reduction in the protection of the pension interests of these plan and former plan members.

Good faith as an obligation does not constitute a “standard of care”. Good faith is a legal notion that is already presumed in law. Accordingly, the proposed change of any existing standard of care to simple “good faith”, in effect constitutes an elimination of what standard of care now exists. It also constitutes an elimination of any real or effective standard of care. This in turn would result in the increased vulnerability to the pension interests of plan and former plan members, while at the same time seriously reducing any real likelihood of success by affected plan and former plan members in any subsequent pension litigation.

The reduction or elimination of accountability through the elimination of the existing standards of care goes counter to the objective of enhanced financial security for workers as recognized and underlined by the Supreme Court of Canada in the matter of *Buschau v. Rogers Communication Inc.*, [2006] 1 S.C.R. 973.

III - PURPOSE OF THE PBSA

In the matter of *Buschau v. Rogers Communication Inc.*, [2006] 1 S.C.R. 973, Mr. Justice Bastarache of the Supreme Court of Canada, as he then was, provided an analysis of the purpose of the PBSA at paragraph 79 of that decision:

“The PBSA is a comprehensive statutory scheme structured to further the public policy **objective of enhanced financial security for workers** upon their withdrawal from the active workforce. The PBSA, together with the Pension Benefits Standards Regulations, 1985 [...] facilitates pension contributions from workers and employers, and protects and preserves pension funds and maximizes pension benefits, all in the interest of providing income security for workers in retirement.” (emphasis added)

At paragraph 96 of *Buschau* Mr. Justice Bastarache went on to state that:

“The underlying social policy objective of the legislation is to promote the establishment and maintenance of private pension plans in order to provide income security for employees and their families in retirement. As this Court recognized in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2004] 3 S.C.R. 152 [...]

modern pension statutes are public policy legislation that recognize the “vital importance of long-term income security”. The “locking-in” provisions, portability provisions, as well as the termination and winding-up provisions are all part of the objective of ensuring retirement income security”.

The protectionist aims of both federal and provincial pension legislation were underlined by the Supreme Court of Canada in both the *Buschau* and *Monsanto* cases. Pension statutes such as the *Pension Benefits Standards Act, 1985*, and the *Pension Benefits Act* of Ontario, are public policy legislation that recognize the vital importance of long term income security, their purpose being:

“to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans”. (para 38 *Monsanto Supra*) (emphasis added)

IV - Legislative and Regulatory Impediments

a. CRA and ITA as main Impediments

As stated in the Department of Finance’s Consultation Paper, plans can be registered under federal or provincial jurisdiction. This takes into account the constitutional jurisdictions in terms of separation of powers between the federal and the provincial governments. However, the aims of both types of pension legislation remain the same. As well, in order to achieve the aims and objectives of both federal and provincial pension legislation, both types of pension plans must generally be registered with the Canada Revenue Agency (“CRA”) for tax purposes. Thus both types of plans can be said to be tax “assisted” when registered pursuant to the provisions of the *Income Tax Act* (“ITA”).

As a general rule, private pensions fall within the constitutional jurisdiction of the provinces in light of section 92(13) of the *Constitution Act, 1867*. As stated by Peter Hogg in his book *Constitutional Law of Canada* (Toronto: Carswell) 1998: “The regulation of labour relations over most of the economy is within provincial competence under property and civil rights in the province.” (p.21.7) In the federal realm, jurisdiction is linked to employment in connection with certain federal works, undertakings and businesses, et al.

It is important to also keep in mind the provisions of section 94A) of the *Constitution Act, 1867* which prohibit the Parliament of Canada from making “laws in relation to old age pensions and supplementary benefits” that would “affect the operation of any law present or future of a provincial legislature in relation to any such matter.”

Both federal and provincial pension legislation have many similar provisions intended to benefit and protect the interests of members and former members of pension plans. Ideally when

both federal and provincial statutes refer to each other, as far as possible, these statutes should be interpreted to work together and be consistent with each other. This includes the inter-relations between not only the provisions of the PBSA and the PBA of Ontario, but with those “assistance” provisions of the *Income Tax Act* (“ITA”).

Unfortunately, in recent years it has come to pass that, in the absence of an overarching federal administrative oversight body such as a Pension Management Board, the Canada Revenue Agency (“CRA”), and more specifically its Registered Plans Directorate (“RPD”), has unilaterally undertaken to fill the existing vacuum by appointing themselves by virtue of the pension registration provisions of the *Income Tax Act* as the oversight body for both provincial and federal pension plans. CRA’s unanticipated foray into this unintended oversight function, while at the same time disregarding the provisions of both federal and provincial pension statutes, has been at the expense of various stakeholders in pension plan regimes, including plan and former plan members. Out of this unilaterally self-expanded CRA mandate a new and unintended *de facto* pension framework has arisen whereby the aims and objectives of both federal and provincial pension legislation have been set aside and defeated in favour of the tax collecting imperatives of CRA which are completely at odds with the protectionist aims of federal and provincial pension legislation.

b. Requirement for Consultation and Harmonization of Legal Regulatory Pension Regimes

In November 2006, the Province of Ontario established an Expert Commission on Pensions to “examine the legislation that governs the funding of defined benefit plans in Ontario, the rules relating to pension deficits and surpluses, and other issues relating to the security, viability and sustainability of the pension system in Ontario.” Two years later, after extensive research and consultations with all stakeholders, pension professionals, academics, consultants and the views of ordinary Ontarians, the Commission issued a report on October 31, 2008. Out of this report came a multitude of recommendations that would be equally applicable and sensible in a federal context.

On the issue of regulatory framework, the Commission stated that:

“...an important principle informing the work of this Commission is the need to “coordinate pension policy with other policy domains and legal-regulatory regimes.” This involves three aspects. The first is to ensure that elements of federal tax and insolvency law that bear on pension provision, entitlement, administration and security make sense in terms of Ontario’s pension policy.”²

The Commission further mentioned the need to coordinate provincial pension policies especially:

²Report of the Expert Commission on Pensions. *A Fine Balance: Safe Pensions - Affordable Plans - Fair Rules*. (Queen’s Printer of Ontario: Toronto) 31 October 2008, p.127.

“with federal policies related to income tax and insolvency.[...] Reducing or eliminating policy conflict between Ontario and the federal government, and of administrative divergence and duplication among provincial and federal pension regulators, would greatly assist the smooth operation of the pension system. [...] The time is right – indeed overdue in my opinion – for pension Ministers to meet and address at least a limited agenda of measures related to harmonization of pension laws and regulatory regimes, and to the adjustment of federal laws to better coordinate with provincial pension policies.”³ (emphasis added)

At the present time, the biggest obstacle in enhancing the legislative and regulatory framework for registered pension plans are the inconsistent policies, lack of pension expertise, and tax collecting culture of the Canada Revenue Agency. Federal and provincial pension regimes were never meant to be tax “led”, but were meant to be tax “assisted”. Unfortunately the mandate and areas of expertise of CRA officials has proven to be at odds and incompatible with the aims and objectives of the regulatory pension frameworks:

“...responsibility for the administration of “pension law” in the largest sense is widely distributed: [...] Pension disputes may therefore find their way – simultaneously or consecutively – into several different forums where decision-makers tend to interpret pension law in light of their own mandate and expertise. **The results are sometimes unexpected, sometimes contradictory, and occasionally, I was told, disruptive of the whole pension system.** To overcome such results, legislation and plan documents may have to be re-drafted, well-established practices revised [...]”⁴ (emphasis added)

V - Sabotaging the Objectives of Pension Regimes - (and how this relates to Multi-Employer Pension Plans.)

As pointed out previously (re: S.C.C.) pension statutes are, *inter alia*, public policy legislation aimed at:

1. Enhancing financial security for **workers**, (emphasis added)
2. establishing minimum standards to protect and safeguard the pension benefits and rights of members and former members, and
3. establishing regulatory supervision.

Some of the important statutory tools identified by the Supreme Court of Canada as being part of the objective of ensuring retirement income security include:

1. The “locking-in” provisions.

³*Supra*, p.198.

⁴*Supra*, p.126.

2. portability provisions,
3. termination, and
4. winding-up provisions.

A) Worker Entitlement to Pension Plan Participation

On the issue of which workers are entitled to participate and benefit from pension plans as specifically contemplated by pension legislation. – As was properly pointed out, many MEPPs are administered by labour unions, rather than employers under traditional single employer plans. MEPPs already exist at the provincial level. In Ontario, they have been established:

“for employees in industries such as construction and food, where individuals tend to move frequently between employers or are employed by a succession of small to medium-sized businesses.[...] In the construction industry, for example, MEPPs exist for carpenters, bricklayers, plumbers and boilermakers. Since there is usually a labour union representing workers in these industries, most MEPPs are sponsored and/or administered by the union.”⁵

While many of the “employees” already governed by existing MEPPs may not fit the traditional common law definition of employee as being restricted to a worker working under a contract of service, this is not a problem in the Ontario pension regulatory scheme of things. The PBA of Ontario has statutorily defined an “employee” for pension purposes as being a worker receiving remuneration to which the pension plan is related. This in fact extends the possibility of taking part and benefiting from a pension plan to a greater number of workers than the traditional common law definition of employee would permit. This is in keeping with the statutory aim and objective of “enhancing the financial security for **workers**”, as remarked upon by the Supreme Court.

Some federal pension statutes also have statutory extensions of what is covered by the term “employee”. For example, presently section 2 of the PBSA extends the definition of employment to “work for remuneration [...] under an express or implied contract of [...] apprenticeship, and includes the tenure of an office”. The PBSA could be further altered to extend its definition of employee for pension purposes in order to facilitate the incorporation of MEPPs in the federal domain. This is not a problem, as the extension or the displacement of the common law test for employment by statute is permitted:

“Where there is an outright conflict between legislation and the common law, the matter is easily resolved: the legislation prevails.”⁶

⁵Financial Services Commission of Ontario. *Your Pension Rights: A Guide for Members of Registered Pension Plans in Ontario*. p.16

⁶Ruth Sullivan. *Statutory Interpretation*. (Irwin Law: Ottawa) 1997, p.234.

Unfortunately, despite the provincial and federal statutory extensions of pension plan membership to workers who do not fit the traditional common law test for what constitutes an employee, the Canada Revenue Agency has chosen to ignore the provisions of both federal and provincial statutes and has instead decreed that workers who do not fit the traditional common law definition of what constitutes an employee cannot be members of pension plans that are registered under the ITA. CRA only recognizes the common law test that it presently applies in the unrelated context of enforcing the provisions of the Employment Insurance and Canada Pension Plan legislation. CRA has also decreed that if only one pension plan member of a pension plan does not meet the common law test of employee, that it can retroactively revoke the ITA registration of the pension plan in question.

This CRA position in fact sabotages both the Ontario provincial pension plan regime and federal pension plan regimes. CRA has unilaterally decreed that notwithstanding federal and provincial pension legislation in the matter, that the pension regimes contemplated by those statutes cannot be extended to the broader base of Canadian workers contemplated by those statutes. This intransigence by CRA in effect also scuttles any contemplated viable Multi-Employer Pension Plan while once again proving to be an obstacle to the stated aim and objective of pension legislation of enhancing the financial security for **workers**.

The CRA position also sabotages the second stated objective (*supra*) of protecting and safeguarding the pension benefits and rights of members and former members of pension plans. This is because, as a corollary to its first position, CRA is of the position that a retroactive revocation of a pension plan **also entails retroactive taxation of the pension benefits of all of the members and former members of the pension plan**. While there is nothing in the *Income Tax Act* that supports this position, and despite various federal and provincial pension statutes having specific statutory provisions⁷ to the contrary, aimed at protecting and safeguarding the vested pension benefits and rights of members earned over a lifetime, these provisions have remained "*lettre-morte*" as against CRA. CRA has demonstrated a marked refusal to acknowledge any statutory provisions other than its own in this context.

While the **termination and winding-up provisions** of pension plans have also been recognized by the Supreme Court of Canada as important tools ensuring retirement income security of plan and former plan members. CRA has instead viewed these provisions as providing it with a lucrative taxation opportunity. And while both federal and provincial statutes provide that pension plan may be wound up as long as the existing rights and entitlements of pension plan members are protected⁸, these statutory provisions of both federal and provincial pension laws have been ignored by CRA. The unintended result to this CRA position, if it remains unopposed, is that the winding up and termination provisions of both federal and provincial

⁷For example, see sections 65, 66, 67 and 73(2) of PBA. Similar provisions exist in the federal *Public Service Superannuation Act*.

⁸See section 29 of PBSA and sections 72 & 73 of the PBA.

pension plan will trigger the ITA revocation of said plans⁹, which in turn will automatically trigger CRA's application of its policy on retroactive taxation of pension benefits, including the application of punitive penalties, fees and interest, thus targeting not only pension plans but possibly other member and former member assets, in complete violation of the Supreme Court's pronouncements on the aims and objectives of the winding-up and termination provisions of pension plans.¹⁰

This CRA strategy has further resulted in the forced un-locking of statutory locked-in pension monies outside of the framework of the statutory scheme applicable in this regard. By forcing the removal of pension monies from their statutory locked-in pension vehicles, CRA has in the past acted in a manner that ignored both the provisions of the ITA and the applicable provisions of the PBA and its regulations¹¹, and consequently reduced the statutory "**locking-in**" provisions of pension plans to an unenforceable paper right which no longer ensures the retirement income security of pension plan members and former members.

Pension portability, also identified by the Supreme Court of Canada in both the *Buschau* and the *Monsanto* cases (*supra*), as constituting one of the mechanisms aimed at ensuring retirement income security, has also been undermined by CRA interference. CRA views pension portability between pension plans as "conduits" improperly enabling the transfer of greater amounts of tax sheltered monies than traditional transfers from pension plans to other types of registered retirement vehicles such as RRSPs. Thus CRA views pension portability as an "improper motive" or "purpose", a potential breach of what they call the "primary purpose" rule of pension plans. This is the breach that enables them to retroactively revoke the ITA registration of virtually any federal or provincial pension plan pursuant to the wording contained in section 8502(a) of the ITA Regulations.

The Federal Court of Appeal has concluded that the purpose that the sponsors of a pension plan had in mind when they established their plan is the relevant purpose to determine whether these was a breach of the primary purpose as per section 8502(a) of the ITA Regulations. In other words the "motives" of the plan sponsors in establishing the plan determines whether the plan can be revoked by CRA at a later date. Unfortunately, there is little, or no way, that plan members would be able to ascertain what these motives were, in any realistic scenario, nor

⁹See section 147.1(11)(i) of the ITA.

¹⁰It is also CRA's position that the pension monies contained in registered pension vehicles are RRSP overcontributions and as such subject to a 1% monthly retroactive tax penalty, s.204.1(2.1) of the ITA, plus applicable interest, as well as becoming taxable upon revocation. This strips the plan members and former members not only of their lifetime pension benefits, but may also target all of the other major assets accumulated by the workers over their lifetimes in the guise of penalties and interest.

¹¹See section 22.2 of Regulation 909 to the PBA of Ontario.

whether CRA would view these “motives” as contravening the “primary purpose” rule.

Further, the views of the Federal Court of Appeal, on plan “purpose” being directly linked to plan sponsor “motive”, appear to be directly at odds with the reality of the market place as recognized and legitimized by the Supreme Court of Canada in the *Buschau* case (supra):

“...an employer motivated by labour market factors to create and maintain a pension plan for its employees for the business benefits it may derive may not be so motivated when a plan instituted for such reasons can be terminated by the unilateral action of members and other beneficiaries, without consideration of the employer’s business interests.” (para 97) (emphasis) added)

It should be noted that CRA is also of the view that the transferring pension plan becomes a revocable pension plan if it transfers pension monies into a pension plan that “subsequently” becomes a deregistered pension plan. This in turn has the direct consequence of discouraging pension plan portability and thus reducing long-term income security, and has the added disadvantage of endangering the pension plans on both sides of the pension portability transaction, in what could be considered to be a “domino” effect.

At the present time, the federal Public Service Superannuation Plan is considered by CRA to be in a retroactive revocable position, thus affecting the pension security of approximately 300,000 federal public servants. This is a little known fact, that for obvious reasons has not been widely disseminated by Treasury Board, the employer/plan administrator of the Public Service Superannuation Plan.

B- Establishing Minimum Standards

By its very name the *Pension Benefits Standards Act, 1985*, establishes its aim of providing minimum standards for regulating and administering the pension plans which come within its purview. The same can be said for instance of the PBA in Ontario which is also recognized by the Financial Services Commission of Ontario (“FSCO”), as establishing the minimum standards for administering and funding pension plans and pension benefits, and which applies to every registered pension plan provided for people employed in Ontario.

A minimum standard should mean that when the PBSA, PSSA, or PBA standards are met, then the pension rights and benefits governed by the provisions of the relevant pension statutes should benefit from, and be protected by, the provisions of their applicable pension legislation in accordance with the aims and objectives of the said pension legislation.

In the *Monsanto* case (supra), Madame Justice Deschamps had this to say about the purpose of the PBA, observations that are arguably also applicable to federal pension scheme legislation:

“The *Pension Benefits Act* is clearly public policy legislation establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans...” (para 13)

CRA should not be permitted to interfere at its discretion with the legislative pension schemes of either federal or provincial jurisdictions, for when it does, then it cannot be said that the PBSA or PBA establish or prescribe the minimum standards as contemplated by the Supreme Court of Canada. The standards of pension legislation at both the federal and provincial level should be enforceable as against CRA.

C - Establishing Regulatory Supervision (The Need for a Pension Champion)

Establishing pension standards and rules without proper supervision and enforcement defeats the purpose of establishing the standards and rules in the first place. Standards and rules meant to benefit and protect the pension rights and entitlement of plan and former plan members must be respected and enforced, and pension plan members and former members must be able to rely in full confidence that these standards and rules will be enforced by an expert pension body whose very mandate should incorporate the recognition, protection and safeguard of the pension assets of the members.

The recent decision of *Ault et al. vs. the Attorney General of Canada*, of the Ontario Superior Court Division, dated September 3, 2008, is a stark reminder of just how horribly pension conflicts can degenerate in the absence of oversight or accountability mechanisms. In this 400+ page ruling the Court outlined the egregious actions of the federal Treasury Board (the employer/pension plan administrator), the Canada Revenue Agency, and others, as against the former federal public servants who transferred, or attempted to transfer, their federal pension benefits into Ontario pension plans governed by the PBA.

In the *Ault* ruling (*supra*), the Court found the federal government officials (TBS, CRA, RCMP, PWGSC et al.) to have been closed minded, biased, to have displayed a negative *animus* toward the public servants, to have breached the provisions of the *Income Tax Act*, improperly shared information, defamed the reputation of public servants, manufactured tainted rulings by various means, acted for improper purposes, intentionally deceived public servants, withheld important information from public servants, treated the former public servants as adversaries, displayed a pejorative attitude toward the public servants, were blind to the legitimate pension interests of the public servants, failed to approach their duties in the even-handedness with which they should have approached these duties, and improperly colluded with other government departments and agencies in a manner calculated to reduce, threaten or eliminate the public servants' statutory pension entitlements.

In its closing remarks in the *Ault* case, the Court's heavy criticism was more than evident when it stated that:

“This is not behaviour which one expects of one’s government, one’s employer or one’s pension administrator.” (para 1304)

A reality check reveals that the statutory pension provisions of both federal and provincial legislation have remained both *lettre-morte* and unenforced as against the positions taken by CRA as a direct result of the lack of established regulatory supervision in the pension arena. The powers presently extended to the federal Superintendent of Financial Institutions as contained in the PBSA are insufficient to police and enforce the necessary compliance of those statutory protections meant to protect and safeguard the pension rights and benefits of members and former members of pension plans.

It is unconscionable and a complete abdication of governmental responsibility and governmental accountability to expect that it be left to individual plan members and former members to take on corporate players, or to engage the forces of CRA to enforce the aims and objectives of federal and provincial pension policy and statutory regimes before the courts.

Unfortunately, there is no-one to champion the rights and entitlements of the plan and former plan members, as individuals or as a group, who are at a serious disadvantage when problems arise with respect to their pension entitlements and benefits. These disadvantages include:

a) Most pension plan members and former members are unsophisticated in terms of understanding pension laws, financial rules and related taxation matters;

b) Pension plan members and former members lack critical information and knowledge of how certain circumstances can adversely affect their interests. They also lack information with respect to CRA’s intentions and actions until such time as they have lost all recourse in the pension arena and receive an “assessment notice” which could purport to tax a lifetime’s worth of pension benefits, in effect stripping the individual of his pension assets.

It should be noted here that the Federal Court of Appeal has in the past stated that CRA has no duty to inform the plan members of its actions when revoking a pension plan, nor do these plan members have any right to be heard by CRA before the decision to revoke is taken;

c) Fiduciary duties and responsibilities vis-à-vis individual plan members are ignored by employers, plan administrators, etc. There is no real enforcement mechanism to protect the pension rights and benefits of individual plan members;

d) The costs of Court enforcement of fiduciary duties and responsibilities are completely prohibitive and out of the reach of the great majority of workers. These are in reality essentially “illusory rights” (i.e. they exist on paper, but that is the extent of it);

e) The cost of tort based litigation is also completely prohibitive.

It should also be noted here that the complex nature of pension and tax law drives up legal costs in light of the requirement to hire the services of highly skilled professionals;

f) The overlap of statutes leads to the proliferation of litigation and associated costs before a variety of judicial bodies, (i.e. the Federal Court, the Federal Court of appeal, the Federal Tax Court, Provincial Court, Superior Court, Financial Services Tribunals (when these exist), Divisional Court etc.) Any hope of timely, and cost-effective resolution, is out of reach of, and completely unrealistic for any worker to contemplate;

g) Pension plan members and former members will often lack the legal standing to take the appropriate remedy at certain levels:

For example, in matters of ITA revocations of pension plans, the statutory right of appeal is only extended to the administrator of the plan or an employer who participates in the plan.¹²

h) Unions who administer pension plans will likely not take into consideration, or champion, the pension rights and benefits of former plan members, because these former plan members are no longer union members;

i) Employers and plan administrators often have the resources of the plan itself to engage in litigation against plan and former plan members who do not have access to such resources;

j) CRA has all the resources of the State.

A federal oversight body should be required to at the very least to:

1. Investigate alleged breaches of the PBSA and other federal pension statutes and regulations, and take enforcement action when required; and to

2. Respond to enquiries and complaints from pension plan members and former members.

3. This federal oversight body should be able to represent and be responsible for ensuring that plan members and former members are fully protected by the provisions of the applicable federal pension statutes as against unscrupulous employers, plan administrators, and government officials who would seek to undermine the security of pension rights and benefits of Canadian workers.

4. This federal oversight body should have the funds, resources, and the responsibility to undertake the litigation required to enforce the pension rights and benefits of plan members as against third parties, including other federal government institutions and officials who would

¹² See sections 147.1(13) and 172(3) of the ITA.

seek to expand their jurisdiction into pension and labour matters ordinarily outside of their mandate and purview and at the expense of the individual workers.

5. When there is a disconnect between the aims, objectives, provisions and interpretation of federal legislation, and/or provincial pension legislation, it should be the responsibility of the federal oversight body to immediately undertake to resolve such disputes and to enforce the applicable pension statutes, including the enforcement of Constitutional jurisdiction. It should not be left to the individual workers to shoulder this burden and to seek to champion public pension issues such as the Constitutional separation of powers between the province and the federal government.

6. It should not be left up to CRA to administer and regulate the provincial pension systems since section 94A) of the *Constitution Act, 1867* is quite clear when it states that the Parliament of Canada shall not make laws that “shall affect the operation of any law present or future of a provincial legislature in relation to any such matter”, meaning laws in relation to old age pensions and supplementary benefits, including survivors, and disability benefits irrespective of age.

7. There should be “Accountability” on the part of government officials who fail in their duties vis-à-vis pension plan members and former members.

As of today, there is no-one really “in charge”. There is no “one” body to coordinate the pension, labour, tax, and intergovernmental issues incidental to pension regimes, and there is nowhere for an individual pension plan member or former member to turn to when his or her pension rights and benefits are being put at risk.

The existence of fiduciary duties and obligations owed to plan members and what few powers exist pursuant to the PBSA in its present form, have proven to be inadequate safeguards to the pension security of Canadian workers, as these remain “paper” rights that have, more often than not, failed to make a successful transition to reality.

This proposed creation of an oversight body should not be governed by the aims and objectives of the Canada Revenue Agency which openly practices “**corporatism**”, a philosophy diametrically opposed to the protectionist philosophy, aims and objectives of the statutory pension regimes in Canada, nor should this body allow CRA to assume this mandate by tacit approval or inaction on its part.

In its 2008 Report, the Ontario Expert Commission on Pensions had this to say on the issue of promoting a “Pension Champion”:

“In my view, benign neglect of “hands off” is not an appropriate stance for government to take vis-à-vis the pension system. Engagement is essential in a voluntary system where individual sponsors and service providers, and in some cases unions, will be the primary

moving parties. Only through engagement can government introduce new ideas for consideration by the stakeholders, bring new actors to the table, and conduct studies that will provide a foundation and context for stakeholder initiatives. Only through engagement can government facilitate innovation, mediate divergent interests, ensure that the general direction of change is in the public interest, and make appropriate and speedy changes in the statute or regulations in the interests of both sponsors and members.¹³

In closing, it should be understood that at this moment in time, the actions and policies of the Canada Revenue Agency constitute the major obstacles to achieving the important objective of safeguarding the security of pension rights and benefits for Canadian workers. In other words, the pension system and pension benefits of Canadian workers are not secure, they are completely vulnerable as they represent too attractive and lucrative a target for many third parties to resist. An oversight body should be put in place to champion the rights of pension plan members and former members, and to enforce the provisions, aims and objectives of pension legislation. There should be consultation processes commenced with the provinces with an aim to harmonizing the various pension provisions of both federal and provincial statutes. And finally, the recognition that the Canadian worker is the very "*raison d'être*" of pension plan regimes, and that fiduciary duties and obligations together with enforced accountability are *sine qua non* conditions to establishing and maintaining pension regimes that fulfill the aims and objectives of ensuring retirement income security.

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¹³Report of the Expert Commission on Pensions (supra) p. 195.