

Via E-mail

Diane Lafleur
Financial Sector Policy Branch
Department of Finance
L'Esplanade Laurier
20th Floor, East Tower
140 O'Connor Street
Ottawa, ON K1A 0G5

Re: March 16, 2009

Dear Ms. Lafleur:

Re: Response to *Strengthening the Legislative and Regulatory Framework for Private Pension Plans Subject to the Pension Benefits Standards Act, 1985* (the “Report”) - Submission of the Nursing Homes and Related Industries Pension Plan (the “NHRIPP”)

1. Introduction

The Nursing Homes and Related Industries Pension Plan (the “NHRIPP”) is a “target” benefit, multi-employer pension plan. This means, while benefits are defined, if fund assets are insufficient to pay the defined benefit, the benefit can be reduced. Hence, the defined benefit is a target subject to funding sufficiency. The NHRIPP has 361 contributing employers, 32,750 active members, 4,400 retirees and assets of approximately \$570 million. The NHRIPP’s membership is comprised of unionized and non-unionized employees in the nursing and retirement home industry. Unlike most multi-employer plans, the Trustees of the NHRIPP are all appointed by the unions which represent plan members in collective bargaining.

This plan is registered in Ontario. However, in the interest of promoting consistent regulation across jurisdictions, the Trustees make this submission to the Department of Finance. Further, we have chosen to comment on select issues that are of particular relevance to multi-employer pension plans. The Trustees’ experience in establishing this target benefit pension plan, with union-only appointed Trustees, puts them in a unique position to comment on some of the issues highlighted by the Department.

The NHRIPP’s unionized members are represented by the SEIU, CUPE, the Canadian Auto Workers (“CAW”), the Ontario Nurses Association (“ONA”) and the United Food and Commercial Workers. The NHRIPP is now the standard pension plan for the nursing and retirement home industry in Ontario.

A significant proportion of Ontario’s nursing and retirement homes are relatively small employers which would normally not be able to offer their employees the advantages of participation in a target benefit pension plan. As a result, until the creation of the NHRIPP, the



nursing and retirement home industry was largely one which did not offer defined benefit pensions to its primarily female workforce. This has now changed due to the efforts of the unions which have been the driving force behind the creation and the success of the NHRIPP. The NHRIPP has expanded beyond the borders of Ontario and now has members in both Alberta and Prince Edward Island.

The Trustees of the NHRIPP together with one other multi-employer pension plan established a separate non-profit corporation to administer the two pension plans. The Multi-Sector (MS) Non-Profit Benefit Plan Administrators has offices separate and apart from the unions. The board of directors of the Multi-Sector (MS) Non-Profit Benefit Plan Administrators is made up of Trustees from both the NHRIPP and the other plan, some of whom serve as Trustees on both plans.

NHRIPP has not been able to increase its benefit levels since inception. Nor has it been required to reduce benefits. Contribution delinquencies are not a significant issue. Even in the case of two significant insolvencies affecting larger contributing employers, the Trustees of the NHRIPP were able to recover virtually all outstanding contributions and to make arrangements with the trustee in bankruptcy, in one instance, and the receiver, in another, for ongoing contributions during the period in which the bankrupt or insolvent employer was managed by the trustee or receiver.

The NHRIPP was created pursuant to a 1988 arbitration award of Arbitrator Martin Teplitsky. The Teplitsky award resulted in approximately 3,000 employees becoming members of the NHRIPP. The SEIU then made participation in the NHRIPP by employers not subject to the Teplitsky award a priority in collective bargaining. In a number of instances, employers agreed to begin making contributions to the NHRIPP. There were also a number of additional HLDAA interest arbitrations in which participation in the NHRIPP was ordered by the terms of the arbitrator's award.

Other unions also represent workers in the nursing home industry. Over time the SEIU, CUPE, ONA and the CAW have nominated trustees to the NHRIPP board. By any measure, the NHRIPP is a very successful pension plans. It has grown significantly in a relatively short period of time and continues to expand during a time when few, if any, new defined benefit pension plans are being established.

Based on its considerable history in administering this plan, the Trustees have identified a number of areas in which legislative reform would assist in encouraging greater participation in target, defined benefit pension plans and solve some of the problems faced by administrators of such plans.

2. Direct Responses to Report Proposals

(a) Solvency Funding for MEPPs

The Trustees acknowledge that solvency funding is intended to ensure that all accrued benefits can be paid upon plan termination and thus protect members in the event that their employer

becomes insolvent or bankrupt at a time at which its defined benefit pension plan is not fully funded. However, multi-employer pension plans are significantly different in their structure than are individual employer plans. As multi-employer plans receive contributions from numerous employers, the insolvency of any particular employer is unlikely to trigger the windup of a multi-employer plan. As multi-employer plans are designed to continue indefinitely despite the fortunes of any single employer, requiring such plans to be funded on a solvency basis results in their being funded for an eventuality which will likely never occur and a resulting reduction in the current level of benefits available to plan members.

In multi-employer plans the contributions of participating employers are limited to the contributions required by the applicable collective agreements. In the event that poor investment returns, or falling interest rates, result in a solvency deficiency, the employers participating in that multi-employer plan cannot be required to increase their contributions to eliminate the shortfall. Contributions may only be increased if the union and the individual employer agree to a contribution increase during the collective bargaining process. The Trustees are thus powerless to unilaterally increase contributions regardless of the funding level of the plan. Should a valuation reveal a solvency deficiency which cannot be eliminated by special payments capable of being funded by ongoing contributions, the only option for the Trustees of a target benefit multi-employer plan is to reduce benefits.

Pension plans are designed and funded for the long-term. The Trustees of multi-employer plans need to be able to rely on funding rules which remain constant over the long-term in order to determine what level of benefits they can provide. Ontario has provided temporary relief through the introduction of the Specified Ontario Multi-employer Pension Plan (SOMEPP) regulation (“Regulation 489/07”). It provides that eligible multi-employer plans may elect to be designated as a SOMEPP and thus be relieved of the obligation to be funded on a solvency basis until August 31, 2010. (As actuarial valuations typically need only be filed once every three years, the regulation effectively extends the moratorium until 2013.)

Alberta, British Columbia, Ontario and Nova Scotia all now have solvency funding moratoriums for eligible defined benefit, multi-employer plans. Additionally, the recently released reports of Alberta and British Columbia’s Joint Expert Panel on Pension Standards, Ontario’s Expert Commission on Pensions and Nova Scotia’s Pension Review Panel, all recommend that this relief from solvency funding be made permanent.

Ontario, British Columbia and Alberta are the provinces of registration for the majority of MEPPs in Canada. Each of these jurisdictions recognizes the nature of target benefit plans and the funding consequences. However, CAPSA’s new draft Reciprocal Agreement requires that a benefit, which is to be funded on a solvency basis by a minor authority (e.g. Quebec) be so funded for members in that jurisdiction, even if the major authority’s legislation does not require such funding. Such a provision might work for an individual employer plan where one employer is responsible for funding any deficiency. However, it will create inequitable treatment amongst members of multi-employer plans where contributions are fixed and require these plans to have multiple transfer ratios.

The Trustees advocate elimination of the obligation to be funded on a solvency basis for federally registered MEPPs. Requiring funding on a solvency basis for these plans results in retirees having lesser incomes than would otherwise be the case merely because the Trustees of their multi-employer pension plans are being required to fund for an eventuality that is unlikely to ever occur.

Recommendation: The Minister of Finance should amend the *Pension Benefits Standards Act* and supporting regulations to permanently relieve multi-employer pension plans from any obligation to be funded on a solvency basis.

In addition, the Minister of Finance should encourage CAPSA to revise section 6 of the proposed Agreement Respecting Multi-Jurisdictional Pension Plans to ensure that solvency funding requirements prescribed by a minor authority not be applied to MEPPs with members in more than one jurisdiction.

(b) Full Funding on Voluntary Plan Termination

The discussion in the Report respecting obligatory full funding on voluntary pension plan termination highlights the inadequacy of the *Act's* current structure. Funding requirements for MEPPs should be contained in distinct statutory provisions that have been developed recognizing the fixed contribution nature of the typical MEPP target benefit plan. In a MEPP context, the issue is not to obtain full funding from the withdrawing employer based on an actuarial valuation of the plan. Rather, the issue is ensuring that the contributions that were committed to by that employer be remitted in full and that the benefits payable to the employees/members related to that employer in the event of a funding deficiency be adjusted. A requirement to fully fund pension benefits, if made applicable in a MEPP context, would jeopardize the very existence of these plans.

One of the key attractions for employers of MEPPs such as the NHRIPP is that they limit the obligations of employers to remitting the contributions required by the terms of their collective agreements and to providing the information necessary to administer the plan. Employers have chosen to participate in a MEPP with the understanding that they will not be held responsible for funding any solvency or going concern deficiency which may arise under the plan. They may choose to agree to increase plan contributions through the collective bargaining process, but they expect that they will not be compelled to make special payments. The trustees of the plan set target benefit levels. But the trustees have no power to force an increase in contributions from participating employers to cover any funding deficits. In the event that the funding of a plan deteriorates, legislation should support a readjustment in benefit level as opposed to requiring participating employers to remit special payments to cover the unfunded liability.

Employers may be reluctant to participate in MEPPs and thus expand pension coverage if there is uncertainty as to employer contribution liabilities.

Recommendation: If the Minister of Finance decides to amend the *Act* to require that plan sponsors fully fund pension benefits when a plan is fully terminated, such a requirement should not apply to participating employers in a multi-employer pension plan.

The Minister of Finance should recommend that the *PBSA* be amended to explicitly provide that:

(a) employers participating in a collectively-bargained MEPP (i.e. one in which contribution rates are set by collective agreement and which is administered by a Board of Trustees no fewer than half of whom are representatives of plan members) are only responsible for making the contributions required by their collective agreements and providing the information required to administer the plan; and that

(b) employers participating in a collectively-bargained MEPP are not responsible for eliminating any funding deficit which may exist upon full or partial plan termination.

(c) Partial Termination and Immediate Vesting

The Government of Canada is seeking views on whether to eliminate the concept of partial termination from the Act but require immediate vesting of pension benefits for all members. This topic relates to our discussion and recommendation above. A MEPP employer withdrawal must be considered in the context of the funding and benefit commitment structure of a MEPP. Recent changes to Quebec legislation have made it a virtual certainty that there will be no expansion of traditionally structured MEPPs in Quebec. Bill 68 now in effect contains declaratory provisions with retroactive application that prohibit administrators of MEPPs from reducing accrued benefits of Quebec plan members. When contributions plus investment earnings attributed to the employer are insufficient to cover the accrued benefits of the employers' plan members and pension payments to retirees, sections 211 and 228 of the QSPPA combine to:

- prohibit an amendment that would reduce accrued benefits and/or benefits in pay;
- impose a debt on the withdrawing employer equal in amount to the extent of the funding shortfall.

The application of these provisions will result in a cross-subsidization assuming that plan members in other jurisdictions participating in the same MEPP will have benefits reduced to reflect funding deficiencies. A Quebec employer withdrawal while the plan is less than fully funded would force the plan administrator to reduce the accrued benefits and pensions in pay on non-Quebec members to a more significant degree while Quebec members affected by the withdrawal would receive the previously promised benefit level without reduction, funded partially through the contributions of employers from other jurisdictions.

The Quebec anomaly should not be repeated federally. There is no problem with an immediate vesting requirement. However, the employer obligation should be restricted to meeting the contracted employer contribution amount and, while immediate vesting can be applied, if there is a funding deficiency related to the provision of benefits to the employees/members of the withdrawing employer, the vested benefit should be capable of reduction.

With respect to surplus, it is not an issue for MEPPs. Employers contribute based on their negotiated contribution commitment. The Plan Trustees establish benefit levels based on the funded status of the plan. Surpluses would be applied to increase benefits; deficits would result in benefit reductions.

Recommendation: The Minister of Finance should not replicate the Quebec requirements with respect to a prohibition against accrued benefit reductions on employer withdrawal from a multi-employer pension plan. If a requirement for immediate vesting is stipulated, it should also include express provisions permitting benefit reductions in the event of funding deficiencies tied to the withdrawing employer of a MEPP.

(d) Disclosure of Information

The Minister is seeking views on whether to:

- require administrators to establish a Statement of Funding Policy (SFP) in a similar fashion as the Statement of Investment Policies & Procedures (SIP&P). The SFP would be examinable upon request, like the SIP&P;
- allow required disclosure items to be disseminated by electronic means, at the option of the receiving member or beneficiary;
- expand the categories of members required to receive plan information to include former members and retirees, where it is appropriate.

The Report discussion on funding policy is largely tied to individual employer pension plan designs. In a single employer plan, issues regarding use of surplus, contribution holidays, and policies for the management of funding risk are now left to the plan sponsor with no explicit obligation to disclose these policies to plan members and beneficiaries. However, disclosure of contribution strategy in a MEPP is not an issue. In most instances, the contribution amount is determined through collective bargaining and is a matter of public record. Several elements contained in the Report's discussion of the contents of this statement would be irrelevant in the MEPP context. Consequently, we recommend exempting MEPPs from a requirement to issue a Statement of Funding should the Minister decide to move forward with this initiative.

Allowing required disclosure items to be disseminated by electronic means, at the option of the receiving member or beneficiary should be considered. In MEPPs, it is often the case that a member works for several participating employers over the duration of plan membership. There

may also be significant breaks in service. One of the issues MEPP administrators face is tracking down members, former members and beneficiaries. Aside from the cost savings that may result from electronic transmission of disclosure materials, it may also serve as an aid in maintaining current contact information for members, former members and beneficiaries. Electronic transmission of shareholder disclosure documents has been in place for several years. It has worked well and saved companies significant amounts in printing and distribution costs. To the extent that similar savings can be promoted in the pension industry, it should be pursued.

The Trustees strongly support enhancing disclosure requirements including expanding categories of members required to receive plan information to include former members and retirees, where it is appropriate.

Recommendation: The Minister of Finance should exempt MEPPs from the preparation and distribution of a Statement of Funding Policy should the Minister decide to introduce this concept for single employer plans.

The Trustees endorse allowing disclosure items to be disseminated by electronic means, at the option of the receiving member or beneficiary.

The Trustees also support expansion of the categories of members required to receive plan information to include former members and retirees, where it is appropriate.

(e) Void Amendments

The Minister is seeking views on whether to amend the regulations to prescribe a solvency ratio level of 0.85 for the purpose of implementing the void amendment provision in the Act. Section 10.1(2) of the *Act* voids any plan amendment that would have the effect of reducing pension benefits accrued before the date of the amendment, or if the solvency ratio of the pension plan would fall below a prescribed solvency ratio set out in the regulations. We have already discussed the unique nature of target benefit MEPPs. Because benefit allocation decisions are made by the Trustees, but contribution decisions are the result of contractual commitments with employers, there is not the same nexus as between an employer sponsor in a single employer plan and the benefit commitment flowing from the actions of the sponsoring employer. Section 10.1(2) was designed to address funding issues in single employer defined benefit pension plans. It should not apply to multi-employer pension plans.

With particular reference to a prescribed solvency ratio, it is an overly simplistic methodology that ignores the maturation and dynamics of a particular pension plan. In the MEPP context, granting of past service benefits has been one tool used to attract new plan members and new employers. Depending on the plan demographics, such commitments can be readily funded from fixed contributions over a relatively short time horizon (say, for example, 15 years). While the immediate solvency ratio may fall below 0.85, the viability of the plan is not in question.

This is particularly true in a regulatory environment that endorses target benefit models. If an unexpected event such as an employer withdrawal occurs, the ability to reduce the target benefit for affected members ensures that the health of the overall plan is preserved. Further, the demographics of a particular plan must be considered. If the composition of the workforce is relatively young, the time horizon to fund benefit improvements can be longer without placing the fund or its members in jeopardy.

Without question, benefit improvements must be affordable. However, the regulator must also recognize the time horizon that is applicable for a particular benefit and the overall plan design. If it is projected to take 15 years for example to fully fund a benefit upgrade in a MEPP, that remains a relatively short period in the life of the pension plan, particularly if the MEPP is a young and growing plan.

A critical aspect of target benefit plan governance is clear communication to plan members that the benefit is not guaranteed and could be subject to reduction. We favour focusing on disclosure requirements for MEPPs that clearly communicate to plan members the contingencies associated with the promised benefit combined with a system that permits benefit adjustments in the event of funding shortfalls.

Recommendation: We reiterate our above-stated recommendation that the *PBSA* should contain express provisions permitting benefit reductions in the event of funding deficiencies tied to the withdrawing employer of a MEPP.

We also oppose the prescription of a solvency threshold ratio below which benefit improvement amendments would be prohibited. Such a threshold would fail to consider a number of plan characteristics that may justify a benefit improvement amendment. If a solvency ratio is to be imposed, there should also be discretion to vary from its application on a case by case basis.

(f) Standard of Care Changes

The Government of Canada is seeking views on whether it is appropriate to revise the standard of care for employers sponsoring defined contribution plans to ‘good faith’ rather than ‘fiduciary’.

We do not have an opinion with respect to modifications of the standard of care for defined contribution plans. However, there may be a need to clarify the responsibility of agents who provide services to the plan. While section 8 of the *PBSA* stipulates a standard of care and, in particular, section 5.1 clarifies that the plan administrator will not be liable if it relies on the report of an accountant, an actuary, a lawyer, a notary or another professional person whose profession lends credibility to the report, there still may be questions as to the extent of liability that may be imposed on these agents of the administrator.

It has been a long-standing practice in Ontario for pension plans to enter into contractual relationships with corporations which provide actuarial and frequently other human resource consulting services. Recently an Ontario court has found that such a corporation cannot be convicted of breaching section 22 of the Ontario *Pension Benefits Act* because the wording of the regulation provides that only the individual actuary is capable of committing such a breach. *R. v. Norton* [2006] O.J. No. 2631. It appears that the *PBSA* wording could be interpreted in similar fashion.

Another Ontario court has found that the duty of care imposed upon an agent of the administrator of a pension plan pursuant to subsection 22(8) of the *PBA* does not apply to employees of an agent, *Mackinnon v. Ontario Municipal Employees Retirement Board* [2006] O.J. No 3295 at para 24. As a result, in one fact situation the court determined that only the individual employee is capable of breaching section 22 while in another it was determined that it was only the employer which was capable of committing such a breach.

In their submission to Ontario's Expert Commission on Pensions, the Trustees of the NHRIPP outlined its concerns regarding the lack of clarity in policy and law respecting the extent of obligations owed by service providers retained by plan administrators. The Trustees highlighted certain contractual practices by service providers where there are attempts to limit or exempt the service provider from fiduciary obligations for services rendered. There are instances where a given service provider provides consultations in several, potentially conflicting areas. As well, as noted above, there are conflicting decisions that have been rendered respecting the duty of care that may be imposed on an agent and its employees.

Recommendations 8-12 and 8-13 in the Ontario Expert Commission's Report support undertaking consultations with stakeholders and representatives of the professional governing bodies to ensure that services are provided in a manner consistent with the good governance and proper regulation of pension plans. In particular, the Commission seeks clarification as to:

- which participants in the governance of pension plans are bound by fiduciary duties;
- the scope of such duties;
- whether such duties can be assigned to professional advisors and agents;
- whether advisors and agents are themselves bound by the same duties; and
- whether fiduciaries, their advisors and agents can enter into exculpatory contracts and indemnification agreements in order to limit their liability to the client or third persons.

These are fundamental issues that, properly defined, will help to ensure that there are sufficient checks and balances in the system. It is also imperative that the provisions that are eventually adopted are consistent from jurisdiction to jurisdiction.

The Trustees submit that the *PBSA* should provide that service providers **and the firms which may employ them** owe fiduciary obligations to plan members.

Recommendation: The Minister of Finance should recommend that the *PBSA* be amended to explicitly provide that service providers (i.e. actuaries, administrators, auditors, custodians, investment managers, legal counsel, etc.) and the firms which may employ them owe fiduciary obligations to plan members. Adequate consultation with other jurisdictions should be undertaken to ensure that a consistent approach to governance and liability issues is adopted across jurisdictions.

(g) Flexibility in the *Pension Benefits Standards Act*

The Government of Canada is seeking views on whether there is interest in alternative plan designs that may not currently be accommodated by the legislative framework. As is acknowledged in the Report, the *PBSA* was drafted at a time when it was assumed that the mainstay of employer-provided pension provision was the single employer defined benefit plan. Such plans have been in a slow and long decline. The respective reviews of the pension plan system recently conducted in Alberta, British Columbia, Ontario and Nova Scotia acknowledge that pension coverage is deficient and that new models of pension provision must be introduced if pension coverage and benefit adequacy are to be improved.

Recommendation: The structure and substantive provisions of the *PBSA* should be reviewed with the objective of introducing a more flexible pension regulatory system that promotes pension growth while continuing to protect the stakeholders in the system.

(h) Multi-employer Pension Plans

The Government of Canada is seeking views on whether there are legislative impediments to the creation or operation of multi-employer pension plans, and if there are improvements that could usefully be made to the legislative framework for these arrangements.

We have noted above that the application of funding rules designed for single employer plans is an impediment to the establishment and growth of MEPPs. The target benefit multi-employer pension plan will prosper if funding requirements are restricted to valuations conducted on a going concern basis; there is sufficient latitude to reduce accrued benefits when necessary to ensure the continued viability of the plan; and there is sufficient flexibility as to how liabilities of employers are measured and benefits calculated to support the plan design.

This last point deserves elaboration. In Quebec, as discussed previously in this submission, there is a prohibition on accrued benefit reductions. The Regie has interpreted the QSPPA so as to require a comparison of the solvency ratio of the plan to the absolute value of the assets of the

plan. If, for example, an employer withdrew from the pension plan when the solvency ratio was 0.9 and the fund was 10 million dollars, the Regie's simplified calculation would be 1 minus 0.9 multiplied by the value of the fund. This would result in an employer liability of one million dollars. It is not sufficient that the employer has fulfilled his negotiated contribution obligation. It must also guarantee the solvency of the pension plan as if it was an individual plan sponsor.

There is no rational basis for such a calculation. It has been derived as if the employer were the sole employer of the plan. With appropriate regulatory flexibility, a MEPP would ensure that the contractual contribution obligation of the employer was fully satisfied. The administrator would then examine the benefit profile of the members related to that employer to determine if the contribution history was sufficient to satisfy the benefit obligation. If not, accrued benefits would have to be reduced. The regulatory framework should explicitly acknowledge that, even within one MEPP, there could be multiple benefit formulae depending on the negotiations concluded with each contributing employer. The individual employer framework applied to MEPPs produces perverse results that operate as a disincentive to expanding MEPP coverage.

MEPPs should be treated as a distinct category of pension plans that is subject to its own comprehensive regulatory design. The Trustees recommend that a standalone MEPP section be developed for inclusion in the *PBSA* so that the distinctive characteristics of these plans will be subject to the appropriate regulatory oversight standards.

Recommendation: The Trustees recommend the development of a comprehensive, standalone regulatory structure within the *PBSA* that is designed to recognize the unique and flexible aspects of multi-employer pension plans. That structure should include provisions that deal with the standard of care, obligations and liabilities of agents, funding, target benefits (including recognition that it is acceptable to reduce benefits in certain instances and that multiple benefit structures can exist in one plan), member disclosure, governance, education, and training.

(i) Investment Rules

The Government of Canada is seeking views on ways to improve the regulatory framework governing pension investment.

A major responsibility of Trustees of multi-employer pension plans is overseeing the investment of the assets of the plan. The Trustees of the NHRIPP believe that this responsibility includes an obligation to have a framework for choosing investments which weeds out, to the extent practical, those which do not meet minimum standards of good governance and corporate responsibility.

Corporate governance issues have recently received considerable media attention as a result of malfeasance by directors and senior managers of some major corporations. Steps appear to have

been taken by securities regulators, the auditing profession and others to improve corporate governance.

However, other corporate activities, which are equally offensive and also affect the value of the securities of the corporation, have received less attention. These concerns come under the general heading of socially responsible investments (“SRI”). The Trustees appreciate this is a major and sometimes contentious topic. Until recently there has been considerable concern about the ability of the Trustees to take these issues into account without breaching their fiduciary duties.

A report commissioned by the United Nations sets forth the United Nations Principles for Responsible Investments (“UNPRI”). While general in nature, they do reflect a useful consensus by a variety of players in the pension investment world about the validity of taking these issues into account.

The major legal concern in applying tests to determine if the investments are socially responsible is that the Trustees are at risk of being accused of a breach of their fiduciary duties by considering anything but the maximization of returns on investments. The UNPRI deals with this by linking environmental, social and corporate governance issues to the performance of the investment portfolios. The UNPRI translates environmental and other issues (which arguably are not the job of the Trustees) into a concern about the long-term viability and returns in investments that do not meet these standards (which clearly is a legitimate concern of the Trustees).

While these internationally drafted and recognized principles are useful, they do not fully answer the concerns of Trustees about the risks associated with establishing SRI criteria.

Manitoba dealt with this issue in its investigation of possible pension reform in 2003. The report resulting from that investigation recommended that employers and pension plan trustees should be permitted to consider non-financial criteria in relation to pension plan investments provided such considerations are made within the context of the requirements of the current legislation. Manitoba’s *Trustee Act*, R.S.M. 1987, c.T160, already recognized that it was permissible to use non-financial criteria without committing a breach of trust if in making the policy or decision the Trustee exercised the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of another. The report recommended that the pension legislation be similarly amended to explicitly apply to pension plans. The Trustees of the NHRIPP would support a requirement that pension plans which utilize non-financial criteria must disclose this fact and a description of the criteria to all members who are entitled to receive or will become entitled to receive a benefit from the plan.

Recommendation: The Minister of Finance should recommend that the *PBSA* investment regulation explicitly provide that pension plan Trustees are permitted to consider non-financial criteria in relation to pension plan investments provided such considerations are made in the context of an overall pension investment strategy and the tests of prudence

otherwise applicable to the Trustees are satisfied and to provide for the disclosure of the consideration of non-financial criteria to plan members and beneficiaries.

3. Other Trustee Recommendations

(a) Multi-Jurisdictional Issues

In his speech to the Conference Board of Canada's 2007 Pensions Summit, David Dodge, the Governor of the Bank of Canada, supported the creation of large, multi-employer pension plans to make it easier for smaller employers to provide their employees with the benefits of membership in a defined benefit pension plan. The NHRIPP is such a plan as most of its contributing employers are too small to individually sponsor a single-employer, defined benefit pension plan.

However, the expansion of both plans is being hampered by the increasing diversity of the pension legislation of the various Canadian jurisdictions. The lack of consistency in the various pension regimes increases the costs and administrative complexity of multi-jurisdictional pension plans and limits their ability to utilize the economies of scale achieved in one jurisdiction to expand plan membership into other jurisdictions.

As noted above, the NHRIPP now has members in jurisdictions other than Ontario so the staff of the Multi-Sector (MS) Non-Profit Benefit Plan Administrators is well aware of the complexity inherent in dealing with the administrative regimes of multiple jurisdictions. Moreover, they are also aware of the fact that many of the discrepancies between the various legislative regimes are differences of form rather than substance in that they provide for different time periods and mechanisms for achieving the same ends. For example, the time limits for exercising portability options, the mechanisms for waiving a pre-retirement death benefit or a joint and survivor pension vary greatly while generally not providing a member in any one province with substantially greater protection than a member subject to another jurisdiction.

Other discrepancies between the various legislative regimes are more substantive. In fact, some MEPP Trustees have decided that given the terms of Quebec's *Supplementary Pension Plans Act*, R.S.Q. c. R-15.1 regarding multi-employer pension plans, they are not willing to make participation in their plans available to employees subject to that legislation. The Trustees of the NHRIPP submit that increased efforts should be made to harmonize the pension legislation of the various Canadian jurisdictions so as to reduce the costs and complexity of maintaining multi-jurisdictional plans. However, such harmonization should not be at the expense of the rights and entitlements of plan members. Harmonization must not result in a race to the bottom.

The 1968 Memorandum of Reciprocal Agreement allows the sponsor of a multi-jurisdictional pension plan to register the plan with the regulator of the province where the plurality of the plan membership is employed. However, the Reciprocal Agreement does not adequately address the differences in minimal entitlements provided under different pension regimes thus

making the administration of multi-jurisdictional plans unnecessarily expensive, complicated and uncertain. While the pension industry has long interpreted the Reciprocal Agreement as providing that administrative issues will be in accordance with the legislation of the province of registration and benefit entitlements will be in accordance with the legislation of the province of employment, many issues do not readily fall into either category. For example Ontario's Regulation 489/07 requires that multi-employer plans must be able to reduce accrued benefits while Quebec's pension legislation prohibits such reductions. As a result, the funding rules of one province conflict with the benefit rules of another. More importantly, the courts have found that the Reciprocal Agreement does not expressly determine when the legislation of the province of registration should be followed rather than the province of employment.

In recognition of the need for updating the Reciprocal Agreement, the Canadian Association of Pension Supervisory Authorities ("CAPSA") has developed a draft of a revised Reciprocal Agreement for presentation to the various pension jurisdictions of Canada. However, the Proposed Agreement Respecting Multi-Jurisdictional Pension Plans ("Proposed Agreement") fails to recognize the unique characteristics of target benefit, multi-employer plans. It uses solvency funding as the criteria for determining how a particular benefit will be treated. In doing so, the proposal repeats the error that prevails in most pension benefits standards legislation – that the single employer-sponsored defined benefit pension plan is the norm around which regulatory rules should be developed. To the contrary, the Proposed Agreement should reflect today's pension plan reality. To this end, the Trustees suggest:

- That the Major Authority should be determined on the basis of the plurality of **all plan members**. The current proposal uses only active plan membership to determine jurisdiction;
- That the definition of multi-employer pension plan in the Proposed Agreement be sufficiently broad to capture the typical target benefit MEPPs;
- That, for MEPPs, the funding requirements of the Major Authority should be applicable to all plan members; and
- That a new section should be added to the Proposed Agreement to deal with the allocation of assets between jurisdictions upon the full or partial windup, or division of a target benefit, multi-employer pension plan. Such allocations should not be based on solvency funding and should defer to plan-specific rules of allocation.

The Trustees of the NHRIPP urge the Federal Minister of Finance to actively engage in the dialogue with other Canadian jurisdictions to harmonize Canada's pension legislation so as to reduce the costs and complexity inherent in administering a multi-jurisdictional pension plan in Canada.

Recommendation: The Minister of Finance should increase efforts to work with all provinces to harmonize their pension legislation (while ensuring such harmonization does not result in a reduction of the current entitlements) and to adopt a revised Reciprocal

Agreement that includes recognition of the unique regulatory requirements that should apply to MEPPs.

(b) Statutory Limits on Settlor Obligations

Based on their understanding of current trust law, the Trustees of the NHRIPP take the position and act on the basis that each trustee of a multi-employer pension plan serves as a Trustee in his or her personal capacity despite having been appointed by a union or an employer. As a result, the individual Trustees are personally responsible for their actions as Trustees. Trustees do not act as representatives or agents of any other entity, including the settlors of the trust who may have appointed them, as doing so would represent a breach of the Trustees' fiduciary obligations to beneficiaries of the trust.

Recommendation: The Minister of Finance should recommend that the *PBSA* be amended to explicitly state that the settlors of the trust fund of a multi-employer pension plan are not liable for the decisions or actions of the Trustees who actually administer that fund.

(c) Funds Owing To Missing Former Members

Pension plans are often unable to locate missing former members following their termination of membership. They are thus unable to refund the contributions of former members who did not become vested, pay former members their minimal lump sum payments or transfer their accrued benefits to another form of retirement savings vehicle. This is particularly the case with multi-employer plans as such plans typically have break-in-service rules which provide that membership in the plan does not automatically terminate with the end of the employment relationship. These break-in-service provisions, which often provide that membership in a multi-employer plan continues for up to 24 months after the last contribution was received, are intended to permit plan members to switch employers while remaining members of the pension plan. While such provisions are of assistance to plan members, they can also result in a termination statement being issued two years after the termination of employment, by which time the former member may have moved without providing a forwarding address.

Pension plans are also frequently unable to locate beneficiaries following the death of an active or deferred member or the former spouse of a member who becomes entitled to receive a pension when the member retires. In a defined benefit plan if the member never comes forward to claim his or her benefit, those accrued benefits may eventually be used for the funding of benefits generally. However, there are costs associated in keeping missing members on the books. These costs can be substantial in the case of a wound up plan which is unable to locate all of its former members and their beneficiaries. Currently such plans are prevented from being wound up entirely until all the outstanding accrued benefits have been distributed or application is made to have the remaining funds paid into the court. Such applications to the court create additional expenses for the plan.

Permitting administrators to pay the commuted value of accrued benefits of missing members or their beneficiaries to a prescribed government office should also be available to the

administrator of a pension plan which is being wound up if that administrator cannot locate every individual who is entitled to receive a benefit.

If a missing member eventually contacts the pension plan seeking his or her benefits he or she would then be directed to that public body to obtain it.

Recommendation: The Minister of Finance should recommend that the *PBSA* be amended to permit the payment of the commuted value of accrued benefits owing to missing plan members, or their beneficiaries, to a prescribed government office, upon the administrator demonstrating that reasonable efforts have been made to locate the missing member.

(d) Recovery of Overpayments

The Trustees of the NHRIPP submit that a pension plan should be able to reduce the commuted value of a plan member's accrued benefits in order to recover any overpayment arising from deliberate misrepresentation or fraud by that member.

It is not difficult to imagine a scenario in which a relatively young plan member receives a substantial benefit from a pension plan by, for example, submitting a fraudulent claim for a disability pension. Should such a fraud later be discovered by the plan administrator, it may be uncollectible other than perhaps by way of setoff against future pension payments, particularly if the member has no assets against which an order from the civil courts can be exercised.

In such circumstances, a plan administrator should be able to seek the approval of the regulator to reduce the commuted value of that member's accrued benefits to recover the overpayment rather than requiring the plan to wait for 20 or 30 years until the member begins to actually receive a pension which the administrator may then seek to reduce to recover the overpayment.

Recommendation: The Minister of Finance should recommend that the *PBSA* be amended to explicitly provide that pension plans, which overpay a plan member due to fraud or a deliberate misrepresentation by the member, may apply to OSFI for permission to reduce the commuted value of that member's accrued benefits in order to recover the overpayment.

(e) Expansion of CPP/OAS

The Report provides an overly positive review of the status of the Canadian pension system. It fails to emphasize that the majority of working Canadians are not covered by an occupational pension and that the combination of OAS and CPP benefits is insufficient to provide adequate pay replacement in retirement. The Canadian Labour Congress (CLC), in its submission, in response to your Report, advocates the expansion of CPP and OAS.

The Trustees support the two primary recommendations of the CLC in this regard:

- The replacement rate for CPP retirement pensions should be increased from 25% to 50% of the average industrial wage;
- The Old Age Security benefit should be increased by 15% to lift all seniors over the low-income cut-off line established by Statistics Canada.

We recognize that these proposed increases are substantial. They can be financed through increases in the contribution base for CPP. This can be accomplished by increasing the yearly maximum pensionable earnings (YMPE) and by increasing the percentage contribution required from employers and employees. The increase in OAS benefits is estimated to cost \$1.2 billion. Funding for this can be obtained by rescinding the personal tax cuts announced in the 2009 Federal Budget.

Recommendation: The Minister of Finance should recommend broadening public pension plan coverage by increasing CPP retirement pensions to 50% of the industrial wage and by raising the Old Age Security benefit by 15%.

All of which is respectfully submitted,



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