

THE LATEST LEGAL DEVELOPMENTS CONCERNING MULTI-EMPLOYER PENSION PLANS



FRASER MILNER CASGRAIN LLP

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***PRESENTATION BY MARY PICARD, FRASER MILNER CASGRAIN LLP
TO THE 11TH ANNUAL ADVANCED FORUM ON
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**The Latest Legal Developments Concerning
Multi-Employer Pension Plans**

This paper will describe the following recent developments in the world of MEPPs:

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CCWIPP update

The Canadian Commercial Workers Industry Pension Plan (“CCWIPP”) is Canada’s largest private-sector multi-employer pension plan. It has nothing to do with the much smaller multi-employer pension plan called Canada-Wide Industrial Pension Plan (“CWIPP”). The website of CCWIPP says:

- it provides pension benefits to 290,000 current and former members of the United Food and Commercial Workers (UFCW) and has 328 participating employers
- it is administered by eight trustees, four appointed by the union and four appointed by employers: Canada Safeway, Loblaws, A&P and Metro Richelieu
- employers contribute approximately \$108 million annually; employees do not contribute
- it has assets of approximately \$1.4 billion

Two significant events in the life of CCWIPP concluded in 2009:

(a) civil lawsuit for \$1 billion

A civil lawsuit in the form of a “representative action” for \$1 billion was commenced at the end of 2006, in Ontario. It was dismissed in 2009.

Many participating employers of CCWIPP were (and remain) completely ignorant of this lawsuit, since they were not served with the claim. The defendants who were expressly named, and served, were the individual trustees, the participating employers who had appointed representatives to the board of trustees (the “appointing employers”), and Kraft Canada Inc. The plaintiffs sought approval to have Kraft Canada Inc. named as the representative defendant for all participating employers who did not appoint representatives to the board of trustees (the “non-appointing participating employers”). This “representative

defendant” aspect of the litigation made it unnecessary for the plaintiffs, at the outset, to serve all of the non-appointing participating employers.

The plaintiffs were three individual members of CCWIPP, who were suing on behalf of all CCWIPP members. The claim against the participating employers was essentially that they had a fiduciary obligation, and owed a duty of care, to the members of the plan. They knew or ought to have known that the trustees were not qualified to make investment decisions. The plaintiffs alleged that the participating employers failed to properly supervise the trustees.

There were some changes to the solicitors who represented the plaintiffs, during the course of the litigation. The “appointing employers” and Kraft Canada Inc. were successful in getting the consent of the plaintiffs to dismiss the claims against them, in April 2008. A year later, the remaining defendants obtained a court order dismissing the claim on the basis of delay. It remains to be seen whether new civil litigation will be commenced as a result of the convictions obtained by the Crown in the charges described as follows.

(b) CCWIPP prosecutions under the PBA

Individuals who were trustees of CCWIPP during 2002 and 2003 were charged in June 2006 for regulatory offences under the Ontario *Pension Benefits Act*. A total of 15 charges were laid related to pension governance, including failing to exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person, failing to supervise the investment committees, and failing to comply with certain quantitative investment limits.

Four of the 15 charges were withdrawn in August 2008 and the trustees were tried on the remaining 11 charges.

On December 7, 2009, the Ontario Court of Justice convicted the trustees who were members of the investment committee with failure to comply with the 10% investment limit on certain property in the Caribbean. The remaining trustees were convicted of failing to adequately supervise the investment committee in a prudent and reasonable manner in respect of compliance with the 10% investment limit. The Court acquitted the trustees on the other nine counts related to failing to exercise the care, diligence and skill in the administration and investment of the pension fund, due to a lack of expert evidence submitted by the Crown. The convicted trustees have not yet been sentenced. The penalty for each trustee could be \$100,000 for the first conviction.

Participating Co-ops lessons to remember

The 2008 settlement of the MEPP litigation regarding the Participating Co-operatives of Ontario Trustees Pension Plan did not receive much media attention. Two lessons from this litigation must not be forgotten:

- It may not be possible to reduce benefits in an Ontario-registered MEPP. The participating employers could be liable for the deficit. This particular pension plan text had unfortunate, inadvertent wording, that did not reflect the intent that benefits could be reduced on wind-up. The PBA provision that allows reduction of accrued benefits in MEPPs was useless, because the plan terms themselves did not permit it. ***Never assume that the terms of a MEPP permit reduction of benefits.***
- The Ontario government can help. The litigation was settled by employers contributing \$14 million. The government of Ontario contributed \$20 million. Bear in mind that MEPPs are not covered by the Pension Benefits Guarantee Fund; this

was not a payment that gives the Superintendent any priority status as a creditor, as is the case when the PBGF kicks in. This was ... gratuitous.

Here is a summary of the facts:

FSCO's "examination" in 2002 raised questions about the plan's operating procedures in respect of investment policies. Of particular concern to the regulator was the policy regarding derivative investments. In 2003, the funded ratio was at 50%. Unfortunately, this meant that a \$120 million pension fund became \$60 million in six years. In the same year, the trustees decided to terminate the plan. Members were notified that their benefits would be reduced by 50%. Two separate legal proceedings followed.

First, in 2003 a \$100 million class action was launched on behalf of 2,300 members and former members of the Participating Co-ops MEPP. The plaintiffs alleged that all defendants were negligent and in breach of their duties of care to the members, causing the investment losses. The defendants were the individual trustees, the investment consultant and asset manager, former actuaries, former and current custodian trustees (including Canada Trust, CIBC and CIBC Mellon), and the fund's legal advisors (Torys LLP). Notably, the participating employers were not included in the lawsuit.

Second, the Ontario pension regulator issued a Notice of Proposal in April 2006 refusing to accept the wind-up report and the amendment that reduced the benefits. The regulator's position was that the wording of the plan text did not permit benefit reductions. FSCO's position was that all employers must make up the pension plan deficit. So ironic, when you consider the fact that the plaintiffs in the class action did not sue the participating employers. Of course the participating employers (the largest was Gay Lea Foods Co-Operative Ltd.)

denied responsibility for the deficit and requested a hearing with the Ontario Financial Services Tribunal (the “FST”).

That FST hearing, and the class action, settled in 2008 upon the payment of \$14 million from the employers, and \$20 from the Ontario government.

Can multi-jurisdictional MEPPs survive the recent Quebec change?

In an infamous move in 2008, the Quebec government amended its pension legislation to provide that benefits in MEPPs cannot be reduced (Bill 68, received Royal Assent on June 20, 2008). The impact of this change on MEPPs who have members across the country has not yet been realized. All MEPP administrators who have non-Quebec members must determine how to deal with the fact that the Quebec component gets special treatment. In my experience, employers who have employees across the country who participate in a MEPP, are unaware of the fact that the benefits could be reduced for some but not all employees, and that they, the employer, could be liable for the underfunding relating to the Quebec component. Responsible administrators of some MEPPs have made this fact clear, and some have succeeded in obtaining increased funding from unhappy employers with Quebec employees. Not all MEPP administrators have found an easy way to deal with this stunning change to the way that MEPP benefits in Quebec were generally interpreted.

Commentators speculate that the result of this Quebec 2008 change is that multi-jurisdictional MEPPs will have to be terminated, or somehow isolated regarding funding negotiations with participating employers, for benefits accrued up to June 19, 2008. Benefit

accruals/contribution obligations thereafter could be set up in a separate plan. The only certainty is that multi-jurisdictional MEPPs are likely unworkable.

Ontario pension reform Bill 236 – special impact on MEPPs

The Ontario government tabled Bill 236 at the end of December 2009. It makes extensive, revolutionary changes to Ontario pension legislation. The most contentious one is the change to “grow in” rights. MEPPs get special treatment in Bill 236 on this issue. Ontario pension legislation currently provides special early retirement rights that are triggered upon the full or partial wind up of a pension plan if certain eligibility criteria are met. Bill 236, if it comes into law, will apply these grow-in benefits effective January 1, 2012, to all terminated members even if there is no partial or full wind up of the plan (unless their employment is terminated “for cause”). An exception will be made, however, for MEPPs: the administrator of a MEPP (the board of trustees) may elect, in accordance with prescribed requirements, to exclude this extension of grow-in benefits. The prescribed requirements have not yet been released.

Another provision in Bill 236 unique to MEPPs will allow members to elect to transfer their entitlement from one MEPP to another MEPP, if they become members of a different union who is part of that second MEPP.

Are MEPPs the solution to the coverage crisis?

Finance ministers from across the country, including federal minister, met in Whitehorse, Yukon Territories, in December, 2009, to begin to discuss possible solutions to the sad fact that most Canadians have no employer-provided pension. The discussion among

governments will continue in 2010 and beyond. Several possible solutions were floated by various groups in the media, prior to Whitehorse meeting. One was to add a DC component to the Canada Pension Plan (a supplementary public pension plan). Another was to change the MEPP rules to make them easy, accessible, and attractive to employers; essentially, a privatized DC MEPP. You can get a flavour for this proposal by reading the following Sun Life Financial press release that was issued on the eve of ministers' meeting. Is it possible that MEPPs could solve the coverage crisis?

TORONTO, ON (November 24, 2009) – A multi-employer defined contribution (DC) pension plan that allows every employer – including the self-employed – to automatically participate would greatly increase pension coverage for Canadians, according to a senior executive with Sun Life Financial.

"With three to five million Canadians not having access to an occupational pension plan, we need to improve the retirement, savings and income system in Canada, opening the door to expanded workplace participation for all Canadians," said Tom Reid, Senior Vice-President, Group Retirement Services, in remarks he made today at the Annual Pension Summit sponsored by the Canadian Pension & Benefits Institute.

Under the proposal, Reid says employers who decide to join the DC plan would select a qualified provider and all the firm's employees would automatically be enrolled.

"While employers could opt out for their own business reasons, we think that employment market pressures, the gentle push of automatic enrolment (which has proven to be an overwhelming success in other countries) and low fees will lead to widespread participation – along with a significant increase in the Canadian retirement savings rate," said Reid.

When it comes to fees, Canadian group plans pay on average lower fees to their pension plan providers than those in the United States which average 93 basis points (Deloitte Defined Contribution / 401(K) Fee Study June 2009). This compares to an overall average of 60 to 70 basis points across Sun Life's Canadian group retirement business, with two-thirds paying

less than 100 basis points and half paying less than 75 basis points. While there are many factors that will determine the precise cost of the proposed solution, such as participation rates, annual deposits and asset balances, Reid believes that a multi-employer DC pension plan will achieve the same scale advantages that larger employers enjoy today.

While there have also been suggestions for expanding government-run plans, Reid believes that the private sector solution is the right one for solving the current shortfall in retirement savings.

"Canadian providers for workplace retirement savings plans today have a proven track record, technology and operating systems, governance structures and consumer insights," said Reid. "They also have the distribution network to reach small and mid-size employers, and the motivation to help expand coverage. If we can knock down the barriers preventing multi-employer plans, do we really need to build a new government-run retirement investment program?"

A MEPP REFRESHER

What is a MEPP?

A MEPP is a registered pension plan established through a collective bargaining process. It covers two or more *unrelated* employers. A MEPP often has dozens, or even hundreds of employers participating in a single plan. A MEPP can include both public-sector and private-sector employers. It's common to see MEPPs in industries such as construction trades, retail, transportation, hotel and restaurants, textiles and electricians. Plan membership usually does not terminate when an employee terminates with one of the participating employers in a MEPP; an employee could accrue pension credits with many different participating employers.

It has been estimated that there are approximately 500 MEPPs in Canada with membership of approximately 1.5 million individuals.

How do MEPPs differ from other, single-employer pension plans?

In the case of a single-employer plan, typically the plan sponsor, the employer, is the administrator of the plan. That employer controls all aspects of running the plan, including investments, record-keeping, benefit payments, etc. The employer delegates to service providers, but the employer remains ultimately in control and liable for all aspects of the plan.

That is not the case with MEPPs. Participating employers in MEPPs do not administer the plan. Their role is limited. The registered administrator of the MEPP is a collection of appointed individuals called the “board of trustees”. Usually the board of trustees is made up of both union-appointed representatives and employer-appointed representatives.

It is generally expected that a participating employer in a MEPP has a limited role: (a) report to the MEPP administrator information about their employees who are eligible to join the MEPP, and (b) submit contributions to the MEPP. Although this is what is generally expected, it may not be true. The legal obligations of the participating employer will depend on the terms of the text of the MEPP and related contracts, the requirements of collective bargaining agreements and the common law. The most significant characteristic of MEPPs is that *if* they are worded properly, legislation in Ontario (but not Quebec) permits benefits to be reduced if there is a deficit; employers are not required to fund the deficit. In

order for this exception to apply in Ontario, note that the MEPP must be “established pursuant to a collective agreement or trust agreement”, or, alternatively, the MEPP “provides defined benefits and the employer’s obligation to contribute to the MEPP is limited to a fixed amount set out in a collective agreement”. The specific legislation must be checked with respect to members in all jurisdictions (regardless of where the MEPP is registered), to ensure that the requirements allowing a reduction of benefits are satisfied.

What is a SMEP?

A specified multi-employer plan, or “SMEP”, is defined in the *Income Tax Act Regulations*¹. It’s a type of MEPP. The SMEP designation is desirable for MEPPs because it will be considered a defined contribution plan for pension adjustments (“PA”) reporting purposes, even if the MEPP promises a defined benefit. A pension plan that does not qualify as a SMEP under the *Income Tax Act*² has to report its PAs in the same way as single-employer plans (this generally requires nine times the benefit accrued during the year).

To acquire the desirable status of an Income Tax Act SMEP, a MEPP must have 15 or more unrelated employers. SMEP designation can apply with fewer employers, if there is significant movement of participants among the plan’s employers (there must be at least 10% of the active members working for more than one contributing employer during the year). Other requirements to be designated as a SMEP include the requirement that contributions be based on hours worked by active members. Also, the board of trustees administering the MEPP cannot be controlled by the employers.

¹ C.R.C., c. 945.

² *Supra*, note 2.

The Canada Revenue Agency (the “CRA”) provides a full list of SMEP requirements in their technical manual at http://www.cra-arc.gc.ca/tax/registered/manual/tech-17-e.html#P8_24v.

The CRA allows for some flexibility in designating a plan as a SMEP:

“We only designate a plan to be a SMEP if it has satisfied several of the characteristics described above and the designation is required to overcome serious PA reporting difficulties. Typically, this designation will only be given when it is reasonable to expect that at least 15 employers will contribute to the plan in the year or at least 10% of the active members will be employed by more than one participating employer.”³

What is a SMEPP?

The term “specified multi-employer pension plan” (“SMEPP”) used to be synonymous with MEPP. The *Alberta Employment Pension Plans Act*⁴ changed the term from MEPP to SMEPP in 2000.

What is a SOMEPP?

In August 2007 the Ontario government introduced changes to regulations under the *Ontario Pension Benefits Act*⁵ to create a new breed of MEPP called a “SOMEPP” (specified Ontario

³ “Registered Plans Directorate technical manual” *Canada Revenue Agency* (1 November 2005), online: Canada Revenue Agency < http://www.cra-arc.gc.ca/tax/registered/manual/tech-17-e.html#P8_24v > at 17.2 8510(2).

⁴ R.S.A. 2000, c. E-8.

multi-employer pension plan). The advantage of being a SOMEPP is that special, temporary solvency funding relief is available. Administrators of SOMEPPs want that relief to be made permanent, since it is difficult to fulfill administration obligations without knowing whether this relief will be removed.

In order to qualify as a SOMEPP:

- A pension plan may make an election at any time between September 1, 2007 and August 31, 2010 to be designated as a SOMEPP. The election may be rescinded. If it is, the rescission is permanent, and no future election to be treated as a SOMEPP is permitted.
- Certain criteria must be satisfied to qualify as a SOMEPP. The plan must meet the criteria for SMEPs under the Income Tax Act (described above). Also, the plan terms must permit the trustees to reduce benefits in the event of a deficit.

Notwithstanding SOMEPP designation, the plan must continue any existing going-concern *special* payments required under any filed valuation reports. Any new going-concern shortfalls may be funded over a period of 12 years. Benefit improvements may be granted, provided that any improvements are funded on a going-concern basis over a period of eight years (rather than 12 years), if, after reflecting the benefit improvements, the plan's transfer ration is less than 80%, or the plan's going-concern funded ration is less than 90%.

Note the requirement that all plan members, unions and participating employers be notified of the fact that the plan is being treated as a SOMEPP.

⁵ R.S.O. 1990, C. P.8

Special solvency rules for MEPPs

All defined benefit pension plans are subject to the calculation of their deficit/surplus position based on either a “going concern” or “solvency” basis. Pension plans which are not MEPPs are usually required to pay off their deficit based on the “solvency” position.

Does it make sense to require a MEPP to make contributions towards paying off a solvency deficit when MEPP benefits will simply be reduced in the event of plan termination and deficit? Certain provincial legislatures have responded to this question by granting “solvency funding relief” to MEPPs. The Ontario temporary relief for SOMEPPs described above is one example.

How can a participating employer in a MEPP reduce the risks of liability?

1. Think carefully before appointing a representative to the board of trustees. Legal risks are fewer for “non-appointing” employers. On the other hand, the right to information may be limited if you don’t have an employer representative on the board of trustees. That may be acceptable, if your liability is clearly limited in all documents, including the plan text, trust/funding agreement and collective agreement.
2. Have your consultant or lawyer review the latest actuarial valuation report. If the funded status or any other aspect of the MEPP is disturbing, don’t join.

3. “Google” the MEPP thoroughly before joining it. New participating employers joined the MEPPs which were the subject of litigation described above, unaware of the problems.
4. Before joining the MEPP, ask to see all documents, particularly the plan text and funding (trust) agreement. Ask for something in writing from the board of trustees that confirms the limited liability of participating employers: to make contributions and provide certain information, only. Ensure also that such confirmation of the limited liability of participating employers is part of the registered text of the MEPP which is filed with the regulators.
5. Write into your collective agreement clear wording that confirms that your only obligation is to make contributions and to inform the administrator of the MEPP of certain information about the eligible employees.

Get professional, independent advice from consultants or lawyers to confirm your role and liability.

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