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**Demystifying the Legal Treatment of  
Multi-Employer Pension Plans: Reducing Risks**

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**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 over a 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 litigation described below demonstrates that participating employers in some MEPPs may be surprised that their legal obligations extend beyond the obligation merely to make contributions and report member information to the MEPP administrator.

The most significant characteristic of MEPPs is that *if* they are worded properly, legislation permits benefits to be reduced if there is a deficit; employers are not required to fund the deficit. This reduction of benefits in a MEPP is specifically permitted in pension legislation across Canada, with the exception of Quebec.

**Quebec exception: MEPP benefits cannot be reduced for Quebec members**

Litigation surrounding the Canada-Wide Industrial Pension Plan (“CWIPP”) illustrates that it may not be permitted to reduce the benefits in a MEPP that has Quebec members.

CWIPP was set up for Canada Labour Congress workers. The plan is registered in Ontario and has more than 100 participating employers with employee members across Canada. Intersan was, at one point, the only participating employer in Quebec. The trustees of CWIPP maintain separate components within the plan, allocable to each participating employer. The funded status of each component varies because the benefits vary by employer.

Litigation arose when Intersan terminated its participation in CWIPP in 1999. Because of a deficit, the board of trustees of proposed to reduce the benefits of the Intersan members according to the percentage deficit in the Intersan component of the plan (57.7% funded). The total funded status of CWIPP at the time was 72.9%.

The Quebec pension regulator refused to allow the benefit reduction and issued an order stating that the Intersan members must be paid 100% of their benefits out of CWIPP because Quebec pension legislation forbids benefit reduction, even for MEPPs. The Quebec regulator required the trustees to dip into the assets allocated to the remaining participating employers to pay the Intersan Quebec members in full. The Tribunal Administratif du Quebec eventually ruled that the terms of CWIPP that permitted benefit reduction were not enforceable under Quebec pension legislation.

### **What is a SMEP?**

A specified multi-employer plan, or “SMEP”, is defined in the *Income Tax Act Regulations*<sup>1</sup>. 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*<sup>2</sup> has to report its PAs in the same way as single-employer plans (this generally requires nine times the benefit accrued during the year).

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<sup>1</sup> C.R.C., c. 945.

<sup>2</sup> *Supra*, note 2.

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.

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](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."<sup>3</sup>

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<sup>3</sup> "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](http://www.cra-arc.gc.ca/tax/registered/manual/tech-17-e.html#P8_24v) > at 17.2 8510(2).

### **What is a SMEPP?**

The term “specified multi-employer pension plan” (“SMEPP”) used to be synonymous with MEPP. The *Alberta Employment Pension Plans Act*<sup>4</sup> 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*<sup>5</sup> to create a new breed of MEPP called a “SOMEPP” (specified Ontario multi-employer pension plan). The advantage of being a SOMEPP is that special, temporary solvency funding relief is available. Attached as Schedule A to this paper is a description of the new Ontario SOMEPP rules that appeared on the website of the Financial Services Commission of Ontario in September 2007.

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.

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<sup>4</sup> R.S.A. 2000, c. E-8.

<sup>5</sup> R.S.O. 1990, C. P.8

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 ratio is less than 80%, or the plan's going-concern funded ratio 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.

### **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. Another example is Alberta's *Employment Pension Plans Amendment Act, 2005*<sup>6</sup> and *Employment Pension Plans Amendment Regulation, 2006*<sup>7</sup>, which states:

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<sup>6</sup> S.A. 2005, c. 26

“The administrator of a SMEPP may make a one-time application to suspend solvency deficiency special payments, for a period of no more than three years.”<sup>8</sup>

Approval by the Alberta Superintendent is conditional upon any “going concern” deficit being amortized over ten years, as opposed to the usual fifteen-year period allowed for paying off the deficit. Further, approval of the solvency relief is also conditional on there being no granting of benefit improvements over the period of suspension. Additional conditions may be imposed by the Superintendent.

### **Participating Co-Ops litigation**

Several court and regulatory proceedings surrounding the Participating Co-ops MEPP illustrate the possible pitfalls and surprise liability regarding MEPPs. regarding

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 members are suing a number of bodies including current and former 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 are not included in the lawsuit.

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<sup>7</sup> Alta. Reg. 88/2006

<sup>8</sup> *Ibid.*

The Ontario pension regulator's internal "examination" in 2002 raised questions about the MEPPs operating procedures in respect of investment policies. Of particular concern to the regulator was the policy regarding derivative investments.

The MEPP had been fully funded prior to 1997. By 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%.

In 2005 the plaintiffs' (members and former members) claim was certified as a class action. Examinations for discovery were held in 2006. The plaintiffs are alleging that all defendants were negligent and in breach of their duties of care to the members, causing the investment losses.

The Ontario pension regulator issued a Notice of Proposal in April 2006 regarding a number of matters. Essentially, the regulator refused the wind-up report and refused the amendment that reduced the benefits. The Ontario pension regulator's position was that the wording of the plan text does not permit benefit reductions. The text of the plan states:

*"...no amendment or discontinuance of the Plan shall reduce the benefits accumulated prior to such amendment or discontinuance..."*

The regulator's stance was that all employers must make up the pension plan deficit. The participating employers (the largest is Gay Lea Foods Co-Operative Ltd.)

denied any responsibility for the deficit and requested a hearing with the Ontario Financial Services Tribunal (the “FST”). A settlement has been reached, subject to certain conditions. The approval of the FST is being sought.

The litigation didn’t end there. The individual trustees filed an application before the Superior Court of Ontario under Rule 14 of the *Rules of Civil Procedure*<sup>9</sup>, the *Pension and Benefits Act*<sup>10</sup> (the “PBA”) and the *Trustee Act*<sup>11</sup>. The application requests the appointment of replacement trustees or administrator, and a declaration discharging the trustees. The court application is adjourned pending a possible settlement.

### **Canadian Commercial Workers Industry Pension Plan (“CCWIPP”) litigation**

The CCWIPP is Canada’s largest private-sector MEPP. It has 300,000 current and former members and 443 participating employers. The employers contribute roughly \$108 million annually and the fund has assets of approximately \$1.4 billion.

On February 14, 2006, an article appeared in the Toronto Star which stated:

“A Toronto Star investigation revealed that a special committee of trustees directed at least \$280 million of pension funds through companies, including the Caribbean ventures, headed by a defrocked Roman Catholic priest.”

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<sup>9</sup> O. Reg. 8/07 s.14 in *Courts of Justice Act*, R.S.O. 1990, c. C.43.

<sup>10</sup> R.S.O. 1990, c. P.8.

<sup>11</sup> *Supra*, note 12.

“ ‘FSCO continues to be of the opinion that no documentation-demonstrating that the board of trustees had taken adequate steps to complete a proper due diligence in respect of the Caribbean development prior to undertaking the investment – exists,’ the Commission said in a follow-up review to a stinging report of the fund’s practices.”<sup>12</sup>

The individual trustees of CCWIPP were charged in June 2006 under Ontario pension legislation and the *Provincial Offences Act*.<sup>13</sup> These regulatory charges allege that the trustees breached Ontario pension legislation because they failed to exercise the care, diligence and skills in the administration and investment of the pension fund that a person of ordinary prudence would exercise, and failed to supervise the investment committee prudently.

In January 2007 a claim was filed in the Ontario Superior Court of Justice on behalf of two retirees and an A&P employee who are members of the MEPP. The plaintiffs intend to seek a court order appointing themselves as representatives of all beneficiaries of CCWIPP. Unlike Participating Co-ops, CWIPP is not being wound up. The three members of CCWIPP sued the individual trustees on the board of trustees *and* all of the participating employers. The claim identified appointing employers and non-appointing employers and alleges:

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<sup>12</sup> Tony Van Alphen “Regulator slams pension plan’s paperwork” *The Toronto Star* (14 February 2006), D03.

<sup>13</sup> R.S.O. 1990, c. P.33.

- The participating employers breached fiduciary obligations and a duty of care.
- The participating employers knew or ought to have known that the trustees were not qualified to make, administer and monitor certain investments.
- The participating employers did not supervise the trustees to ensure that they carried out their duties in a manner required by law.

**Neville v. Wynne**<sup>14</sup>

This case involved a British Columbia MEPP established by the Plumbing and Pipe Fitting Industry. The trust fund suffered investment losses of \$70 million over a two-year period. As a result, the seven individuals on the board of trustees decided that they could not maintain the contribution and benefit structure.

In August 2002, the B.C. pension regulator approved a proposed benefit reduction scheme: The trustees had consulted with an actuary, and considered a number of options for reduction. They unanimously chose the option that allocated more of the reduction to the non-retired members than the retired members.

The plaintiffs sued saying that the trustees shouldn't be allowed to favour one group of beneficiaries over another. In October 2006, the B.C. Court of Appeal ruled that the trustees had acted properly.

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<sup>14</sup> (2006) 55 C.C.P.B. 157, 57 B.C.L.R. (4th) 199, (B.C.C.A).

## **Reducing Risks**

Whose risks should be reduced? The board of trustees that is the administrator of the MEPP? The individual members of the MEPP who want to avoid the reduction of their benefits in the event of a deficit? The participating employers in the MEPP?

The following are some practical suggestions for participating employers in MEPP:

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.

In summary, don't assume that the general understanding of limited liability for participating employers is true in the case of the specific MEPP you're considering joining, or are already participating in. Get professional, independent advice from consultants or lawyers to confirm your role and liability.

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## SCHEDULE "A"

Posting on FSCO web site as of September 4, 2007

### Changes to the Funding Rules for Multi-Employer Pension Plans

On August 24, 2007, O. Reg. 489/07 under the *Pension Benefits Act* was filed. The Regulation makes changes to the funding rules for multi-employer pension plans. The following are answers to some of the questions that may arise as a result of these changes.

#### Overview of changes

**Q: What are the key changes to the funding rules for multi-employer pension plans (MEPPs)?**

**A:** The key changes are:

- o Introduction of temporary solvency funding relief for Specified Ontario Multi-Employer Pension Plans (SOMEPPs).
- o Clarification of the funding requirements for multi-employer pension plans.

#### Rules applicable to SOMEPPs

**Q: What is a Specified Ontario Multi-Employer Pension Plan (SOMEPP)?**

**A:** A SOMEPP is a multi-employer pension plan which meets the eligibility criteria set out in the new regulation and for which the administrator has filed an election, in writing, with the Superintendent (declaring the pension plan to be a SOMEPP) on or after September 1, 2007 and before September 1, 2010.

**Q: What eligibility criteria must be satisfied by a MEPP to be a SOMEPP?**

**A:** The eligibility criteria are:

- o No more than 95% of the membership are employed by one employer at the end of the previous year;
- o During the previous year at least 15 employers were making contributions to the plan or at least 10% of the members were employed by two or more employers;
- o All or substantially all of the employers are not exempt from tax under Part 1 of the *Income Tax Act*;
- o All employers make contributions to the plan pursuant to one or more collective agreements;

- o The employers' contributions are limited to a fixed amount set out in one or more collective agreements;
- o Under the plan the administrator is authorized to determine the benefits that are to be provided under the plan;
- o Nothing in the documents that create and support the plan prevents the administrator from reducing the amount of or the commuted value of the pension benefit, a pension, a deferred pension or an ancillary benefit in the circumstances described in subsection 14(2) of the *Pension Benefits Act*.

**Q: What funding requirements will be applied to a SOMEPP?**

**A:** Each actuarial valuation report filed for a SOMEPP, with a valuation date on or after September 1, 2007 and before September 1, 2010, must include a demonstration that the required contributions to the plan are not less than the sum of the following amounts:

- o The normal cost of the plan.
- o The special payments set out in a previous report that remain to be paid with respect to any going concern unfunded liability.
- o The special payments to be paid with respect to any going concern unfunded liability determined in the report.

Any going concern unfunded liability determined in a report for a SOMEPP must be liquidated by special payments over a period of 12 years.

**Q: Are there limitations on the ability of a SOMEPP to improve benefits?**

**A:** Yes. If, after an amendment to improve benefits, the transfer ratio of the plan is less than 0.8 or the ratio of the market value of the plan assets to the going concern liabilities is less than 0.9, any increase in the going concern unfunded liability as a result of the amendment must be liquidated by special payments over a period of 8 years.

**Q: Given that a SOMEPP is temporarily not required to make solvency special payments, is there still a need to determine the existence of a solvency deficiency?**

**A:** Yes. A SOMEPP is not exempt from the determination of a solvency deficiency under section 17 of Regulation 909 under the *Pension Benefits Act* (Regulation). An actuarial valuation report filed for a SOMEPP must still set out the amount of the solvency deficiency, if any, and the special payments required to liquidate it in accordance with section 5 of the Regulation. However, these special payments will not be taken into account in determining the sufficiency of contributions for a SOMEPP.

**Q: Is a SOMEPP required to provide notice to the members?**

**A:** Yes. Notice is required within 60 days of filing a report to which the special funding rules of a SOMEPP apply, and it is to be given to each member and former member of the plan.

**Q: What information must be included in the notice?**

**A:** The notice shall include the following:

- o name and the provincial registration number of the plan;
- o name and contact information of the administrator;

- o transfer ratio of the plan;
- o if the plan is amended to increase pension benefits or ancillary benefits, the transfer ratio both before and after the amendment; and
- o an explanation of how the security of the pension benefits and ancillary benefits for the members and former members might be affected as a result of the election.

**Q: Who else gets a copy of the notice?**

**A:** A copy of the notice is given to the Superintendent, every employer who makes contributions to the plan and to every bargaining agent who represents members of the plan. The administrator shall also give a copy of the notice to each member who becomes eligible to join or is required to become a member of the plan after the filing of the report and before the plan ceases to be a SOMEPP.

**Clarification of Funding Requirements for MEPPs**

**Q: What clarifications have been made to the funding rules for MEPPs?**

**A:** The new regulation clarifies the funding requirements for MEPPs. The sufficiency of the required contributions under these plans must be determined on the basis of a going concern valuation and a solvency valuation.

Specifically, an actuarial valuation report with a valuation date on or after September 1, 2007 must include a demonstration that the required contributions to the plan are not less than the sum of the following amounts:

- o The normal cost of the plan.
- o The special payments set out in a previous report that remain to be paid with respect to any going concern unfunded liability or solvency deficiency.
- o The special payments to be paid with respect to any going concern unfunded liability or solvency deficiency determined in the report.

**Q: If an actuarial valuation report for a MEPP discloses a going concern unfunded liability or solvency deficiency, is there a requirement to establish a fixed-period schedule of special payments to liquidate either one of them?**

**A:** Yes. A going concern unfunded liability or solvency deficiency must be liquidated by special payments over the period that is stipulated in section 5 of the Regulation. The filed report must set out the amount of the going concern unfunded liability or solvency deficiency, if any, and the schedule of special payments required to liquidate them.