

RESEARCH REPORT

**CURRENT ISSUES CONCERNING MULTI-EMPLOYER
PENSION PLANS IN ONTARIO**

**SUBMITTED TO
THE ONTARIO EXPERT COMMISSION ON PENSIONS
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EXECUTIVE SUMMARY

The majority of pension plans in Ontario are single-employer plans (“SEPPs”), established or sponsored by individual employers to provide benefits to their own employees. A significant number of Canadian workers, however, are members of plans that do not fit this model. They belong to multi-employer pension plans (“MEPPs”), which provide benefits to members based on their employment with one or more of a specific group of employers who participate in the plan. Ontario regulates significantly more MEPPs than any other Canadian jurisdiction; more than 30% of Canadian MEPPs are registered in Ontario. The regulatory framework in Ontario was originally designed with the single employer model in mind. While it has been adapted over the years to accommodate some of the unique features of MEPPs, this process has been a “patchwork” exercise which has left gaps and inconsistencies. Many pension plan officials, their professional advisors and the regulators share the view that there is room for improvement in the regulatory “fit” between the *Pension Benefits Act* (“*PBA*”) and the real world of MEPPs in Ontario.

The purpose of this Report is to provide the OECF with background information for addressing a number of policy questions, including:

- Does the *PBA* adequately recognize the variety of MEPPs currently in existence, and is it sufficiently flexible to provide for the on-going development of new structures and benefit types?
- Does the *PBA* provide adequate regulatory guidance with respect to the representative structure, quality and conduct of the governing bodies of MEPPs?
- Does the *PBA* provide adequate protection for the benefits of MEPP member? Are its funding rules realistic in light of the unique structure of MEPPs?
- Do the *PBA*'s wind-up and partial wind-up rules adequately recognize the fluidity among participating employers in MEPPs?
- Do MEPPs generally experience more regulatory problems than SEPPs?

Part I of the Report examines MEPPs in Ontario, including a review of the legislative history of MEPP regulation and an examination of the current profile of Ontario MEPPs. MEPPs in Ontario range in size from 230,000 members to seven members. They fall into three broad categories. The first and largest category is the “classic” MEPP, characterized by substantial trade union involvement in the establishment and governance of the plan, an important role for broad-based collective bargaining in recruiting participating employers and establishing contribution levels, and mobility of plan members among participating employers. Classic MEPPs are normally DB plans funded by fixed, collectively bargained contributions. The second category is the public sector MEPP. This category includes a number of very large statutory DB plans, several of which are

jointly sponsored by employers and plan members. Several public sector plans are established by trust agreement; many of these are DB plans as well. The common element in these plans is the fact that the employers involved are fully or substantially publicly funded. The third category is the “co-operative” MEPP, a heterogeneous group of plans organized on a multi-employer basis simply to achieve administrative efficiencies and economies of scale, rather than because of employee mobility, or a coordinated collective bargaining structure. These plans, which may involve unions, have a broad range of benefit structure and may be either DB or DC plans. A recurring theme throughout the Report is that Ontario law was designed primarily to accommodate the classic MEPP, and fails, in some areas, to encompass the realities of other types of MEPPs.

Part I also includes a detailed examination of the current regulatory framework for MEPPs, focusing on:

- how MEPPs are defined;
- how they are governed;
- what rules are in place to address benefit stability and plan funding; and
- what rules are in place with respect to plan wind-ups and partial wind-ups.

This analysis identifies the fact that many of the special legal rules applicable to MEPPs in Ontario apply only to MEPPs established pursuant to collective or trust agreements. The new (2005) legal regime applicable to jointly sponsored pension plans (JSPPs) is examined as well.

Part II is an analysis of how these issues (definition, governance, benefit stability/funding, and wind-ups) are addressed in the regulatory frameworks of certain other jurisdictions across Canada: specifically, the federal jurisdiction, British Columbia, Alberta and Quebec. These jurisdictions have been chosen because together with Ontario, they regulate most of the MEPPs registered in Canada, and because they represent a range of different approaches to MEPP issues. The analysis identifies a number of areas in which these jurisdictions approach the regulations of MEPPs differently than Ontario, including:

- British Columbia’s distinction between Negotiated Cost Plans and other types of DB plans;
- Alberta’s distinction between unionized MEPPs and non-unionized MUPPs; and
- The requirement in the federal and British Columbia legislation that there be regulatory approval of any reduction in accrued benefits;

In addition, three recent amendments to Quebec’s pension legislation are relevant to the regulation of MEPPs:

- the new member-funded pension plans;
- additional quality-control measures within governing bodies; and

- innovations in regulating the relationship between governing bodies and third party service providers.

Part III examines available data on how well MEPPs are faring within the current regulatory regime compared to SEPPs. In addressing this issue, the Report first examines data generated by the Financial Services Commission of Ontario (“FSCO”) and related bodies, on:

- decisions of the Superintendent of Financial Services;
- pension cases before the Financial Services Tribunal;
- the funded status of pension plans;
- plan wind-ups and partial wind-ups; and
- prosecutions.

The purpose of this examination is to identify, where possible, areas in which MEPPs have raised particular problems for FSCO within the current regulatory framework. The Report then looks at comparative data from other jurisdictions under these headings, where available. The data is incomplete, but suggests that MEPPs do not pose more, or more serious, problems within the regulatory system than SEPPs.

Part IV is a thematic discussion of issues arising out of the current legislative framework for MEPPs, commenting on problems raised for regulators in Ontario by the current system, and exploring some solutions that have been implemented in other provinces. Issues addressed include approaches to MEPP categories, representation and quality control in MEPP governance, whether MEPPs should have to meet solvency funding standards, wind-ups and partial wind-ups, the role of unions, multi-jurisdictional MEPPs and communications with plan members.

Part V concludes the report with a brief discussion of implications for regulation. Appendices to the Report provide statistical information on:

- the incidence of MEPPs and SEPPs across Canada,
- the six largest and six smallest MEPPs in Ontario,
- the number of Pension Plans by Plan Type in the surveyed jurisdictions,
- Pension Plan Members by Plan Type in the Surveyed Jurisdictions,
- Number of MEPPs and SEPPs by Plan and Benefit Type in the Surveyed Jurisdictions,
- Wind-ups and Partial Wind-ups in the Surveyed Jurisdictions,
- Funding Data in the Surveyed Jurisdictions; and
- Alberta MUPPs.

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INTRODUCTION

The majority of pension plans in Ontario are single-employer plans (“SEPPs”), established or sponsored¹ by individual employers to provide benefits to their own employees. A significant number of Canadian workers, however, are members of plans that do not fit this model. They belong to multi-employer pension plans (“MEPPs”),² which provide benefits to members based on their employment with one or more of a specific group of employers who participate in the plan. Ontario regulates significantly more MEPPs than any other Canadian jurisdiction; more than 30% of Canadian MEPPs are registered in Ontario.³

The regulatory framework in Ontario was originally designed with the single employer model in mind.⁴ While it has been adapted over the years to accommodate some of the unique features of MEPPs, this process has been a “patchwork” exercise which has left gaps and inconsistencies. Many pension plan officials, their professional advisors and the regulators share the view that there is room for improvement in the regulatory “fit” between the *Pension Benefits Act*⁵ (“PBA”) and the real world of MEPPs in Ontario.

This Report was prepared against the backdrop of the following general questions:

- Does the *PBA* adequately recognize the variety of MEPPs currently in existence, and is it sufficiently flexible to provide for the on-going development of new structures and benefit types?
- Does the *PBA* provide adequate regulatory guidance with respect to the representative structure, quality and conduct of the governing bodies of MEPPs?

¹ The term “sponsor” is not legally defined in the *Pension Benefits Act*. Many industry professionals use the term “to denote the one or more entities, or persons who, establish the pension plan and to whom is reserved in the pension contract the ultimate power to amend or terminate the plan”: Ari Kaplan, *Pension Law* (Toronto: Irwin, 2006) 96. Others use the term to refer to the “party or parties responsible for the ultimate funding of a DB pension plan (for greater clarity, this means directly responsible for deficits)”: see Association of Canadian Pension Management. *Back from the Brink: Securing the Future of Defined Benefit Pension Plans*, August 2005, www.acpm.com, accessed October 1, 2007. In this Report, the term “sponsor” encompasses both these concepts.

² The term “MEPP” is used generically throughout this Report to denote pension plans the members of which work for more than one employer. Such plans may or may not fall within the legal definition of “MEPP” in Ontario; other jurisdictions may use other terminology to describe such plans, an issue that will be discussed in the body of the report. This report does not deal with those plans known in some jurisdictions as “simplified pension plans” (e.g. Quebec, federal). Simplified plans are “off-the-shelf” defined contribution plans established and administered by financial institutions; although they may cover several different employers, they do not raise the same regulatory issues as the jointly sponsored, union-sponsored or employer-sponsored MEPPs discussed in this Report.

³ See Appendix A.

⁴ In its 2005 Consultation Paper, “The Funding of Jointly Sponsored Defined Benefit Pension Plans”, the Ontario Ministry of Finance notes: “[The *PBA*] was written with traditional employer-sponsored defined benefit pension plans in mind where the employer or a person who makes contributions on behalf of an employer is the sole sponsor of the plan” (4).

⁵ R.S.O. 1990, c.P.8, as amended

- Does the *PBA* provide adequate protection for the benefits of MEPP member? Are its funding rules realistic in light of the unique structure of MEPPs?
- Do the *PBA*'s wind-up and partial wind-up rules adequately recognize the fluidity among participating employers in MEPPs?
- Do MEPPs generally experience more regulatory problems than SEPPs?

The purpose of the Report is not to answer these questions, but to provide background for the Expert Commission's exploration of the issues they raise. To that end, Part I of the Report examines MEPPs in Ontario, including a review of the legislative history of MEPP regulation, a look at the current profile of Ontario MEPPs, and a detailed examination of the current regulatory framework for MEPPs, focusing on:

- how MEPPs are defined
- how they are governed
- what rules are in place to address benefit stability and plan funding, and
- what rules are in place with respect to plan wind-ups and partial wind-ups.

Other Canadian jurisdictions have taken different approaches to some of these issues; these differences may provide some useful guidance to policy-makers in Ontario. Accordingly, Part II is an analysis of how these issues are addressed in the regulatory frameworks of certain other jurisdictions across Canada: specifically, the federal jurisdiction, British Columbia, Alberta and Quebec. These jurisdictions have been chosen because together with Ontario, they regulate most of the MEPPs registered in Canada, and because they represent a range of different approaches to MEPP issues.

Part III examines available data on how well MEPPs are faring within the current regulatory regime compared to SEPPs. In addressing this question, the Report first examines data generated by the Financial Services Commission of Ontario ("FSCO") and related bodies, on:

- decisions of the Superintendent of Financial Services
- pension cases before the Financial Services Tribunal
- the funded status of pension plans
- plan wind-ups and partial wind-ups, and
- prosecutions

The purpose of this examination is to identify, where possible, areas in which MEPPs have raised particular problems for FSCO within the current regulatory framework. The Report then looks at comparative data from other jurisdictions under these headings, where available.

Part IV is a thematic discussion of issues arising out of the current legislative framework for MEPPs, commenting on problems raised for regulators in Ontario by the current system, and exploring some solutions that have been implemented in other provinces.

There has been very little academic research to date on MEPPs in Canada, and due to the brief time frame provided for the preparation of this Report, primary research has been confined to such public resources as legislation, case law and statistical data available in the annual reports and other publications of the regulators. This material was modestly supplemented, within the time constraints available, by interviews in person and by email with representatives of regulatory authorities and professionals working in the pension field, and some additional data compiled by the regulators at my request.⁶ In many cases, however, the regulators were not able to respond to my requests for data. Particularly with respect Part III, “Regulatory Issues”, I have reported here on the information provided, but must acknowledge that it is neither systematic nor entirely consistent, a significant limitation with respect to that aspect of the Report. Overall, however, the research findings do suggest some directions Ontario might usefully consider taking in regulating MEPPs. Accordingly, Part V concludes the report with a brief discussion of implications for regulation.

PART I **MEPPS IN ONTARIO**

1. PROFILE OF MEPPS IN ONTARIO

As of March 31, 2007, there were 126 MEPPs registered in Ontario. While this constitutes only about 2% of all pension plans registered in the province,⁷ many of these plans have a sizable membership. Consequently, 43% of pension plan members in Ontario belong to MEPPs.⁸ Male MEPP members outnumber female members almost two to one in Canada as a whole, although women now constitute almost 50% of the membership of registered Canadian pension plans.⁹

MEPPs fall into three broad categories:¹⁰

⁶ I acknowledge with thanks the assistance of David Gordon, Lynda Ellis, George Ma, John Graham and Mark Bailey of FSCO, Denise Coderre and Pierre Perron of Quebec’s Régie des rentes, Ellen Nygaard and Mark Prefontaine of the office of the Alberta Superintendent of Pensions, Michael Peters of the Financial Institutions Commission of British Columbia, and Philip Yung of the federal Office of the Superintendent of Financial Institutions. I am also grateful to Isla Carmichael, Louis Erlichmann, Heather Gavin, Ari Kaplan, Michel Lizée, Clare Pitcher and David Short for their assistance with various aspects of the Report.

⁷ See Table 1, Appendix C.

⁸ See Table 1, Appendix D.

⁹ Based on data extracted from the Statistics Canada pension database for the Ontario Expert Commission on Pensions. This data shows overall pension plan membership in Canada at 5,589,876; 2,630,495, or 47%, are women. MEPPs in Canada have 1,113,776 members; 397,753, or 35%, are women. There is no separate data for Ontario. Overall, these figures show that approximately 20% of pension plan members in Canada belong to MEPPs; as noted above, the comparable figure for Ontario is 43%. The difference may be accounted for by the fact that the Ontario regulator includes public sector MEPPs in its numbers, which is not the case in many other Canadian jurisdictions.

¹⁰ This taxonomy for MEPPs is not current in the industry; it has been developed for purposes of this Report.

- Classic MEPPs
- Public Sector MEPPs¹¹
- Co-operative MEPPs

Classic MEPPs have historically been established by trade unions, sometimes in cooperation with industry associations.¹² They sprang up in sectors of the economy where employers are usually small and often relatively transient; typically, members of these plans have a more stable relationship with their unions than they do with their employers, and move from job to job within the industry, often with the assistance of a union “hiring hall”. These plans are invariably associated with collective bargaining agreements; many of them are found in the construction industry, where they typically co-exist with broad-based multi-employer collective agreements. Older plans of this type may also be found in the other industries with similar characteristics, such as the garment industry and the trucking industry. The hallmarks of the classic MEPP are the essential role of unions in the governance structure, the mobility of plan members among a shifting group of employers in the same industry, and the role of broad based collective bargaining in recruiting participating employers and establishing contribution levels.

These classic plans are typically defined benefit plans (“DB plans”), with a benefit formula in which the total number of hours worked in the industry for participating employers is multiplied by a flat rate.¹³ Contribution levels are negotiated at the collective bargaining table, and fixed for the life of the particular collective agreement. Significant periods of lay-off may affect accumulations, and overall benefits are not normally as high as those found in public sector plans. Furthermore, with defined benefits funded by fixed contributions, funding shortfalls are always a possibility, and accordingly such plans normally permit the trustees to amend the plan to reduce not just future, but also *accrued* benefits, if the trustees determine that it is necessary to take this step to keep the plan solvent. Although FSCO classifies these plans as DB plans and requires benefit levels to be spelled out in the plan with some precision, these benefits have sometimes been called “target benefits” rather than “defined benefits”.

The classic MEPP still dominates the list of MEPPs currently registered in Ontario in terms of numbers of plans, although it is not the dominant model in term of plan membership. The largest plan in this category is the Labourers Pension Fund of Central and Eastern Canada.¹⁴

¹¹ In Ontario, the term “public sector” is usually used to refer to the government and its employees, whereas the “broader public sector” includes agencies, boards and commissions (the “ABC” sector) and municipalities, universities, schools and hospitals (the “MUSH” sector) , as well as certain social service and other organizations totally or substantially funded through government transfers. In this Report, the term “public sector” is generally used to include both the public service proper and the broader public sector.

¹² These “classic MEPPs” are known as Taft-Hartley Plans in the United States. Many of the private sector MEPPs extant in Ontario in 1980 were Canadian clones of Taft-Hartley plans, established for their Canadian membership by international trade unions based in the United States.

¹³ Flat benefit formulae of this sort are typical of the construction industry: Hubert Frenken, “Pension Plan Potpourri”, *Perspectives*, Summer 1995 (Statistics Canada – Catalogue 75-001E) 24

¹⁴ See Appendix B.

Many public sector MEPPs are large plans established by statute, such as the Ontario Teachers' Pension Plan ("Teachers")¹⁵, the Ontario Municipal Employees Retirement System ("OMERS")¹⁶, and the OPSEU Pension Plan ("OPP")¹⁷. A number of non-statutory plans also fall into this category. These include the Hospitals of Ontario Pension Plan ("HOOPP"), a large health care sector plan of long standing established by trust agreement and involving many major health sector employers as well as four trade unions active in the health care sector. Likewise in the public sector category are newer MEPPs such as the Nursing Homes and Related Industries Pension Plan, established in 1989 as the result of an arbitrated settlement of the nursing homes collective agreement under the *Hospital Labour Disputes Act*.¹⁸ The common thread among these plans is that they involve employers that are substantially or totally publicly funded. The largest pension plan in Ontario, OMERS, is also the largest plan in this category.¹⁹

The best of these public sector plans offer traditional defined benefits, with formulae based on final or best salary [times] years of service. These plans often provide close to the maximum benefit permitted under the *Income Tax Act* (currently 2% of salary per year of service); such a plan might replace as much as 70% of pre-retirement salary over a 35 years career.

Co-operative MEPPs are a much more heterogeneous group. Co-operative plans initiated by businesses may spring from industry affiliations or associations.²⁰ In the non-profit sector, plans may arise out of church²¹ or educational affiliations.²² Increasingly, co-operative plans are also initiated by unions²³ or groups of unions. A key feature distinguishing these union co-operative plans from classic MEPPs, however, is the lack of a coordinated collective bargaining structure linking participating employers; employer participation is usually bargained on a unit-by-unit basis. Another distinguishing feature is that plan members do not typically move from job to job on a regular basis among participating employers. In co-operative unionized MEPPs, participating employers may have little in common except the union that represents their employees, in contrast to the classic MEPP where employers are tend to be involved in the same industry and are often subject to the same collective agreement. Co-operative plans are usually organized on a multi-employer basis simply to achieve administrative efficiencies and economies of scale. The largest plan in this category registered in

¹⁵ *Teachers' Pension Act*, R.S.O. 1990, c.T.1

¹⁶ *Ontario Municipal Employees Retirement System Act*, S.O. 2006, c.2

¹⁷ *Ontario Public Service Employees Union Pension Act, 1994*, S.O. 1994, c.17, s.143, Schedule

¹⁸ Further information about this plan can be obtained on the plan website:

<http://www.nursinghomespension.com/booklets/NursingPensionEng.pdf>

¹⁹ See Appendix B.

²⁰ For example, the Canadian Football League Players' Pension Plan, with 934 members.

²¹ For example, the Pension Plan of the United Church of Canada, with 3957 members.

²² For example, the Canadian Christian School Pension Plan, with 2,134 members.

²³ For example, the Steelworkers Members' Pension Benefits Plan, with 2,204 members.

Ontario is the Canada-Wide Industrial Pension Plan (“CWIPP”), a plan established in 1970 by the Canadian Labour Congress. It currently has 15,565 active members.²⁴

Co-operative MEPPs have a range of different benefit formulae. The plans may provide different benefits for the employees of different participating employers, and may or may not assume that plan members will accumulate service with multiple participating employers.

There is significant co-relation between unionization and pension coverage in Canada, and this co-relation appears to be even more pronounced in the MEPP sector. By definition, of course, all classic MEPPs involve unionized employees. While not all members of public sector MEPPs are unionized,²⁵ most of these plans are jointly sponsored by unions and employers, and the vast majority of their members are covered by collective agreements. Likewise many cooperative MEPPs involve unionized workplaces, although there are a small number of plans in this category in Ontario that have no direct union involvement.²⁶

MEPPs in Ontario range from very large plans to very small plans. The largest MEPP in Ontario is OMERS, a public sector plan offering defined benefits to 230,000 active members. The smallest plan, sponsored by the Joint Retirement Board for Conservative Judaism, is a private sector defined contribution plan (“DC Plan”) for seven members. The six largest MEPPs in Ontario account for almost 80% of total MEPP membership.²⁷

2. LEGISLATIVE HISTORY OF MEPP REGULATION IN ONTARIO

In 1963 when Ontario first began to regulate occupational pensions,²⁸ there were MEPPs as well as SEPPs in Ontario. The *Pension Benefits Act* of the day, however, did not grant them any visibility; the same regulatory rules were applied to all pension plans. The regulation of MEPPs did not surface as a distinct policy issue until the early 1980s, with the advent of the Pension Benefits Guaranty Fund (“PBGF”).²⁹ At that time, the

²⁴ See Appendix B. More information on this plan can be obtained on the plan website: www.cwipp.com. This plan should not be confused with the Canadian Commercial Workers Industry Pension Plan, with 170,335 members, a plan which has experienced considerable legal difficulty in recent years: see discussion at 36, *infra*.

²⁵ For example, while most of the members of Teachers are also members of Ontario’s four teachers’ unions, management personnel in the publicly funded school system are also members of the plan. Membership is also open to certain other categories of employees, such as qualified teachers teaching in designated private schools, many of whom are not unionized.

²⁶ The largest group of plans which do not involve unions are sponsored by religious organizations.

²⁷ Calculations based on FSCO database, “Pension Plan Extract”, downloadable from <http://www.fSCO.gov.on.ca:80/english/pensions/pplanaccess.asp>, accessed October 3, 2007. Appendix B provides data on the six largest and six smallest plans registered in Ontario, as of March 31, 2007.

²⁸ *Pension Benefits Act, 1962-63*, S.O. 1962-63, c.103. The regulatory scheme contemplated by this Act never came into effect; the Act was repealed and replaced in 1965 by *Pension Benefits Act, 1965*, S.O. 1965, c.96: see Ari N. Kaplan, *Pension Law*, *supra* at 41-43. Neither statute recognized the existence of MEPPs.

²⁹ *Pension Benefits Amendment Act, 1980*, S.O. 1980, c.80, effective December 4, 1980.

government of the day made the policy decision that MEPPs should be exempt from the fund. Accordingly, in 1983 the regulation under the *PBA* was amended to recognize MEPPs for the first time as a separate class of pension plans, and to exempt them from the PBGF.³⁰

The prototype which drove the legal definition of “MEPP” was the classic MEPP. The 1980 *Report of the Royal Commission on the Status of Pensions in Ontario* (the “Haley Report”) described these plans as follows:³¹

Such plans typically exist in industries characterized by a large number of small competing employers using a large number of skilled workers, who move frequently from employer to employer while remaining in the same trade union. The multi-employer approach is suited for such industries as construction, in which it is often impracticable, because of the temporary nature of the employer-employee relationship, to maintain separate pension or insurance programs..... At present, multi-employer plans are operated for members of a wide variety of trade unions: plumbers, bricklayers, machinists, labourers, teamsters, typographical, iron, electrical, sheet metal workers, and others.

The *Haley Report* recognized the special problems to which the typical defined benefit/fixed contribution structure gave rise. It noted that:³²

When it becomes evident that the specified contribution rate is insufficient to support the plan benefits – and assuming that the contribution rate is not renegotiated for some time at least – solvency of the plan can be maintained only by means of a reduction in benefits. The regulatory agency must be satisfied that this remedy is available; the multi-employer plan, like the single employer plan, must not be permitted to promise more than it is able to deliver.

The *Haley Report* acknowledged in passing the existence of other types of MEPPs, commenting on the plight of small, permanent operations for which “access to a multiemployer plan may be the only solution for a proprietor who wishes to provide pensions without assuming an undue obligation of cost and paperwork”.³³ It also noted the presence on the scene of the CWIPP, the Canadian Labour Congress plan, which it describes as a “non-profit pooled plan, mainly for small groups (100 or fewer employees).”³⁴ There was little discussion of the benefit structures in these types of MEPPs, however, and no discussion of whether they too give rise to the same types of solvency concerns as the classic craft union MEPP.

³⁰ O.Reg.500/83, amending R.R.O.1980, Reg.746, retroactive to December 4, 1980. The definition of MEPP enacted by the regulation is very similar to the definition found in the *PBA* prior to May of 2007: see discussion at p.8-9, *infra*.

³¹ *Report of the Royal Commission on the Status of Pensions in Ontario*, Chairman: Donna J. Haley, Q.C. (the “Haley Report”), Vol. I at 227

³² *Haley Report*, *supra*, Vol. I at 231

³³ *Haley Report* . *supra*, Vol. I at 227

³⁴ See note 24, *supra*.

When Ontario's new *Pension Benefits Act* was passed in 1987,³⁵ it folded the 1983 regulatory definition of "MEPP" into the Act, and for the first time contemplated a variety of special rules for MEPPs: governance by a board of trustees requiring member representation, funding rules designed to accommodate the anomaly of fixed employer contributions to fund a defined benefit, and the right of a plan to reduce accrued benefits. These rules reflected the unique structure of the classic MEPP. It is clear, however, that they were not drafted in contemplation of the variety of MEPPs that existed in Ontario in the 1980s.

Likewise these rules were not well adapted to accommodate existing and evolving mega-MEPPs such as OMERS and Teachers. When the *PBA, 1987* was enacted, these plans were largely employer-sponsored and employer-governed plans offering classic defined benefits. By the late 1980s and early 1990s, however, they had evolved, primarily through negotiation with the unions representing plan members, into jointly sponsored and jointly-governed plans. The *PBA* did not clearly recognize the governance models developed by these plans. Nor did it directly address how liability for funding shortfalls and solvency deficiencies would be distributed between employers and plan members.³⁶ In 2005, after issuing a consultation paper on the issue, the government amended the *PBA* to recognize a new category of pension plan, the jointly sponsored pension plan ("JSPP"), for which issues of solvency, liability for funding shortfalls and on plan wind-up, and security of accrued benefits are dealt with somewhat differently than they are for conventional SEPPs and MEPPs. The definition of JSPP was carefully targeted, and there are currently only five plans in Ontario that meet the qualification. These are all large public sector plans; four of them are MEPPs.³⁷ The special rules applicable to JSPPs will be discussed in more detail below.³⁸

3. LEGAL REQUIREMENTS APPLICABLE TO MULTI-EMPLOYER PLANS IN ONTARIO

a. Definition

Section 1(2) of the *PBA* defines a MEPP as follows:³⁹

³⁵ *Pension Benefits Act, 1987*, S.O. 1987, c.35

³⁶ Most plans of this type were statutory plans. Accordingly, they were arguably not subject to such provisions of the *PBA* as s.8(1)(e) [joint governance] or s.14(2) [permitting reduction of benefits], nor could they take advantage of the special funding regime for MEPPs established by Reg.909: see discussions at 10-16, *infra*.

³⁷ The five JSPPs are OMERS, Teachers, HOOPP, the Community Colleges ("CAAT"Plan) and the OPSEU Pension Trust. Four of these are statutory plans; the exception is HOOPP, established by trust agreement. While the OPSEU plan has a multi-employer structure, it has been deemed not to be a MEPP within the meaning of the *PBA*: see *infra* at 9. The other JSPPs are all MEPPs.

³⁸ See "Special Rules for JSPPs", *infra* at 17-18.

³⁹ This definition is new as of May 17, 2007, when the *PBA* was amended by S.O. 2007, c.7, Schedule 31, s.1(1). Prior to that date, the *PBA* defined "MEPP" as follows:

"multi-employer pension plan" means a pension plan established and maintained for employees of two or more employers who contribute or on whose behalf contributions are made to a pension fund by reason of agreement, statute or municipal by-law to provide a pension benefit that is

“multi-employer pension plan” means a pension plan described in subsection (3)

Subsection (3) provides:

For the purposes of this Act, a pension plan is a multi-employer pension plan if it is established and maintained for employees of two or more employers who contribute, or on whose behalf contributions are made, to a pension fund by reason of agreement, statute or municipal by-law to provide a pension benefit that is determined by service with one or more of the employers.

Subsection (4) goes on to say:

Despite subsection (3), a pension plan is not a multi-employer pension plan for the purposes of this Act,

- (a) if all of the employers who contribute, or on whose behalf contributions are made, to the pension fund are affiliates within the meaning of the *Business Corporations Act*; or
- (b) if the regulations specify that the pension plan is not a multi-employer pension plan.

To date, no regulations have been passed exempting specific plans from the definition of MEPP.

The *PBA* binds the Crown, and accordingly public sector plans are generally subject to its terms. They may be exempted from the application of certain specific provisions, however, either by the *PBA* and its regulations,⁴⁰ or by the terms of their own constituting statute. For example, the OPSEU Pension Plan, which would otherwise appear to fall within the definition of MEPP, has been deemed by its statute not to be a MEPP.⁴¹ Public sector plans are governed by the provisions of the *PBA* discussed in this Report except where specifically noted otherwise.

Under Ontario law, no special registration or “declaration” as a MEPP is required for the MEPP provisions of the *PBA* to be applicable. Nor does the definition establish any specific requirements for how MEPPs should be constituted.⁴² The question of whether

determined by service with one or more of the employers, but does not include a pension plan where all the employers are affiliates within the meaning of the *Business Corporations Act*” The Schedule also spells out authority to establish by regulation “one or more classes of multi-employer pension plans”. It is apparent that the purpose of the amendment was to provide the government with more flexibility with respect to the regulation of MEPPs.

⁴⁰ For example, both the Public Service Pension Plan and the OPSEU Pension Plan are exempt from s.69 of the *PBA*, which permits the Superintendent to order a plan wind-up: *Reg. 909*, ss.47.3-47.3

⁴¹ *Ontario Public Service Employees’ Union Pension Act, 1994*, S.O.1994, Chapter 17, s.143, Schedule, s.4(6).

⁴² While the definition contemplates that contributions for MEPPs may be determined in three distinct ways, by agreement, by statute, or by municipal by-law, it does not require that plans be constituted or “established” in one of these ways. Many of the special regulatory rules discussed in this Report apply only to MEPPs established pursuant to collective agreements or trust agreements.

pension plans are required to meet any formal documentation requirements to be recognized as MEPPs was discussed by the Financial Services Tribunal in *Dustbane Enterprises Limited v. Superintendent of Financial Services*.⁴³ The case involved a pension plan established in 1967 by Dustbane Enterprises Ltd. for its employees, and those of its subsidiaries, associated or affiliated companies. The plan was not described in its constituting documents as a MEPP, and Dustbane, the plan administrator, had never identified the plan as a MEPP in its filings with FSCO. Distributors had never signed participation agreements in the plan. Dustbane had paid premiums to the PBGF, which would have been unnecessary if the plan in fact was a MEPP. In 1980, however, Dustbane amended the plan to provide that the employees of its distributors would no longer be members of the plan, and applied for a partial wind-up. A funding shortfall was identified in the wind-up report, and Dustbane took the position that the distributors were participating employers who had liability for the shortfall. The Superintendent disagreed, ruling that Dustbane was wholly liable. Dustbane appealed to the Financial Services Tribunal.

The majority of the FST panel hearing the case rejected Dustbane's claim that the plan involved was a MEPP, in part because there was no documentation supporting that claim, and Dustbane had always conducted itself as if it had sole control of the plan, *vis-à-vis* both the distributors and the regulator.⁴⁴ Vice-Chair Kathryn Bush, in dissent, would have found that the plan was a MEPP, in the face of evidence that: (1) the plan members who performed services for the distributors were clearly employees of the distributors rather than of Dustbane, and (2) the distributors had paid contributions to the plan on their employees behalf. In coming to that conclusion, however, she was highly critical of the lack of coherence in the *PBA*'s approach to MEPPs:⁴⁵

The Act and Regulations thereunder do not provide a systematic code for understanding the treatment of multi-employer plans. Rather the legislation contains a series of apparently unconnected provisions that seem to have been intended to address only limited concerns. Multi-employer plans in the collectively bargained arena have different concerns than those in the present case. It would be preferable that the legislation be amended to provide a more systematic consideration of these plans and to consider the different contexts in which these plans may arise.

b. Governance Structure

Section 8(1) of the *PBA* provides a number of governance options for pension plans, including the employer, a joint employer-member pension committee, a pension committee composed entirely of plan member representatives, or an insurance company. In practice, most SEPPs are administered by the employer. With respect to MEPPs, s.8(1)(e) provides that:

⁴³ FST Decision No. P0095-1999-2(K. Bush, dissenting); aff'd [2002] O.J. No. 2943 (Div. Ct).

⁴⁴ *Ibid* at 7-9.

⁴⁵ *Ibid* at 18.

A pension plan is not eligible for registration unless it is administered by an administrator who is,

- (e) if the pension plan is a multi-employer pension plan established pursuant to a collective agreement or a trust agreement, a board of trustees appointed pursuant to the pension plan or trust agreement establishing the pension plan of whom at least one-half are representatives of members of the multi-employer pension plan, and a majority of such representatives of the members shall be Canadian citizens or landed immigrants.

The first case to test the meaning of s.8(1)(e) was *Canadian Union of Public Employees (CUPE) v. Ontario Hospital Association*.⁴⁶ This case involved HOOPP, a MEPP involving over 300 participating employers and approximately 70,000 members at the time the case was heard. HOOPP had been set up in 1960 by the Ontario Hospital Association (“OHA”). Its plan documents consisted of the plan text and a trust agreement between the OHA and two trust companies. The original plan text and trust agreement contemplated that HOOPP’s governing body would be a pension committee appointed by the OHA, but including representation from the unions with bargaining rights for plan members. In 1988, the OHA proposed to amend the plan text to designate itself as the administrator. The unions challenged this move, taking the position that HOOPP was a MEPP established pursuant to a trust agreement, and s.8(1)(e) of the recently enacted *PBA* required that it be governed by a board of trustees with at least 50% member representation. The Superintendent rejected the unions’ position.

The Unions appealed to the Pension Commission of Ontario (“PCO”).⁴⁷ Before the Commission, two issues were raised: (1) was HOOPP established pursuant to a trust agreement? and (2) if so, did s.8(1)(e) *require* a representative board of trustees, or was such a board simply an additional option for MEPPs? The PCO held that even though HOOPP had originally been initiated pursuant to a resolution of the OHA board of directors, it was not truly “established” until the trust agreement contemplated by the plan text was completed. Accordingly, HOOPP fell within the scope of s.8(1)(e). In addition, the Tribunal held that s.8(1)(e) was not optional; under the *PBA*, it was mandatory for such MEPPS to be administered by a representative board of trustees. The PCO’s decision was subsequently upheld by the Divisional Court.⁴⁸

Accordingly, all MEPPS “established pursuant to a collective agreement or a trust agreement” must be governed by a board of trustees which includes a minimum of 50% member representatives; plans which do not meet those requirements will be ordered to restructure their governing bodies.⁴⁹ There is no requirement for employer representation on MEPP boards of trustees. While representation of pensioners is permissible on boards

⁴⁶ Pension Commission of Ontario (June 26, 1991) (the “HOOPP Case”)

⁴⁷ The PCO was the predecessor of the Financial Services Tribunal as adjudicator under the *PBA*.

⁴⁸ (1992) 91 D.L.R. (4th) 436 (Ont. Div. Ct.)

⁴⁹ See also *Colleges of Applied Arts and Technology Pension Plan* (Notice of Proposal, November 9, 2006; Order March 15, 2007), (“the CAAT Case”) reported in the on-line *Pension Bulletin*, www.fsco.gov.on.ca in the February 2007 and May 2007 issues respectively.

of trustees, it is not mandatory.⁵⁰ The powers and duties of such a board of trustees must be set out in the plan documents.⁵¹

Neither the *PBA* nor the regulations address the issue of how trustees are chosen to represent members, although s.10(1) of the *PBA* does require that the method of appointment of the administrator be set out in the plan documents. Most MEPP plan documents contemplate that member representatives will be selected by the trade unions holding bargaining rights for the members. Practices vary from union to union as to whether pension plan trustees are elected, appointed, or come from the ranks of union officers serving *ex officio*.

The *Labour Relations Act, 1995* imposes some special rules applicable to the construction industry⁵² with respect to the appointment of trustees to the boards of benefit plans, including pension plans. In brief, these rules establish the right of the local trade union to appoint a majority of non-employer trustees to the board of any pension plan which provides benefits primarily to members of the local trade union, their dependents and beneficiaries. They also establish the right of local trade unions to be involved in such appointments where a plan provides benefits to members of more than one local, and in multi-jurisdictional plans which provide benefits to union members in Ontario as well as in other jurisdictions. While the Act contemplates the possibility that the local union or unions involved may agree otherwise, the default appointment procedure is by appointment of the local union, or if more than one union is involved, by a vote among the local unions, with each local entitled to one vote.⁵³

The only provision in the *PBA* with respect to the qualifications of plan trustees is the requirement, contained in s.8(1)(e), that a majority of them be Canadian citizens or landed immigrants. Accordingly, practices vary from plan to plan as to whether trustees are expected to have any specific expertise going into the position, or whether they are expected to participate in professional development once they become trustees.

MEPPs established by statute are not subject to the requirement imposed by s.8(1)(e) to establish a representative board of trustees; typically, their governing structures are set out in their constituting statutes. The boards of these public sector plans have substantial member representation, although not always 50%.⁵⁴

⁵⁰ *PBA*, s.8(2). See 40, *infra*, for further discussion of the issue of retiree representation.

⁵¹ *PBA*, s.10(2).

⁵² *Labour Relations Act, 1995*, S.O. 1995, c.1, Sch. A, defines the “construction industry” as “the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site”: s.1(1). The majority of classic MEPPs in Ontario would likely fall into this category.

⁵³ *Labour Relations Act, 1995*, s.150. While the purpose of this provision appears to be the regulation of the rights of local unions operating in Ontario as against their national and international bodies, it has the indirect effect of mandating that within the construction industry, at least a majority of member representatives on pension boards of trustees will be selected by union appointment.

⁵⁴ One of the administrator options permitted by s.8(1) of the *PBA* is a “corporation, board, agency or commission made responsible by an Act of the Legislature for the administration of a pension plan” (f). The board of Teachers has an equal number of trustees appointed by the government and the Ontario Teachers’ Federation, with a “neutral” chair agreed upon by both parties.

c. Benefit Stability and Funding Regime

i. Right to Reduce Benefits

As discussed earlier, most MEPPs in Ontario offer defined benefits. The general principle applicable in Ontario is that where a plan offers defined benefits, the value of benefits accrued to date cannot be retroactively reduced. Section 14(1)⁵⁵ establishes this general rule:

An amendment to a pension plan is void if the amendment purports to reduce:

- (a) The amount or the commuted value of a pension benefit accrued under the pension plan with respect to employment before the effective date of the amendment;
- (b) The amount or the commuted value of a pension or a deferred pension accrued under the pension plan; or
- (c) The amount or the commuted value of an ancillary benefit for which a member or former member has met all the eligibility requirements under the pension plan necessary to exercise the right to receive payment of the benefit.

The *PBA* does recognize some important exceptions to the rule, however. Section 14(2) provides that:

Subsection (1) does not apply in respect of a multi-employer pension plan established pursuant to a collective agreement or a trust agreement.

In addition, subsection 14(3) provides that:

Subsection (1) does not apply in respect of a pension plan that provides defined benefits if the obligation of the employer to contribute to the pension fund is limited to a fixed amount set out in the collective agreement.

These exceptions are closely tied to unionized workplaces. While the s.14(2) exemption is not strictly limited to MEPPs established under collective agreements, in practice most s.14(2) MEPPs are unionized plans. The s.14(3) exception is restricted to plans in which the employer's contributions are fixed and set out in a collective agreement; accordingly, it is available only with respect to unionized plans. The s.14(3) exemption is also available only to plans which have adopted a "defined benefit funded by fixed contributions" formula, whereas under s.14(2), *all* MEPPs established under collective or trust agreements are exempt from the prohibition against reducing accrued benefits. As a matter of statutory interpretation, MEPPs established in ways other than under collective or trust agreements may qualify for the exemption under s.14(3) even if they do not

⁵⁵ *PBA*, s.14(1)

qualify under s.14(2). In practice, however, only one plan currently registered in Ontario is believed to qualify by resort to s.14(3).⁵⁶

There is some controversy in Ontario about whether s.14(2) has the effect of permitting all MEPPs established by collective or trust agreement to reduce benefits, or whether its scope is narrower than that. This issue has arisen in *Gay Lea Foods Co-operative Limited et. al v. Superintendent of Financial Services of Ontario*, a case involving the Co-operatives of Ontario Trusteed Revised Pension Plan.⁵⁷ The plan was underfunded, and the trustees sought to wind it up. Accordingly, they sought to file a plan amendment reducing benefits, and a wind-up report which was dependent on the reduction in benefits to reconcile the plan's assets and liabilities.

The Superintendent issued a Notice of Proposal refusing to register the plan amendment reducing benefits. In the Notice of Proposal, the Superintendent took the position that the plan documents did not permit the reduction of benefits, and accordingly any such amendment would not comply with the *PBA*.⁵⁸ In consequence, the Superintendent also refused to accept the wind-up report, and ordered the participating employers to make up the funding shortfall before the plan could be wound up. This reflects the Superintendent's general position that a MEPP amendment reducing accrued benefits is valid only if the plan documents permit such an amendment. Permission need not be express; where the plan documents are silent, such an amendment will be registered.⁵⁹ If the plan documents *prohibit* the reduction of accrued benefits, however, the Superintendent takes the position that such an amendment is void. The *Gay Lea* case has not yet been heard by the FST.⁶⁰

As discussed above, the PBGF, which insures the benefits of DB plan members in Ontario up to a certain minimum level, does not apply to MEPPs.⁶¹ It is likely that the rationale behind this exclusion is the perception that MEPPs have the power to reduce accrued entitlements to meet funding difficulties. It should be noted, however, that the scope of the exclusion from the PBGF is broader than the scope of s.14(2), and accordingly there may be MEPPs excluded from the PBGF that do not have the power to reduce accrued benefits.

ii. Funding

⁵⁶ This plan is the Toronto Transit Commission Plan (information provided by Lynda Ellis, FSCO, Senior Manager, Pension Policy, Pension Division, October 22, 2007). It is not a MEPP.

⁵⁷ *Gay Lea Foods Co-operative Limited et. al v. Superintendent of Financial Services of Ontario*, FST File No. P0275-2006. The Notice of Proposal in this case is reported at FSCO, Pension Bulletin, vol.15, issue 2 (May 2006) 54-62.

⁵⁸ *PBA*, ss.17, 18(1)(d),(e), 75.

⁵⁹ Information provided by David Gordon, Deputy Superintendent of Financial Services.

⁶⁰ See FST website, www.fstontario.ca (accessed October 3, 2007), under 'Hearing Schedule' for a current status report.

⁶¹ *PBA*, s.85

The approach taken by the *PBA* with respect to the regulation of plan funding closely parallels the approach taken with respect to the right to reduce benefits.⁶² The general rule is that employer sponsors of most Ontario DB SEPPs are required, in effect, to guarantee accrued benefits. If the assets in a DB plan are not sufficient to fund the accrued liabilities, the employee is liable under the *PBA* to make up the difference.⁶³ Such plans are required to demonstrate to FSCO through actuarial reports prepared and filed every three years that there is enough money in the pension fund to meet the plan's liabilities both on a going-concern basis (i.e. based on the assumption that the plan will continue indefinitely) and on a solvency basis (i.e. based on the assumption that the plan will be wound up immediately). If the plans do not pass both these tests, employers are required to make "special payments" to close the gap. Generally, they have fifteen years to pay off a "going concern" liability, and five years to liquidate a solvency deficiency.

The general funding regime is established by s.4 of *Reg. 909*. Section 4 of *Reg. 909* does not apply to "a multi-employer pension plan established pursuant to a collective agreement or trust agreement or a pension plan that provides defined benefits where the obligation to contribute to the pension plan is limited to a fixed amount set out in a collective agreement" unless it is also a JSPP.⁶⁴ Therefore the provisions imposing liability on employers for special payments when plans are underfunded do not apply to these plans.⁶⁵

Section 6 of *Reg. 909* sets up a special funding regime for these plans which are exempt from s.4. Unlike s.4, which sets out detailed requirements with respect to going concern and solvency funding, s.6 requires only that the plan actuary:

- perform such tests as will demonstrate the sufficiency of the contributions required by the collective agreement or agreements to provide for the benefits set out in the plan without consideration of any provision for reduction of benefits set out in the plan;⁶⁶ and
- where the contributions are not sufficient to provide the benefits under the plan, propose options available to the administrator of the plan that will have the result that the required contributions will be sufficient to provide the benefits under the plan.⁶⁷

If the actuary finds an "insufficiency" and proposes options, the actuary is required to inform the plan administrator.⁶⁸ The onus then falls on the plan administrator to advise

⁶² The parallel is not exact because JSPPs, discussed in more detail below, are subject to their own rules with respect to funding: *Reg. 909*, s.4(13), s.5-5.5, s.6(6).

⁶³ *PBA*, s.75

⁶⁴ *Reg. 909*, s.4(13), 6(1).

⁶⁵ *Reg. 909*, ss. 4(13), 30(1). Section 30(1), specifically imposing liability on employers for special payments when funding falls short on plan wind-up, does not apply to any plan not covered by the PBGF.

⁶⁶ *Reg. 909*, s.6(4)

⁶⁷ *Reg. 909*, s.6(5)

⁶⁸ The actuary is also required to file the report with the Superintendent no later than nine months after the valuation date: s.4(5)(c); 14(10)

the regulator of what action will be taken to “meet the funding requirements of this section.”⁶⁹

Until recently, there was considerable controversy about whether the “sufficiency” standard required MEPPs subject to s.6 to meet the same actuarial standards, on both a going concern basis and a solvency basis, as other DB plans. O.Reg. 489/07, which came into effect on September 1, 2007, attempts to lay this controversy to rest. That regulation amends s.6 of *Reg. 909* by adding a new subsection 4.1 providing that:

For purposes of clause (4)(a), the sufficiency of the required contribution is to be determined on the basis of a going concern valuation and a solvency valuation.

In addition, a new s.6 (4.2) spells out that “the required contributions are sufficient” if they include, among other things, “the special payments to be paid with respect to any solvency deficiency that is determined in the report”.

O.Reg. 489/07 also establishes a three-year moratorium on solvency funding for eligible⁷⁰ MEPPS that chose to enter the newly created category of “Specified Ontario Multi-Employer Pension Plan” (“SOMEPP”). Once a plan elects to become a SOMEPP, for a three year period the newly enacted ss.6(4.1) and (4.2) do not apply. Instead, the regulation provides that contribution “sufficiency” for a SOMEPP will be determined solely on a going concern basis.⁷¹ The price paid for the election, however, is that if a going concern unfunded liability is identified, it must be resolved through special payments made over a 12 year period, rather than the normal 15.⁷² Furthermore, if benefit improvements are made which reduce the transfer ratio to less than 0.8, or the “asset to going concern liability” to less than 0.9, an accelerated timetable applies to the liquidation of any increased unfunded liabilities.⁷³ Once the three year moratorium expires for any given plan, ss.6 (4.1) and (4.2) apply to these plans as well.

d. Plan Windups and Partial Wind-ups

In Ontario, pension plan wind-ups may be initiated in two ways: the employer (or in the case of a MEPP, the plan administrator) may wind up the plan,⁷⁴ or the Superintendent may order the plan to be wound up.⁷⁵ The same two options are available with respect to a partial wind-up.

⁶⁹ *Reg. 909*, s.6(5)

⁷⁰ Among the conditions of eligibility are that (a) employer contributions are made pursuant to collective agreements, (b) contributions are limited to a fixed amount, and (c) nothing in the plan documents prevent the reduction of accrued benefits: *Reg. 909*, s.6.0.1 (1)¶4, 5, 7

⁷¹ Any solvency deficiency must be identified, but special payments to liquidate it need not be included in determining the sufficiency of contributions. This means, in essence, that any such special payments can be deferred.

⁷² *Reg. 909*, s.6.0.4 (4)

⁷³ *Reg. 909*, s.6.0.4 (5)-(6)

⁷⁴ *PBA*, S.68

⁷⁵ *PBA*, s.69

Section 69(1) generally permits the Superintendent to order a plan wind-up, or partial wind-up if appropriate, when an employer has ceased or failed to make contributions, when an employer is bankrupt, where an employer has ceased operations or where a significant number of plan members cease to be employed by an employer, among other circumstance. Section 69(1)(h) has specific application to MEPPs, and permits a wind-up order when: (i) there is a significant reduction in the number of members, or (ii) there is a cessation of contributions under the pension plan or a significant reduction in such contributions. It is unclear whether s.69(1)(h) is intended to pre-empt or limit the application of the general provisions of s.69(1) to MEPPs, or whether it is intended simply to provide an additional basis for wind-up in the case of MEPPs.

The application of the general wind-up conditions to MEPPs is potentially problematic, since a wind-up or partial wind-up could be triggered as a result of the withdrawal of a single employer, even though this may have little or no impact on the active membership of plan members. Classic MEPPs are structured on the basis that individual participating employers may come and go without affecting the stability of the plan; it would be unfortunate if wind-up could result from the conduct of a single participating employer, triggering distribution of any surplus, significant administrative costs, and additional benefit costs to the plan through immediate vesting and the application of grow-in rights.

Very few MEPPs in Ontario have been subject to either full or partial wind-ups.⁷⁶ There is no evidence that there has been inappropriately broad application of s.69 to MEPPs.

e. Special Rules for JSPPs

As noted above, the legislature has recently amended the *PBA* to recognize a new category of pension plan, the jointly sponsored pension plan, or JSPP. To qualify as a JSPP, a plan must meet the following conditions with respect to benefits and contributions:⁷⁷

- It must provide defined benefits;
- The benefits must be “contributory”: i.e. the members must make contributions as well as the employers;
- Members must be required to contribute to going concern unfunded liabilities and solvency deficiencies;
- Employer contributions must be at least equal to member contributions;
- The plan must not permit reduction of benefits except on wind-up;
- Pension benefits must be directly related to the member’s pensionable earnings.

In addition, the plan must meet the following conditions with respect to governance:

⁷⁶ See Table 1, Appendix F.

⁷⁷ *PBA*, s.1(2) of the *PBA* and Reg. 909, s.3.1. In addition, plans may be “prescribed” as JSPPs (*Reg. 909*, s.3.2); under this power, OMERS has been prescribed as a JSPP (*Reg. 909*, s.3.2), although it is likely that this plan would have qualified even in the absence of prescription.

- Employer(s) and plan members must be jointly responsible for making decisions about the terms of the plan, including amendments to the plan;
- Employer(s) and plan members must be jointly responsible for appointing the plan administrator, or for appointing members of the plan’s governing body;
- The plan must set out the method of decision-making on all matters regarding the terms and conditions of the pension plan and any amendments to the pension plan, and the appointment of the administrator or member so the governing body

While these conditions require “joint responsibility” with respect to a number of important issues, they fall short of a requirement for equal governance: for example, investment issues are absent from the list of issues subject to joint decision-making.

These requirements are merely facilitative, in the sense that the *PBA* does not require any plan to construct or modify its plan documents to meet these conditions. Where the plan documents *do* meet these conditions, however, the *PBA* bolsters the plan documents by giving these requirements statutory force. For example, if a plan is a JSPP, plan members are required by law: (i) to make contributions to the plan;⁷⁸ (ii) to make contributions in respect of going concern unfunded liabilities and solvency deficiencies;⁷⁹ and (iii) to participate in making up funding deficiencies on plan wind-up.⁸⁰

Reg.909 requires all JSPPs, regardless of whether or not they are MEPPs, to meet the same going concern and solvency funding requirements imposed on regular DB plans.⁸¹ However, JSPPs have a somewhat less onerous schedule for making special payments to amortize going concern unfunded liabilities and solvency deficiencies, designed to avoid imposing upon employees obligations such as retroactive and lump sum payments.⁸²

PART II LEGAL FRAMEWORKS FOR THE REGULATON OF MEPPS IN OTHER SELECTED CANADIAN JURISDICTIONS

1. FEDERAL JURISDICTION

a. Definition

*The Pension Benefits Standards Act, 1985*⁸³ (“PBSA”) defines a MEPP as follows:

⁷⁸ *Reg.909*, s.55(3)

⁷⁹ *Reg. 909*, s.55(4)

⁸⁰ *Reg. 909*, s.75.2

⁸¹ *Reg. 909*, ss 4, .5-5.5

⁸² *Reg. 909*, s.4 (2.3-2.8), 5 (1.1-1.2) and 5.5. Employee special payments click in at a later date (up to one year after the valuation date) and are calculated for each employee as a percentage of earnings, rather than as a lump sum. No payments in arrears are required. From an employee’s perspective, therefore, special payments would be experienced as an increase in contribution rates. Both current and new members would be required to pay these increased rates.

⁸³ R.S.C.1985, c.32 (2d Supp.) as amended

“multi-employer pension plan” means a pension plan organized and administered for employees of two or more employers who contribute to the plan pursuant to an agreement, by-law or statute, where the pension plan provides pension benefits that are determined by periods of employment with any or all of the participating employers, but does not include a pension plan where more than ninety-five per cent of the plan members are employed by participating employers who are incorporated and are affiliates within the meaning of the *Canada Business Corporations Act*.

This definition is similar in effect to Ontario’s except that it has a slightly lower threshold for affiliated employers (95% instead of 100%), and there is no provision for the exclusion by regulation of plans that otherwise fall within the definition.

The *PBSA* does not have application to most public sector plans. Crown employees and the employees of many Crown corporations, agencies and commissions are not governed by the Act;⁸⁴ their pensions are subject to the *Public Service Superannuation Act*.⁸⁵

b. Governance Structure

With respect to governance structures, the *PBSA* distinguishes between MEPPs established under collective agreements, and MEPPs established by other means. MEPPs established under collective agreements must be administered by a board of trustees “or other similar body”.⁸⁶ Unlike the Ontario Act, however, the *PBSA* does not regulate the composition of that board; the only requirement is that the board be constituted “in accordance with the terms of the plan or the collective agreement”.⁸⁷ MEPPs established outside of collective agreements must be governed by a pension committee,⁸⁸ which must include, at the request of a majority of the members, at least one member representative. Likewise the committee must include at least one retiree representative if a majority of the retirees so request and the MEPP has 50 or more retired members.⁸⁹

The *PBSA* does not establish any rules for how trustees should be selected, or what qualifications or training they should have.

c. Benefits Stability and Funding Regime

⁸⁴ *PBSA*, s.49(5) excludes Crown employees. S.6(a) permits the exclusion by regulation of employment by Crown agents. Pursuant to this provision, s.4 and Schedule I of the *Pension Benefits Standards Regulations, 1985*, SOR/87-19 (“*PBSReg.*”) exclude employees of any board, commission or any other body listed in Parts I or II of the Schedule of the *Public Service Superannuation Act, R. S.C.1985, c.P-36*

⁸⁵ R.S.C. 1985, c.P-36

⁸⁶ *PBSA*, s.7(1)(a)

⁸⁷ *PBSA*, s.7(1)(a)

⁸⁸ *PBSA*, s.7(1)(b)

⁸⁹ *PBSA*, s.71.(a), (b). Section 5 of the *PBSReg.* sets out procedures for the nomination and election by secret ballot of these representatives.

The *PBSA* makes no special provision for MEPPs to reduce benefits. This does not mean, however, that no benefit reductions are possible. Section 10.1(2) of the *PBSA* provides as follows:

Unless the Superintendent authorizes the amendment, an amendment is void if:

- (a) It would have the effect of reducing
 - (i) pension benefits accrued before the date of the amendment or pension benefit credits relating to pension benefits accrued before the date of the amendment, or
 - (ii) an immediate or deferred pension benefit to which a member, former member or any other person was entitled before the date of the amendment...

Accordingly, the Superintendent of Financial Institutions has the discretion to permit benefit reductions for any plan, including MEPPs, provided the plan is able to persuade the Superintendent that such reductions are appropriate. While there is little statutory guidance as to the criteria to be applied when permitting the reduction of benefit, OSFI has issued an *Instruction Guide* providing administrative advice on the considerations it will take into account in determining whether or not to approve such amendments.⁹⁰ These include: (i) the process that was followed to inform members of the reduction in their benefits, and (ii) the authority provided under the terms of the plan to make such an amendment. In the *Instruction Guide*, OSFI makes clear its expectation that pension plans will honour their pension promises, and seek out other options before resorting to the reduction of benefits.⁹¹

Under the *PBSA*, all pension plans are required to meet the same standards for funding. Section 9(1) of the Act imposes a general requirement that:

A pension plan shall provide for funding, in accordance with the prescribed test and standards for solvency, that is adequate to provide for payment of all pension benefits and other benefits required to be paid under the terms of the plan.

The regulation prescribes requirements for both going concern and solvency funding very similar to those in Ontario.⁹² There are no special rules, procedures or exemptions applicable to MEPPs. Unfunded liabilities and solvency deficiencies must be liquidated by special payments on a fifteen year/five year schedule similar to that in Ontario. The *PBSA* also specifically provides that⁹³

⁹⁰ *Instruction Guide: Authorization of Amendments Reducing Benefits in Defined Benefits Plans*, (April 2006) www.osfi-bsif.gc.ca/app/DocRepository/1/eng/pension/guides/bnft_rdc_e.pdf, accessed October 31, 2000.

⁹¹ *Ibid* at 3.

⁹² *PBSReg.* ss.8-10.

⁹³ S.29(6)

On the termination of the whole of a pension plan, the employer shall pay into the plan all amounts that would otherwise have been required to be paid to meet the prescribed tests and standards for solvency referred to in subsection 9(1)....

As in other jurisdictions, federally registered DB plans have experienced some recent difficulties in meeting these funding requirements. The *Solvency Funding Relief Regulations*⁹⁴ were passed in November of 2006 to address this problem. Applicable to all DB plans, the new regulations in general give plans the option of liquidating solvency deficiencies over a ten year period rather than over five years, unless 1/3 or more of plan beneficiaries object. MEPPs as well as SEPPs are given this option.⁹⁵ Employers can fund their solvency deficiencies by obtaining and maintaining letters of credit.⁹⁶

d. Plan Wind-ups and Partial Wind-ups

The *PBSA* distinguishes between plan “termination”, defined as “the cessation of crediting of benefits to plan members generally” and “winding-up”, defined as “the distribution of the assets of a pension plan that has been terminated”.⁹⁷ The Act gives the Superintendent very broad power to declare a pension plan terminated, either in whole or in part, where “there is any cessation of contributions in respect of all or part of the plan members”,⁹⁸ or where “the Superintendent is of the opinion that the pension plan has failed to meet the prescribed tests and standards for solvency in respect of funding referred to in subsection 9(1)”.⁹⁹ There are no special provisions or exemptions for MEPPs. Once a plan is terminated, whether by order or voluntarily, a distribution of assets in accordance with the statutory scheme may be ordered where the Superintendent “is of the opinion that no action or insufficient action has been taken to wind-up the plan”.¹⁰⁰ As in Ontario, there is potential in this language for the application of these statutory provisions to MEPPs in situations in which only one or two employers have run into difficulties. As in Ontario, however, there have been very few wind-ups involving MEPPs, and no evidence that regulators have been applying these provisions to MEPPs on the basis that they have lost a participating employer or plan members.¹⁰¹

2. BRITISH COLUMBIA

a. Definition

⁹⁴ SOR/2006-275

⁹⁵ *Supra*, s.7

⁹⁶ *Supra*, Part 3

⁹⁷ *PBSA*, s.2(1).

⁹⁸ *PBSA*, s.29(2)(a)

⁹⁹ *PBSA*, s.29(2)(c)

¹⁰⁰ *PBSA*, s..28911)

¹⁰¹ See Appendix F, Table 1

British Columbia's *Pension Benefits Standards Act*¹⁰² (*PBSA-BC*) defines MEPP as follows:¹⁰³

"multi-employer plan" means a pension plan administered for employees of 2 or more employers, unless those employers are affiliates within the meaning of the *Business Corporations Act*

The Act gives the Superintendent power to exempt a pension plan from the definition of MEPP "if the superintendent considers that an exemption is in the best interest of the plan members",¹⁰⁴ a power which has been exercised to exempt nine specified pension plans.¹⁰⁵ Public sector plans are generally governed by the *PBSA-BC*.¹⁰⁶

In addition to recognizing MEPPs, British Columbia has created a specific statutory category of pension plans, called "negotiated cost plans" ("NCPs"). NCPs are defined as follows:¹⁰⁷

"negotiated cost plan" means a pension plan, including a multi-employer plan, where an employer's financial contribution to the plan is limited to the amount the employer is contractually required to contribute to the plan;

In other words, NCPs include plans which follow the classic MEPP formula of providing defined benefits funded through fixed employer contributions. By creating a separate NCP category, the *PBSA-BC* is able to target special regulatory rules to plans on the basis of their benefit and funding structure.¹⁰⁸

b. Governance Structure

Under the *PBSA-BC*, all MEPPs must be administered by a board of trustees. For MEPPs established by statute or by-law, there is no requirement for member representation on the board of trustees.¹⁰⁹ For MEPPs established and maintained under collective agreements, however, at least half the trustees must be member representatives.¹¹⁰

There are no statutory guidelines on qualifications or training for trustees, nor on how they should be selected.

¹⁰² R.S.B.C.1996, c.352 as amended

¹⁰³ *PBSA-BC*, s.1(1)

¹⁰⁴ *PBSA-BC*, s.1(3.1)

¹⁰⁵ *Pension Benefits Standards Regulation*, B.C.Reg.433/93 ("BC Reg.") s.3(11)

¹⁰⁶ *PBSA-BC*, s.1(8)

¹⁰⁷ *PBSA-BC*, s.1(1)

¹⁰⁸ BC's NCP category is open to any plan with the required benefit/funding structure. Ontario's approach to special funding and benefit rules is both more and less inclusive than BC's: more inclusive in that it encompasses all MEPPs established by agreement, regardless of their benefit/funding structure, and less inclusive in that for all practical purposes it excludes non-union plans.

¹⁰⁹ *PBSA-BC*, s.7(1). MEPPs constituted or maintained under collective agreements are exempt from the obligation to create a pension advisory committee, provided at least one member of the board of trustees is actually a member or former member of the plan (B.C. Reg. 433/93, s.3(9)).

¹¹⁰ *PBSA-BC*, s.7(2)

c. Benefits Stability and Funding Regime

Under the British Columbia statute, there is a general prohibition against the reduction of accrued benefits. This prohibition applies equally to MEPPs and SEPPs, *unless* they are NCPs.¹¹¹ With respect to NCPs, s.59(3) explicitly contemplates that reductions in accrued benefits may be necessary, although the consent of the Superintendent is required before any such reduction can take place.

The *PBSA-BC* requires that “an employer must make contributions to a pension plan that are sufficient to pay for all the benefits in accordance with the prescribed solvency tests”.¹¹² These tests are set out in some detail in s.35 of the regulation, and require both going concern and solvency funding. They apply to all DB plans, whether MEPP or SEPP, *unless* they are NCPs. With respect to NCPs, once again the rules are different. Section 41(4) of the Act explicitly provides that “a participating employer’s liability for funding the benefits of a negotiated cost plan is limited to the amount that the employer is contractually required to contribute to the plan”. Section 51(2), which spells out the requirement that if a pension plan is terminated with a solvency deficiency, participating employers who are not insolvent must make up the deficiency, likewise specifically excludes NCPs from its application.

The British Columbia legislation requires that NCPs keep close tabs on the relationship between contribution rates and funding levels by imposing procedural requirements on plan actuaries, who are obligated to perform special supplementary tests to identify funding deficiencies and report them to plan administrators, with options spelled out for resolving the problem. Administrators in their turn must then report the problem to the regulator, together with information about what steps will be taken to bring the plan back into equilibrium.¹¹³ The only special provision applicable to all MEPPs is s.35(9), which allows the plan actuary to allocate separately actuarial gains in the plan to specific participating employers, and contemplates that such actuarial gains may be used by specific participating employers to dissolve their liability for special payments, as well as for the improvement of benefits. There is no Ontario equivalent to this provision.

All DB plans, including MEPPs, must spell out how benefits will be reduced and assets allocated in the event the plan is wound up without sufficient assets to pay the benefits (s.45(1)).¹¹⁴ All DB plan members must be informed in their annual statements that on wind-up, benefits may be reduced if the assets in the plan are not sufficient to fund the benefits.¹¹⁵

¹¹¹ *PBSA-BC*, s. 59

¹¹² *PBSA-BC*, s.41(1.1)

¹¹³ *BCReg.* s.7(3)(k), s.35. These provisions are similar to those found in s.6 of Ontario’s *Reg.909*.

¹¹⁴ The mechanics of this process are governed by *BCReg.*, s.39.

¹¹⁵ This provision is specifically subject to s.41, which makes employers generally liable for making sufficient contributions to pay the benefits in DB plans unless the plan is an NCP. For non-NCPs, therefore, it presumably has application only where the employer is insolvent and cannot make good any deficiency.

d. Plan Wind-ups and Partial Wind-ups

Like the federal legislation, the *PBSA-BC* differentiates between plan termination, which generally occurs once contributions cease to be made,¹¹⁶ and plan wind-up, meaning the distribution of a plan's assets.¹¹⁷ As in other jurisdictions, termination can take place voluntarily, or in response to a Superintendent's order. In general, MEPPs and SEPPs, including NCPs, are subject to the same triggers for plan termination and wind-up: refusal to register or cancellation of registration, suspension or cessation of employer contributions to plan, and suspension or cessation of crediting of benefits to the plan are all grounds for termination.¹¹⁸ Section 48(6) of the Act, however, explicitly recognizes the special characteristics of MEPPs by providing that the cessation or termination of contributions on the part of a participating MEPP employer *does not* result in a partial termination of the plan unless the plan states otherwise.¹¹⁹ The requirements to wind-up a pension plan after termination apply equally to MEPPs and SEPPs with the exception that the provisions making sponsoring employers who remain solvent after a plan wind-up liable for wind-up costs does not apply to either MEPPs or NCPs.¹²⁰

3. ALBERTA

a. Definition

Alberta's *Employment Pension Plans Act* ("EPPA")¹²¹ recognizes two distinct types of multi-employer pension plans: Specified Multi-Employer Pension Plans ("SMEPPS") and Multi-Unit Pension Plans ("MUPPs"). The legislation does not provide detailed definitions for these two types of plans. Indeed, the statutory definition for both plans is virtually identical:¹²² it simply requires that they be pension plans "administered for employees of 2 or more employers" and that they be designated by the Superintendent as either SMEPPs or MUPPs. Administrative policy statements issued by the Alberta Minister of Finance make it clear, however, that plans designated as SMEPPs will be plans with collectively bargained contributions;¹²³ plans designated as MUPPs, on the other hand, are described as non-collectively bargained plans.¹²⁴ Although both categories appear to be open to either DB or DC plans, the *Alberta Annual Statistical*

¹¹⁶ *PBSA-BC*, s.48.

¹¹⁷ *PBSA-BC*, ss.54-55

¹¹⁸ *PBSA-BC*, s.48. MEPPs, however, are required to specify in the plan text the consequences of a participating employer's withdrawal in respect of funding and vesting of benefits: s.46.

¹¹⁹ *PBSA-BC*, s.48(6)

¹²⁰ *PBSA-BC*, ss.57(2)(3).

¹²¹ R.S.A. 2002, c.E-8. as amended

¹²² *EPPA*, s.1(1)(x) and (qq)

¹²³ Policy Bulletin #17: "Specified Multi-Employer Pension Plans", www.finance.alberta.ca/business/pensions, accessed October 3, 2007.

¹²⁴ Policy Bulletin #37, "Multi-Unit Pension Plans", available at www.finance.alberta.ca/business/pensions, accessed October 3, 2007. For a list of MUPPs currently registered in Alberta, see Appendix H.

Report, April 1, 2005-June 30, 2006 describes SMEPPs as “negotiated contribution defined benefit plans to which multiple employers contribute.”¹²⁵

Much of Alberta’s public sector is not governed by the *EPPA*.¹²⁶ Instead, plans covering such employees as public servants and employees of local authorities, as well as elementary and secondary school teachers, are subject to their own special statutory regimens under the *Public Sector Pensions Act*¹²⁷ and the *Teachers’ Pension Plans Act*¹²⁸, except to the extent that those Acts specifically make the *EPPA* applicable.¹²⁹ In general, the only applicable provisions of the *EPPA* involve the division and distribution of benefits on relationship breakdown.¹³⁰ The provisions of the *EPPA* reviewed in this Report do not apply to the public sector, including the teachers’ plans.

b. Governance Structure

Section 10 of the *EPPA* requires that SMEPPs be governed by a board of trustees. Where the SMEPP is established under a collective agreement, or maintained pursuant to contributions required under a collective agreement, at least 50% of the trustees on the board must represent employees.¹³¹ While MUPPs must also be governed by a board of trustees established pursuant to a trust document, there is no requirement for member representation on the board.¹³²

There are no provisions in the Act dealing with how trustees are appointed, or what qualifications or training they should possess.

c. Benefits Stability and Funding Regime

MUPPs are governed by the ordinary rules applicable to funding and solvency in Alberta; if they are defined benefit plans, they must maintain funding at the levels required by the *EPPA* for such plans (i.e. adequate funding on both a going concern and solvency basis). The Act does, however, recognize the special structural features of MUPPs by allowing for actuarial evaluations to be done on an employer-by-employer basis, which in turn permits liability for shortfalls to be allocated on a per-employer basis. This means that employers participating in MUPPs are liable only for the deficiencies attributable to their own employees and contribution records; they will not be liable for the funding/solvency problems caused by other participating employees. Withdrawal of a participating

¹²⁵ Alberta Superintendent of Pensions, *Annual Statistical Report, April 1, 2005-June 30, 2006* at 5

¹²⁶ *EPPA*, s.3-4. These sections make the *EPPA* applicable to public sector and teachers’ plans “to the extent prescribed by regulations” made under the statutes which govern those plans.

¹²⁷ R.S.A. 2000, c.P-41

¹²⁸ R.S.A. 2000, c.T-1

¹²⁹ *EPPA*, s.3

¹³⁰ *Teachers’ Pension Plans Act*, R.S.A. 2000, c.T-1, s.28; *Public Sector Pension Plans Act*, R.S.A. 2000, c.P-41, s.6

¹³¹ In view of the definitional requirement in Policy Bulletin #17 that a SMEPP have collectively bargained contributions, it would appear that all SMEPPs in Alberta must meet this requirement unless otherwise exempted by special statutory provisions.

¹³² *EPPA*, s.11

employer from a MUPP automatically triggers a partial plan termination;¹³³ the withdrawing employer remains liable for its share of any solvency funding deficiency.¹³⁴

For SMEPPs, by contrast, employer liability is explicitly limited to the amount of the contributions agreed to in the collective agreement.¹³⁵ Requirements with respect to the contents of actuarial reports for SMEPPs are similar to those found in the Ontario legislation;¹³⁶ the plan actuary is required to perform supplemental tests to determine whether “cents per hour” contributions are adequate to fund the benefits, including any outstanding special payments. If they are not, the actuary must propose options, and the administrator must report to the regulator about which options will be pursued.

Nevertheless, on its face s.81(1) of the *EPPA* places stringent constraints on the ability of all pension plans to reduce accrued benefits:

An amendment to a pension plan, or, where one plan has been adopted in the place of another, the plan so adopted, may not reduce

- (a) a person’s benefits in respect of employment on or after the initial qualification date and before the date of the amendment or the adoption of the other plans.

Indeed, s.81(5) goes on specifically to provide that the Superintendent “may refuse to register an amendment to a specified multi-employer plan if, before taking into account the effect of the amendment, the plan has a solvency deficiency.”

Notwithstanding this strong language, the legislation does contemplate the reduction of accrued benefits in SMEPPs as a remedy for funding deficiencies, albeit as a last resort. Schedule .02 of the *EPPR* provides as follows:¹³⁷

Where the option chosen under section 48(18) of this Regulation [i.e. pursuant to the actuary’s report] has been implemented and the amount of contributions remains insufficient to cover the cost of benefits, the specified multi-employer plan is exempted from the application of section 81(1) of the Act if, on application to the Superintendent, the Superintendent considers that it would create an undue burden on the plan to apply that provision and approves that exemption.

This appears to require that a SMEPP make at least one attempt to make up any funding deficiency through other measures, including special payments and contribution increases, without reducing benefits. Only where such an attempt is unsuccessful is the

¹³³ *EPPA* s.70(10); this provision applies unless that participating employer joins or establishes a successor plan.

¹³⁴ *Employment Pension Plans Regulation*, A.R. 35/2000 (“*EPPR*”), s.48(19)

¹³⁵ *EPPA*, s.48(6). This explicit limitation of liability also applies to “a pension plan, other than a specified multi-employer plan, that is established, and maintained pursuant to contributions required, under a collective agreement and whose administrator is a board of trustees”.

¹³⁶ *EPPR*, s.48(17)-(18)

¹³⁷ *EPPR*, Schedule .02

Superintendent permitted to give the plan an exemption from the prohibition against reducing benefits.

It should be noted that effective August 10, 2006, SMEPPs may make a one-time application for a temporary moratorium of up to 3 years on the obligation to make solvency special payments, under certain detailed and specified conditions,¹³⁸ including the requirement that the solvency deficiency in question be repaid within 10 rather than 15 years. The terms of this moratorium are similar, although not identical, to the terms more recently adopted in Ontario in O.Reg. 489/07.¹³⁹

Another 2006 innovation for Alberta is the creation of a new pension category, the “publicly funded pension plan”. Schedule .02 of the *EPPR* permits the Superintendent to designate pension plans partially or wholly funded by public money from the requirement to make solvency payments.¹⁴⁰ To date, one MUPP has been granted an exemption under this provision; the only condition imposed was that the deficiency would be paid in the event that the plan terminates.¹⁴¹

d. Plan Wind-ups and Partial Wind-ups

Like the federal and British Columbia legislation, the Alberta statute distinguishes between plan termination and plan wind-up; the two terms generally have meanings similar to those in the comparable statutes. As in the other jurisdictions, termination can be voluntary or by order of the Superintendent. The provisions with respect to both termination and wind-up generally apply equally to SEPPs, SMEPPs and MUPPs. The *EPPA* spells out that the cessation or suspension of contributions by an individual employer in a SMEPP does not automatically trigger a termination;¹⁴² however, the Superintendent has the power to approve a termination in such a case. With respect to MUPPs, however, the withdrawal of a participating employer will automatically trigger a partial termination and windup unless the employer joins or establishes a successor plan.¹⁴³ The Alberta statute also gives explicit recognition to the role of collective bargaining in SMEPP funding by providing that where all the members of a trade union who belong to a plan withdraw from the plan, and they, or an identifiable group of them, do not join another plan, there may be a termination or partial termination with respect to those members who do not join another plan.¹⁴⁴

¹³⁸ *EPPR*, Schedule 0.2(3)

¹³⁹ see discussion above

¹⁴⁰ *EPPR*, s.1(1).

¹⁴¹ Information provided by Mark Prefontaine, Acting Deputy Superintendent of Pensions, Alberta Finance, Alberta Superintendent of Pensions, on October 2, 2007.

¹⁴² *EPPA*, s.48(8)

¹⁴³ *EPPA*, s.70(10)

¹⁴⁴ *EPPA*, S. 48 (9)

4. QUEBEC

a. Definition

The *Supplemental Pension Plans Act*¹⁴⁵ (“*SPPA*”) defines a MEPP as follows:¹⁴⁶

A multi-employer pension plan is a plan in which the members are the employees of two or more employers.

However, a plan is not considered to be a multi-employer pension plan if the following conditions are met:

- 1) the employers who are parties to the plan are either subsidiaries of the same parent company or a parent company and its subsidiaries;
- 2) the plan provides that the subsidiaries that are parties to the plan and the parent company agree that the plan not be considered to be a multi-employer pension plan.

In comparing the Quebec regime to the Ontario regime, it is important to note that the *SPPA* is significantly narrower in its scope than the *PBA*. The *SPPA* exempts public sector and broader (“para”) public sector plans which are governed by their own statutes;¹⁴⁷ this includes plans covering government employees and the employees of school boards and the health care sector. Employees of municipalities, universities and publicly funded daycares are included within the scope of the *SPPA*. They are, however, excluded from the requirement to fund solvency deficits.¹⁴⁸ While the pension plan covering employees in the construction industry is covered by the *SPPA*, this plan too is governed by its own statute and has been exempted from a number of the provisions of the *SPPA*. It is, however, governed by the provisions of the *SPPA* dealing with the issues addressed in this Report.¹⁴⁹

b. Governance Structure

Quebec is the only jurisdiction surveyed which makes no special provision for MEPP governance. It is also the only province which requires member representation in the governance structures of *all* registered pension plans. All Quebec pension plans must be

¹⁴⁵ R.S.Q., c.R-15.1 as amended

¹⁴⁶ *EPPA*, s.11

¹⁴⁷ *SPPA*, s.2(4)

¹⁴⁸ *Regulation respecting the exemption of certain pension plans from the application of provisions of the Supplemental Pension Plans Act*, R.Q. c. R-15, r.4 (“*SPPA r.4*”), Divisions I and II.

¹⁴⁹ *SPPA r.4*, Division III. More information about this plan can be obtained on the website for the Commission de la Construction du Québec, www.ccq.org. With respect to the discussion on benefit stability and funding, it should be noted that the construction industry pension plan is no longer a DB plan; the DB plan was closed in 2004 when it ran into serious funding difficulties, and a new DC plan was established through industry-wide collective bargaining.

administered by pension committees which include (i) at least one member who is independent of the plan, (ii) at least one member designated by the active members of the plan, and (iii) one member designated by the non-active members, which includes pensioners, beneficiaries and deferred members of the plan.¹⁵⁰ The Act also provides for two additional non-voting members, one designated by the active participants and one by the non-active.¹⁵¹

Recent amendments to the *SPPA* have clarified and enhanced the rights, duties and responsibilities of pension committee members. In particular, the Act now:

- Requires that pension committees adopt by-laws ensuring that members will be provided with appropriate professional development at the expense of the plan;¹⁵²
- Ensures that members of pension committees will be provided by the plan with all of the documents and information required to carry out their functions;¹⁵³ and
- Requires the adoption of pension committee bylaws dealing with such issues as ethics, risk management, service standards and the selection, supervision, remuneration and evaluation of third party service providers.¹⁵⁴

In addition, the *SPPA* now provides that third-party service providers with discretionary power have the same fiduciary responsibility in exercising those powers as the pension committee that appointed them.¹⁵⁵ Third-party service providers are no longer permitted to contractually limit their responsibilities.¹⁵⁶

The *quid pro quo* for these enhanced responsibilities is a ‘safe-harbour’ provision protecting from liability a pension committee member who acts in good faith on the basis of expert advice.¹⁵⁷ The *SPPA* likewise now imposes on third party service providers a “whistleblower” obligation in the event that a pension committee fails to take corrective action with respect to any situation identified by these professionals in the course of their duties that might “adversely affect the financial interest of the pension fund and requires correction”. In such a case, the third party must report to the regulator, but is protected from liability for doing so.¹⁵⁸

¹⁵⁰ *SPPA*, s. 147. Michel Lizée, Coordinator for the Service aux collectivités, Université du Québec à Montréal and active since 1991 in a pension plan trustee education program offered in cooperation with the Quebec Federation of Labour, advises that in practice private sectors plans in Quebec tend to have a majority of employer-designated pension committee members, while municipal and university plans tend to have more equal member representation.

¹⁵¹ *SPPA*, s. 147.1

¹⁵² *SPPA*, s.151.1, 162

¹⁵³ *SPPA*, 151.3; 154.3

¹⁵⁴ *SPPA*, s.151.2, in force December 13, 2007

¹⁵⁵ *SPPA*, s.153, 154, 154.4

¹⁵⁶ *SPPA*, s. 154.4

¹⁵⁷ “The pension committee is presumed to have acted with prudence where it acted in good faith on the basis of an expert’s report”: *SPPA*, s.151.1. There is no statutory definition of “expert”.

¹⁵⁸ *SPPA*, c.154.2. Prior to these amendments, only accountants were subject to that requirement: see Former *SPPA*, s. 161.1, now replaced by section 154.2.

c. Benefit Stability and Funding Regime

Under the *SPPA*, no amendment to a pension plan may be made which has the effect of reducing the value of pensions in pay;¹⁵⁹ likewise it is generally not permissible to amend a plan to reduce the value of accrued pension benefits.¹⁶⁰ The only exceptions are: (i) where a reduction may be necessary to comply with the *Income Tax Act*, or (ii) where there has been an employer bankruptcy and the members or beneficiaries of the plan have agreed to the reduction effective the date of the bankruptcy.¹⁶¹ In contrast to Ontario law, there is no exception for MEPPs.

The *SPPA* specifically acknowledges plans with a classic MEPP benefit structure by creating a category of pension plan called the “defined benefit-defined contribution” (“DB/DC”) pension plan:

A defined benefit-defined contribution pension plan is a plan under which employer contributions and, where applicable, member contributions and the normal pension, or the method used for calculating them, are set in advance.

Under the *SPPA*, these plans can be either a MEPP or a SEPP.¹⁶² For most purposes, however, the rules for DB/DC plans are the same as for pure DB plans. Indeed, Chapter X of the *SPPA*, which imposes obligations with respect to going concern and solvency funding very similar to those in Ontario, specifically provides that:¹⁶³

For the purposes of this chapter, a defined benefit-defined contribution plan shall be considered to be a defined benefit plan.

This means that like other DB plans, DB/DC plans do not, in general, have the right to reduce accrued benefits.

It is important to note, however, that older DB/DC MEPPs (i.e those registered prior to January 1, 1990) which meet the required conditions may opt out of certain provisions of the *SPPA*.¹⁶⁴ These plans, known as “Exempted MEPPs” do not have to comply with the obligations imposed by the *SPPA* with respect ensuring contributions sufficient to meet funding requirements, and need not make special payments to make up solvency deficiencies. Consequently, they may reduce accrued benefits if necessary in order to meet funding standards.

¹⁵⁹ *SPPA*, s.21

¹⁶⁰ *SPPA*, s.20

¹⁶¹ *SPPA*, s.20(2)

¹⁶² *SPPA*, s.7

¹⁶³ *SPPA*, s.117

¹⁶⁴ *Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act*, R.Q., c.R.15.1, r.2 (“*SPPA* r.2”), Division VI. These conditions include the requirement that these plans have no members outside Quebec. As of October 23, 2007, only two plan have taken advantage of this exemption (information provided by Pierre Perron, Régie des rentes du Québec).

In addition, Quebec has recently recognized a new type of defined benefit plan, a member-funded pension plan (“MFPP”), to which employers make defined contributions and members make up any difference required to maintain funding standards through their own contributions.¹⁶⁵ These amendments resulted from lobbying by the Quebec Federation of Labour for a DB regime more congenial to the needs of small and medium-sized employers.¹⁶⁶ The regulator, the Régie des rentes, notes that:¹⁶⁷

Although MFPPs are not aimed at specific group, they should be of particular interest to unionized workers. Workers' associations have indicated their members want to have access to a defined benefit plan. Moreover, at a time when employers are increasingly reticent about assuming the financial risks of defined benefit plans, workers' groups say that they are ready to take on such risks. The new MFPP responds to the concerns of both groups in that the plan members collectively assume the ultimate financial responsibility for the plan.

While these plans need not be MEPPs, experienced pension professionals predict that new MEPPs in Quebec will likely be constituted on the MFPP model rather than the older MEPP model, because of the fact that employers can limit their liability with respect to these plans, and need not run the risk of defaults in contributions from other participating employers.¹⁶⁸

In order to make sure that participating employers in MEPPs do not seek to avoid their funding obligations by simply withdrawing from under-funded plans, Quebec stringently regulates the terms on which employers can withdraw from MEPPs. These conditions include the following:

- Pensioners and beneficiaries affected by the withdrawal may require that the obligation to pay their pensions be assumed by an insurer (this does not apply to Exempted MEPPs);¹⁶⁹

¹⁶⁵ *SPPA* r.2, Division X

¹⁶⁶ Information provided by Michel Lizée.

¹⁶⁷ See website of the Régie des rentes:

www.rrq.gouv.qc.ca/en/programmes/rcr/rrfs_nouveau_regime_retraite.htm, accessed October 2, 2007. The *Income Tax Act* has now been amended to accommodate MFPPs; they will be required to be established under the terms of a collective agreement as a condition of registration, unless the minister issues special approval. A key feature of MSPPs is that funding must take into account future indexing on accrued benefits (either prior to retirement, or both prior to and during retirement). Indexing is not taken into consideration when computing solvency, however, providing a funding margin which reduces contribution volatility. No surplus can be used for benefit improvements as long as all members' pension credits and benefits have not been indexed for the previous three years. Likewise no benefit improvement can create or increase an actuarial deficit: the plan needs to be and remain in surplus for any improvement to be put in place. (Information provided by Michel Lizée).

¹⁶⁸ Information provided by Louis Erlichmann, Director of Research for the Canadian National Office of the International Association of Machinists and Aerospace Workers and Michel Lizée. Michel Lizée advises that major affiliates of the Quebec Federation of Labour are currently in the process of organizing a new MEPP according to this model, while a group of community and women's organizations have also been working since 2004 to set up such a plan, scheduled for launch in 2008.

¹⁶⁹ *SPPA*, s.2000(3)

- The withdrawing employer must pay all outstanding contributions within 60 days of withdrawal;¹⁷⁰
- No employer can withdraw except by amendment of the plan, which must be authorized by the Régie;¹⁷¹ and
- The Régie will not authorize the amendment unless employer contributions have been paid in full and the plan administrator certifies that plan members, pensioners and beneficiaries will receive the payouts to which they are entitled¹⁷² except in the case of employer bankruptcy. They must receive these payouts within 30 days after the Régie authorizes the amendment.¹⁷³

d. Plan Wind-ups and Partial Wind-ups

The *SPPA* differentiates between termination and wind-up; once a plan is terminated, it is required to be wound up. As in Ontario, Quebec pension plans may be terminated in two ways: voluntarily, or by order of the regulator. In general, the Régie may terminate a plan where the employer ceases to make contributions and has not voluntarily terminated the plan.¹⁷⁴ Where the plan is a MEPP, however, it is clear that this power is triggered only where *all* the employers involved cease to make contributions; a single employer default does not trigger a termination. Likewise, a plan may be terminated voluntarily only where *all* of the employers acting jointly give notice of termination.¹⁷⁵

The provisions applicable to plan wind-ups are designed in large part to ensure that the benefits of terminated plans are appropriately valued, and that members and beneficiaries get the benefits to which they are entitled in a timely fashion.¹⁷⁶ These provisions apply to MEPPs which have been terminated, and likewise to the payout of benefits to MEPP members affected by the withdrawal of a single employer.

PART III REGULATORY ISSUES

1. INTRODUCTION

In addition to exploring comparative legislative frameworks for MEPPs in selected jurisdictions across the country, this Report examines data on how MEPPs are faring within the current regulatory framework. In addressing this question, the Report first examines a variety of quantitative data generated by the Financial Services Commission

¹⁷⁰ *SPPA*, s. 202

¹⁷¹ *SPPA*, s. 198

¹⁷² *SPPA*, s. 202

¹⁷³ *SPPA*, s. 209.1

¹⁷⁴ *SPPA*, s.205. The Régie may also order a termination where the plan is not in compliance with orders from the Régie, or where the plan has no more active members.

¹⁷⁵ *SPPA*, s.204

¹⁷⁶ *SPPA*, ss.208-227

of Ontario (“FSCO”) and related bodies. The Report then looks at comparative data from other jurisdictions under these headings, where available. In some cases, comparative data does not exist because of differences in regulatory structure. For example, the Ontario data on Superintendents’ Decisions stands alone because the other comparator jurisdictions take different approaches to how the regulatory body communicates with pension plans about regulatory issues. Likewise there is no comparable data on Tribunal activity because no other jurisdiction has a Tribunal with comparable scope to the Ontario Financial Services Tribunal.¹⁷⁷

The Report surveys the following gauges of regulatory activity in Ontario:

- Superintendent’s decisions, including Notices of Proposals, Orders, Consents, Refusals and Declarations
- Matters proceeding before the Ontario Financial Services Tribunal
- Pension prosecutions in FSCO jurisdiction
- Plan wind-ups and partial wind-ups
- Funding and solvency

The period surveyed was the most recent five year period for which data was available.¹⁷⁸ The data is provided in raw quantitative form. Similar data was sought from the comparator jurisdictions over the same period of time; where the information was available, it has been reported here. The comparative data needs to be approached with particular caution because of the differences among regulatory frameworks. For example, funding and solvency data that includes public sector plans cannot readily be compared with similar data from jurisdictions where public sector plans are not included, either because they are not governed by the regulator, or because they are exempt from funding standards.

2. ONTARIO

a. Superintendents’ Decisions

Under the *PBA*, the Superintendent of Financial Services is the decision-maker of first instance with respect to a very wide range of issues: for example, she has the right to refuse to register pension plans, to revoke plan registrations, to make orders against administrators where she finds non-compliance with the *PBA*, to register plan amendments, to order wind-ups and partial wind-ups, and to approve distribution of

¹⁷⁷ While British Columbia does have a Financial Services Tribunal, it has more limited jurisdiction: The *PBSA-BC* makes broader use of civil enforcement than does Ontario (see s.71), and requires arbitration of a number of issues involving plan administration, as well as issues of surplus, contribution holidays, and the withdrawal of participating employers from MEPPS (s.62).

¹⁷⁸ This period varies depending on the matter dealt with: in some cases five-years statistics are reported for the period April 1, 2006-March 31, 2006, and in others the five year period is April 1, 2002-March 31, 2007. In order to maintain comparability as much as possible, for each issue I have used the five year period for which the most data was available across the surveyed jurisdictions. With respect to plan funding, the approach of regulators to gathering and maintaining statistics varied so considerably that no uniformity was possible, and I have simply reported the information on the basis that it was provided.

surplus.¹⁷⁹ In exercising her decision-making power, the Superintendent normally issues a formal Notice of Proposal, advising the parties of what decision she intends to make, and the basis for that decision. Parties then have a right to appeal the decision to the Financial Services Tribunal. If no appeal has been filed by the time the appeal period expires, the decision in the Notice of Proposal is then finalized, and issued as an Order, Consent, Refusal or Declaration. This regulatory activity is routinely reported in FSCO's Pension Bulletins.¹⁸⁰

The Table below summarizes this data. As noted above, no qualitative assessment has been made, and accordingly it is not possible to determine how many of these decisions represent regulatory problem areas, and how many simply reflect, for example, approvals of routine plan amendments. In some cases, the raw data includes both a Notice of Proposal and a final decision on the same matter. This does not occur in all cases, however, because of the timing of decisions and because of the fact that some of these matters are appealed to the Tribunal.

Ontario: Superintendent's Decisions, April 1, 2002-March 31, 2007					
	2003	2004	2005	2006	2007
SEPPs	98	137	137	151	92
MEPPs	1	3	2	6	6
TOTAL	99	140	139	157	98

Source: Financial Services Commission of Ontario, Pension Bulletins, May 2002 to date

Based on these figures, it appears that MEPPs have attracted approximately 3% of Superintendent's decisions.

b. Matters Proceeding before the Ontario Financial Services Tribunal

As noted above, many decisions of the Superintendent involve routine matters, and a Superintendent's decision does not, in itself, signal a problem with the plan. A more meaningful gauge of the importance of the issues involved may be gleaned from examining the extent to which Notices of Proposal end up on appeal before the Financial Services Tribunal. The FSCO *Pension Bulletins* provide information about cases brought before the Tribunal.¹⁸¹ The Table below summarizes this information, identifying which cases involve MEPPs and which involve SEPPs.

Ontario: Cases Appealed to the Financial Services Tribunal, April 1, 2002-March 31, 2007					
	2003	2004	2005	2006	2007
SEPPs	13	5	5	10	12
MEPPs	3	3	1	4	3
TOTAL	16	8	6	14	15

¹⁷⁹ See Ari Kaplan, *Pension Law*, *supra* at 142-144.

¹⁸⁰ Available online at www.fSCO.gov.on.ca

¹⁸¹ Many cases brought before the Tribunal settle before hearing.

Based on these figures, slightly less than 25% of the cases brought to the Tribunal over the past five years involved MEPPs. Without a qualitative analysis, it would be difficult to draw meaningful conclusions from this data about whether MEPPs draw disproportionately on the resources of the Tribunal. It should be recalled, however, that while MEPPs constitutes only about 2% of the total plans registered in Ontario, these plans currently cover 43% of plan members in Ontario.

c. Prosecutions

Section 109 of the *PBA* provides that every person who contravenes the Act, or an order made under the Act, is guilty of an offence. Likewise, the *PBA* provides that:¹⁸²

Every director, officer, official or agent of a corporation and every person acting in a similar capacity or performing similar functions in an unincorporated association is guilty of an offence if the person,

- (a) causes, authorizes, permits, acquiesces or participates in the commission of an offence referred to in section 109 by the corporation or unincorporated association; or
- (b) fails to take all reasonable care in the circumstances to prevent the corporation or unincorporated association from committing an offence referred to in section 109.

As the Table below shows, pension-related prosecutions are relatively rare in Ontario.

Ontario: Prosecutions Instituted Under the Pension Benefits Act, April 1, 2002- March 31, 2007					
	2003	2004	2005	2006	2007
SEPPs	13	4	6	2	2
MEPPs	0	0	0	0	1
TOTAL	13	4	6	2	3

Source: Financial Services Commission of Ontario, *Pension Bulletins*, May 2002 to date

The sole MEPP prosecution reflected on this Table involves charges laid in June 2006 against ten trustees of the Canadian Commercial Workers Industry Pension Plan (“CCWIPP”). This plan is the second-largest MEPP registered in Ontario, and the largest private sector MEPP. The plan covers members and former members of United Food and Commercial Workers International Union bargaining units, most of them in the retail food industry. The charges relate to a variety of plan investments over the period from February 15, 2002 to December 31, 2003, which FSCO alleges were made in

¹⁸² *PBA*, s.10(2)

contravention of the *PBA*. The case is now scheduled for a six-week trial commencing September 8, 2008.¹⁸³

d. Plan Wind-ups and Partial Wind-ups

Ontario has experienced very few wind-ups or partial wind-ups relating to MEPPs. As Table 1 of Appendix F shows, over the period from April 1, 2003 to March 31, 2006, there were twelve partial wind-ups involving MEPPs, six of those involving DB plans¹⁸⁴ and six DC plans.¹⁸⁵ Over the same period, four full MEPP wind-ups took place, two involving DB plans¹⁸⁶ and two DC plans.¹⁸⁷ Data is also available for a fifth year, April 1, 2006 to March 31, 2007: in this year, FSCO's most recent fiscal year, there were three partial wind-ups, one involving a DB plan¹⁸⁸ and two involving DC plans.¹⁸⁹ There were no full wind-ups in this period.

e. Funding and Solvency

In addition to regulatory concerns that might be reflected in the activity measures discussed above, FSCO also monitors the financial health of pension funds, requiring plan administrators to report annually on a variety of statistical measures, including whether DB plans are fully funded on both a going concern and on a solvency basis.

Table 1 of Appendix G sets out detailed data on both solvency and going concern funding for the valuation periods falling between January 1, 2001 and December 31, 2005. as of January 31, 2007 on solvency funded ratios for Ontario registered plan. This information is based on actuarial date for DB plans with valuation dates between July 1, 2003 and June 30, 2006. This data shows significant underfunding of all plans on both a solvency and a going concern basis: only 22% of plans are fully-funded on a solvency basis, and 46% on a going concern basis. In both cases, however, MEPPs are doing somewhat better than SEPPs: 25% of MEPPs are fully funded on a solvency basis, as compared to 22% of SEPPs, and 67% of MEPPs are fully funded on a going concern basis, as compared to 45% of SEPPs. It should be noted that the seven largest public sector plans and certain designated plans are excluded from this data.

¹⁸³ There are also two civil suits outstanding in connection with CCWIPP investments, one an application for class action status filed by two retired and one active CCWIPP members, and on brought by California-based Case Financial: *Benefits Canada*, January 25, 2007 and March 26, 2007.

¹⁸⁴ The plans involved were a Communications, Energy and Paperworkers plan (1), a United Steelworkers plan (1) and the Canadian Commercial Workers Industry Plan (4).

¹⁸⁵ The plans involved were Aggregate Industries (1), the Canadian Council of Christian Charities (1), and the Ontario Long Term Care Association (4)

¹⁸⁶ The plans involved were the Service Employees International Union National Industry Plan (Canada), and the Participating Co-operatives of Ontario (currently before the Tribunal: see discussion of the *Gay Lea* case *supra* at 13-14).

¹⁸⁷ The plans involved were International Alliance of Theatrical Stage Employees, Local 105 and Health Care Services Upjohn Limited.

¹⁸⁸ The plan involved was Canadian International Investment.

¹⁸⁹ The plans involved were the Ontario Long Term Care Association and Aggregate Industry.

3. DATA FROM OTHER JURISDICTIONS

a. Superintendents' Decisions: General Regulatory Activity

Data was requested from the comparator jurisdictions about general regulatory activity corresponding to Superintendents' decisions in Ontario. None was received, reflecting differences both in the structure of regulatory operations and in the way that statistics are maintained.

b. Prosecutions

Pension prosecutions in general are rare in Canada. With the exception of Alberta, in which one MEPP charge was laid and subsequently withdrawn, no jurisdiction other than Ontario reported any prosecutions of MEPPs over the five year period for which data was requested.

c. Plan Wind-Ups and Partial Wind-ups

Appendix F provides a series of Tables setting out available data on full and partial wind-ups for MEPPs and SEPPs. In all jurisdictions where data was available, there have been few wind-ups, either full or partial, affecting MEPPs.

d. Funding

Appendix G provides a series of Tables setting out the available information on DB plan funding on both a solvency and going concern basis. In general, these Tables show patterns similar to those in Ontario: underfunding is widespread, but MEPPs are generally doing somewhat better than SEPPs in this regard. In analyzing and comparing the data, it should be noted that for most jurisdictions, public sector data is not reported because public sector plans are not subject to the funding regimes.

PART IV DISCUSSION

1. PROS AND CONS OF MEPP CATEGORIES

All jurisdictions surveyed recognize that MEPPs raise some unique issues. Special regulatory rules for MEPPs with respect to governance structures, ability to reduce accrued benefits and funding requirements are common, although not universal, across the country. As we have seen, however, MEPPs come in a variety of types: classic MEPPs, public sector MEPPs and co-operative MEPPs. Each of these types may raise different issues for regulators. This fact has been recognized in other jurisdictions in various ways. Some jurisdictions, for example, address public sector plans by excluding

them from the scope of general pension legislation (federal, Alberta, Quebec). Others create regulatory rules which distinguish between plans which fund defined benefits through fixed contributions (British Columbia's NCPs), and those with more conventional benefits structures. Alberta has created separate regulatory categories for MEPPs based on their union status: SMEPPs are unionized plan, whereas MUPPs are not. While Quebec has generally treated MEPPs and SEPPs alike, its new member-funded category (MFPPs) promises considerable flexibility in designing new plans on a model that may attract employer support while continuing to provide a solid regulatory framework to protect benefits.

Ontario's *PBA* has only a single definition for MEPPs. Most of the special rules applicable to MEPPs, however, apply only to MEPPs established pursuant to collective or trust agreements. This category appears to have been designed originally to correspond with unionized private sector MEPPs. However, as a result of the HOOPP, decision which gave a broad reading to the words "established by trust agreement",¹⁹⁰ the correspondence between MEPPs established pursuant to collective or trust agreement and unionized MEPPs is imperfect.¹⁹¹ The assumption that all such MEPPs are classic MEPPs was probably inaccurate in 1987 when the *PBA* was first enacted, and is certainly inaccurate today. The application of s.14(2), which permits the reduction of accrued benefits as a remedy for dealing with funding shortfalls, is justified only on the assumption that all non-statutory MEPPs have the "defined benefit funded by fixed contribution" structure characteristic of the classic MEPP. Likewise it is the presumption that all MEPPs fit this pattern, making reductions in accrued benefits a standard risk of the MEPP structure, that justifies the blanket exemption of all MEPPs from the protection of the PBGF. As noted above,¹⁹² this presumption is less than completely justified; not all MEPPs fall within the scope of s.14 (2) of the *PBA*. Ironically, however, the assumption may have become self-fulfilling, channeling more MEPPs into the "defined benefit funded by fixed contribution" mould than might otherwise have chosen to be there, and encouraging most non-statutory MEPPs to frame their plan documents accordingly.

Where MEPPs are established by statute, the statutes have created unique regimes which, at least until the *PBA* recognized the new JSPP category in 2005, were a poor fit with the "one size fits all" approach espoused by the *PBA*. The new JSPP category has provided some additional design flexibility, and given members of these plans some additional protection by ensuring that the right to reduce accrued benefits applies only in the unlikely event of plan wind-up. But while this category is technically open to all comers, including those in the private sector, in fact the rules of entry were carefully tailored to accommodate certain very specific public sector plans, and at least as yet there has been no broad take up of this plan design.

¹⁹⁰ See discussion at 11, *supra*.

¹⁹¹ HOOPP itself, of course, is a unionized plan, but the decision's approach to trust agreements with financial institutions swept a number of non-union MEPPs into the category of plans "established by collective or trust agreement".

¹⁹² See discussion at 14, *supra*.

There are substantial differences of opinion among Canadian jurisdictions and in the broader pension community about whether employees in DB plans are best protected by a rule that absolutely prohibits the reduction of accrued benefits, or whether DB plans are more likely to survive if plan administrators have some flexibility to adjust benefit formulae when plans get into trouble.¹⁹³ That broad question is, of course, beyond the scope of this Report. It is clear, however, that Ontario's approach to this question suffers from some inconsistency; the *PBA* framework invites virtually all non-statutory MEPPs to establish benefit/funding structures which permit the reduction of accrued benefits, while limiting SEPP access to this remedy.

4. REPRESENTATION AND QUALITY CONTROL IN MEPP GOVERNANCE

Ontario has adopted a governance model for MEPPs established pursuant to collective or trust agreements requiring at least 50% member representation on the fiduciary body that administers the plan. Similar approaches have been taken in the comparator jurisdictions, although the scope of the requirement to establish a board of trustees varies, as does the extent of the requirement for member representation. The review of regulatory activities in Part III of this Report suggests that in general, current MEPP governance models have not resulted in conflict with the *Pension Benefits Act* to any greater degree than the governance models currently employed by SEPPs.

Nevertheless, concerns have been expressed about the role of trustees in pension plan governance. In particular, in this era of increasing challenges for pension plans and pension funds, including increasing complexity in global capital markets, questions have been raised about whether "lay" trustees are capable of doing the job.¹⁹⁴ To the extent that these concerns are well-founded, it is fair to say that the current *PBA* contains little in the way of prophylaxis, and provides FSCO with few tools to address the problems that might arise from plan mismanagement by boards of trustees. For example, FSCO has no power under the *PBA* to place the administration of an on-going pension plan under trusteeship, nor can it order the removal and replacement of individual trustees

¹⁹³ The data currently available suggests that the right to reduce benefits is not widely used by MEPPs. No Ontario data on reduction of benefits was made available. British Columbia, however, reports that over the past five years, it has processed only six applications from MPPs to reduce benefits: Michael Peters, Executive Director, Pensions, Financial Institutions Commission, October 30, 2007. The *OSFI Annual Report 2005-2006* notes that "as of March 31, 2006, OSFI had seven applications outstanding to reduce accrued plan benefits, and was aware of a number of pending transactions of the same nature" (44). A year earlier, as noted in the *OSFI Annual Report 2004-2005*, there were nine outstanding applications of the same kind. Philip Yung advises that OSFI received only 8 applications from MEPPs to reduce benefits between April 1, 2001 and March 31, 2006.

¹⁹⁴ For example, in his recent book *The Pension Revolution: A Solution to the Pensions Crisis* (Hoboken: Wiley, 2007), Keith Ambachtsheer identifies as a problem with pension plan governance the fact that "[t]oo many people continue to be appointed to pension governance positions not for the skills and experience they bring to the governance body, but for the interest they represent (e.g. the union, the employer, the pensioners, the state governor, their own.) The result is too many boards that still do not understand their role in the management of the pension plan" (13). Ambachtsheer favours a model in which pension plan governors are selected for their expertise, and operate at arm's length from interest groups.

As discussed above,¹⁹⁵ Quebec has taken some recent steps to deal with the issue of quality control in plan governance. While the new provisions of the *SPPA* fall short of mandating improved qualifications for pension committee members, they do require pension committees to address quality-of-governance issues in a structured way by adopting by-laws which deal with professional development, ethics, risk management and service standards, as well as insuring that pension committee governors are provided with the information they need to carry out their fiduciary responsibilities. In addition, the *SPPA* tackles the issue of quality control of third party service providers by requiring that pension committee by-laws address how such providers are selected, supervised, remunerated and evaluated. These provisions have the practical effect of structuring the oversight obligations of the pension committee over third party providers. In return, the new whistle-blower obligation imposed on third party providers effectively requires them to maintain some degree of oversight over plan governors.

Concerns have also been expressed about the fact that the *PBA* requires trustee representation only for plan members. There is no requirement that any other interest group be represented; employers, unions, deferred members and pensioners, for example, have no legal right to representation. Accordingly, FSCO has generally declined to involve itself in issues of the composition of boards of trustees, beyond enforcing the statutory requirement in s.8(1)(e) of the *PBA* for 50% member representation.¹⁹⁶

The issue of retiree representation emerged in the *CAAT Case*, where a retiree challenged the composition of the board before Superintendent. The plan documents provided for a total of twelve trustees: six representing the employers, five representing active members and one representing former members, a category which included but was not limited to retirees. The complainant took the position that retirees should be entitled to their own representation. The Superintendent did not provide the remedy sought. On the contrary, he ruled that since the plan was a MEPP, its board was required to have at least 50% representatives of the active members. Under the terms of the plan documents, the retiree representative was not a member representative, and accordingly the composition of the board did not comply with the s.8(1)(e) of the *PBA*. The plan was ordered to reconstitute its board to include 50% member representatives.¹⁹⁷

Quebec's pension committees are required to have at least one member representing non-active members, a category that includes pensioners. This requirement applies to MEPPs and SEPPs alike. The federal PBSA requires retiree representation under certain circumstances on the pension committees of MEPPs established outside of collective agreements; unionized MEPPs are left to sort this issue out on their own. In general, the

¹⁹⁵ *Supra* at 29.

¹⁹⁶ *Supra*, at 11-12

¹⁹⁷ This decision could be interpreted as requiring that on any 50/50 board, a retiree representative would have to be included in the employers' 50%, although this may depend on the method according to which the retiree representative is selected. In the *CAAT* case, the employers were involved in the selection of the retiree representative.

pension statutes of other provinces do not mandate representation of retirees on MEPP governing bodies.

Efforts have been made in other provinces to address in the courts the issue of whether the governing bodies of pension plans should be more representative. In one 1998 case the Manitoba Queen's Bench refused to apply the Manitoba *Trustees Act* to order that a union representing a number of employees who were plan members be given power of appointment to a seat on the board of trustees.¹⁹⁸ In 2002, however, the same court refused to approve variation to a pension trust agreement which had been negotiated and agreed to between the unions and City of Winnipeg, unless retirees were given representation on the board.¹⁹⁹

5. FUNDING ISSUES: SHOULD MEPPS HAVE TO SOLVENCY FUND?

Regulators have expressed some unease about MEPPs with the classic defined benefit/fixed contribution structure. Typical is an October 19, 1999 Memorandum posted on the OSFI website.²⁰⁰ This memo raises a variety of concerns about such plans, which are seen as posing many special regulatory problems making them particularly vulnerable to funding difficulties. OSFI points to perceived frailties in MEPP governing structures, including trustee conflicts of interest and lack of authority and expertise. In addition, it highlights the administrative challenges of managing contributions and contribution information from multiple employers. Overall, the memo notes that MEPPs consume a disproportionate share of the regulator's time: "approximately 50 per cent of time attributed to off-site plan supervision is spent on NCDB plans." FSCO has expressed similar concerns.²⁰¹

While the data available on DB MEPP funding levels in the jurisdictions surveyed certainly indicates that some MEPPs are struggling to meet regulatory requirements,²⁰² there is nothing on the face of that data to suggest that MEPPs are in more serious funding trouble than other DB plans.²⁰³ Nevertheless, industry professionals representing

¹⁹⁸ *Manitoba Health Organizations Inc. v. Trustees of the Healthcare Employers Pension Plan- Manitoba*, [1998] M.J. No. 170

¹⁹⁹ *Winnipeg (City) v. Winnipeg (City) Employee Benefit Program*, [2002] M.J. No.257

²⁰⁰ MEPPs which provide defined benefits funded by defined contributions are not treated as a separate category under the statute and regulations. As an administrative matter, OSFI places them in a separate category, labeled "negotiated contribution defined benefit plans" (NCDBs"). The October 19, 1999 Memorandum, addressed to the Pension Industry from Ronald J.M. Bergeron, Senior Director, Supervision, and headed "Negotiated Contribution Defined Benefit Plans", can be found on the OSFI website: <http://www.osfi-bsif.gc.ca/osfi>. While other jurisdictions recognize that the NCDB structure is not confined to MEPPs, it is clear that OSFI is referring only to MEPPs in this memo, since it notes that under the *PBSA*, such plans are administered by a board of trustees.

²⁰¹ Meeting with FSCO staff on August 28, 2007.

²⁰² See Appendix G.

²⁰³ In its July 2007 *Report: Canadian Institute of Actuaries, 2006 Pension Review Project*, the 2006 Pension Review Task Force of the CIA examined, on a snap-shot basis, actuarial reports conducted on multi-employer pension plans across Canada in 2004-5. For purposes of its study, the Task Force interviewed regulators across the country and identified their concerns regarding MEPPs. The Task Force

MEPPs believe current funding requirements are too stringent, and have made frequent submissions to government and regulators supporting the position that MEPPs should not be required to meet solvency funding standards.²⁰⁴ They argue that since MEPPs are stable over the long term compared to SEPPs, and are never hostage to the fortunes of a single company, MEPP benefit protection should not ebb and flow based on the volatile, short-term assumptions that go into solvency funding calculations. They also argue that classic MEPPs promise only a “target benefit”, and therefore by definition they are always solvent and in a position to deliver on their pension promise.²⁰⁵

These arguments were evaluated by a Canadian Institute of Actuaries Task Force on Multi-Employer Pension Plans in a May 2001 report. While the Task Force did not fully accept all the arguments, it gave its endorsement to the position that solvency funding was not appropriate for MEPPs.²⁰⁶ In particular, it noted that while MEPPs do from time to time wind up, they are generally unlikely to do so, and have a “long history of providing retirement benefits consistently over many years.”²⁰⁷ In the judgment of the Task Force, MEPPs rarely run into difficulties. The Report’s authors argue that if MEPPs have to meet unrealistically high funding standards, the result will be lower benefits for MEPP members than contribution rates would justify.²⁰⁸

notes that it “found evidence to justify some of the concerns...., while others did not appear or appeared only rarely in the sample of plans studied” (6). The study focuses on actuarial practices, rather than on funding levels, and the Report notes a number of limitations in its methodology. In general, however, it is fair to say that the Report does not sound any significant alarm in regard to MEPPs. See *Report: Canadian Institute of Actuaries, 2006 Pension Review Project*, July 2007

²⁰⁴ The Multi-Employer Benefit Council of Canada, a Canada-wide industry organization has long argued that solvency funding requirements are inappropriate for MEPPs, and that going concern funding is sufficient to protect benefits: see, for example, MEBCO, *Submission to the Canadian Association of Pension Supervisory Officers (“CAPSA”) Re: A Model Pension Law*, June 2004 at 2,511-12, www.mebco.org accessed on October 3, 2007. See also H. Clare Pitcher, *MEPPs: To Solvency Fund or Not*, www.cpb-icra.ca/iactivefiles/MEPPs.pdf, accessed on October 6, 2007..

²⁰⁵ The position that MEPPs should not be held to the same funding standards as SEPPs is probably as old as pension regulation itself, and the arguments put forward for exempting MEPPs from funding requirements have not changed a great deal. James A. Wooten, in his book *The Employment Retirement Income Security Act of 1974* (Berkeley: University of California Press, 2004) at 7ff., 105ff. and *passim*, discusses the split in the labour movement in the period leading up to the passage of ERISA, between unions participating in multi-employer plans, who argued that these plans should be exempt from vesting and funding standards, and unions who did not, who argued that vesting and funding standards should apply to all plans. As Wooten notes: “Representatives of unions with multiemployer plans had long contended that participants in their plans already possessed the protections that vesting and funding standards were meant to provide. The purpose of a funding standard was to ensure that plans could pay vested obligations in case of termination. This rationale made sense for single-employer plans because they depended on a single firm. Multiemployer plans were different because they included more than one employer. Indeed, some multiemployer plans took in most of the firms in an industry. If the purpose of funding was to protect employees from default in case a plan terminated, policy-makers ought to consider the fact that large multiemployer plans were much less likely to terminate than single-employer plans” (142-3).

²⁰⁶ Canadian Institute of Actuaries, *Report of the Task Force on Multi-Employer Pension Plans*, May 2001, Document 20145

²⁰⁷ *Ibid* at 5

²⁰⁸ *Ibid* at 8.

As discussed above,²⁰⁹ there has been a long-standing dispute in Ontario about whether the *PBA* required solvency funding for MEPPs. Whether or not the *interpretative* dispute has been resolved by the recent amendments to *Reg. 909*, the *policy* dispute about whether MEPPs *should* be required to meet such standards continues to rage. Policy makers elsewhere across the country have responded to the controversy in a variety of ways. Some jurisdictions do exempt certain types of plans from solvency funding requirements. In most cases such exemptions are reserved for publicly funded plans (e.g. Alberta);²¹⁰ Quebec offers this exemption to older classic MEPPs. Not all regulators, however, are in agreement that more flexible standards are appropriate for MEPPs. OSFI, in issuing its October 1999 Memorandum on NCDB plans, rejects the proposition that MEPPs should be held to different standards: “[t]he distinctiveness of these plans does not warrant more lenient funding requirements, in our opinion.”²¹¹

Because MEPPs in Ontario have the right to reduce accrued benefits, funding shortfalls may have some immediate and serious consequences for MEPP members. There is a perception in the MEPP community that regulators have turned the *right* to reduce accrued benefits into a *duty* to reduce accrued benefits in the event of funding difficulties. MEPPs in Ontario report that they are under some pressure from FSCO to pursue this option in order to bring plans quickly back into financial equilibrium.²¹² The consequences to plan members may be serious and long-term; once accrued benefit levels fall, they are unlikely to be restored anytime soon. It is no doubt to protect benefit levels against unnecessary erosion that three-year moratoria on solvency funding for MEPPs have been invoked in both Alberta (2006) and Ontario (2007), and funding relief has been provided at the federal level (2006).

6. WIND-UPS AND PARTIAL WIND-UPS

Wind-ups of MEPPs have been quite rare in Canada.²¹³ There is no evidence that the wind-up provisions of the statutes in the jurisdictions surveyed, including Ontario, have given rise to any difficulties, perhaps because they have been so infrequently applied. It is clear, however, that the structural differences between MEPPs and SEPPs mean that at least some of the events and circumstances which trigger virtually automatic wind-ups and partial wind-ups for SEPPs do not pose any serious risk to the stability of MEPPs and at least with respect to the classic MEPP, are unlikely to affect plan membership. Examples include the bankruptcy of an employer, the failure of an employer to make plan contributions, and the withdrawal of an employer from the plan. By the same token there may be other situations where circumstances which would not trigger a wind-up or partial wind-up in a SEPP may warrant at least an inquiry in a MEPP as to whether or not a wind-up or partial wind-up might be appropriate. Examples include the transfer of a

²⁰⁹ *Supra* at 15-16.

²¹⁰ Jurisdictions which exempt their public sector plans from the scope of general pension legislation would not normally subject these plans to solvency funding requirements under their special statutes.

²¹¹ *Memorandum to the Pension Industry, supra*, note 200

²¹² FSCO notes, of course, that by law an underfunded plan has only two options: to raise contributions or to cut benefits. If the cycle of collective bargaining rules out the first option, that leaves only the second.

²¹³ See Appendix F.

significant number of members of one union from one pension plan to a different pension plan. Some jurisdictions address these situations explicitly in their legislation. In Alberta, for example, the withdrawal of all the members of a union from a pension plan may trigger a partial or full termination.²¹⁴

Ontario's existing rules leave a great deal is left to the discretion of the Superintendent. While there is no evidence that this discretion has been applied inappropriately to MEPPs, the *PBA* may benefit from some more specificity on MEPP wind-up issues.

7. THE ROLE OF UNIONS

Trade unions have played an important role in the development of occupational pension plans in Canada. With respect to MEPPs, their role has been pivotal. Most private sector MEPPs were originally either solely sponsored by trade unions, or co-sponsored by trade unions and employer associations, on the initiative of trade unions and as a result of collective bargaining. Today trade unions both in the private and the public sector continue to play a crucial role in the establishment and governance of MEPPs. Collective bargaining continues to be an important mechanism for establishing employer contribution levels to MEPPs. Only about 10% of the Ontario's current 126 MEPPs do not involve unionized workplaces, and some of this 10% involve active employee associations who take a close interest in the pension plan.²¹⁵

In view of the prominence of trade unions on the MEPP landscape, the *PBA* is strangely silent on their role. The *PBA* does give some indirect recognition to the fact that trade unions play a representative role in many workplaces in which MEPPs are to be found. Examples of such recognition include the following:

- The requirement for member representation on the governing boards of MEPPs is applicable only to MEPPs established by collective or trust agreement;
- MEPP administrators are given an express “conflict of interest” exemption for leasing office space to or from a trade union or employers’ association or employee benefit fund, and for other similar transactions, provided the plan documents authorize such transactions;²¹⁶
- The requirement to provide notice of ‘adverse’ amendments to all plan members does not apply to MEPPs established under collective or trust agreements;²¹⁷ and
- The obligation on the plan administrator to provide to the trustees a summary of contributions, and the companion requirement to notify the Superintendent if employer contributions are not paid when due, do not apply to MEPPs established under collective or agreements.²¹⁸

²¹⁴ See discussion at 27, *supra*. The *PBA* contain successorship and transfer rules applicable to such situations (*PBA* ss.38(5), 80(8)), but does not contemplate wind-up or partial wind-up.

²¹⁵ *Supra* at 6.

²¹⁶ *Reg. 909*, s.49

²¹⁷ *PBA*, s.26(4)(c)

²¹⁸ *Reg. 909*, s.49.1

In addition, the link between MEPPs and particular trade unions is recognized by the establishment of special rules for transfers from one pension plan to another resulting from a change in bargaining agent:

- A plan member may terminate her membership in a MEPP if she joins a different pension plan because her former union has lost the bargaining rights for her work under s.57 of the *Labour Relations Act*;²¹⁹ and
- Successorship provisions are triggered where there is a change in trade union representation of MEPP members, providing for the transfer of members' funds from a predecessor union's plan to a successor union's plan under certain defined circumstances.²²⁰

The *PBA* is silent, however, on such important issues as

- The role of trade unions in the selection of member representatives to boards of trustees of pension plans;
- The on-going relationship between trade unions and trustees representing plan members;
- The role of trade unions in representing pensioners;
- The role of trade unions in the routine administration (as distinct from the governance) of pension plans, including (i) the provision of information to plan members about their pension rights; and (ii) the monitoring of employer contributions and collecting from delinquent employers; and
- The relationship between the pension plan and the collective agreement, and the role of grievance arbitration in dealing with issues arising out of the administration of the pension plan.²²¹

While none of the Canadian jurisdictions surveyed fully recognizes and regulates the representative role of trade unions in MEPPs, some do make some important distinctions between union and non-union MEPPs. Alberta and British Columbia apply the requirement for 50% member representation on governing boards of pension plans only to unionized MEPPs.²²² The federal legislation requires a board of trustees only for unionized MEPPs.²²³ Alberta places multi-employer plans in different regulatory

²¹⁹ *PBA*, s.38(5)

²²⁰ *PBA*, s.80(8) The scope and meaning of these provisions are currently before the Financial Services Tribunal in the case of *Canadian Bricklayers and Allied Craft Workers Members Pension Trust and Kerry Wilson v. Bricklayers & Trowel Trades International Pension Fund – Canada*, FST No. P0259-2005, scheduled for hearing commencing November 19, 2007.

²²¹ In *Bisaillon v. Concordia University* (2006), 51 C.C.P.B. 163, the Supreme Court of Canada dismissed a class action brought by unionized plan members alleging that the employer had made invalid amendments to the plan, ruling that because the pension plan was a term of employment, had been the subject of collective bargaining and was referred to in the collective agreement, the matter should have proceeded instead through grievance arbitration. The pension plan in question covered the members of nine different bargaining units, as well as a number of non-union employees.

²²² *PBSA-BC*, s.7; *EPPA*, s.10.

²²³ *PBSA*, s.7

categories, depending on whether they are established through collective bargaining or not: the SMEPP category is restricted to plans which are collectively bargained, whereas the MUPP category belongs to plans which do not involve trade unions.²²⁴ As discussed above, the rules with respect to funding and the right to reduce benefits are different for SMEPPs and MUPPs; SMEPPs are assumed to be funding their defined benefits by collectively bargained fixed contributions on the classic MEPP model, and have the right to reduce benefits accordingly,²²⁵ whereas MUPPs do not.

Like Ontario, however, these jurisdictions are silent on a number of core issues involving trade unions; none of them has chosen to recognize or regulate the critical representative role of trade unions in the establishment or governance/administration of pension plans.

8. THE MULTI-JURISDICTIONAL MEPP

Canada's federal structure poses special problems for the regulation of pension plans. The many challenges of administering a multi-jurisdictional pension plan are by no means unique to MEPPs, and it is beyond the scope of this Report to analyze the current state of the law or regulatory practice on this issue. One problem of administration of multi-jurisdictional plans is peculiar to MEPPs, however, and requires special comment here. This is the problem posed by different provincial rules on the reduction of accrued benefits. For Ontario MEPPs, this problem is most acute when a MEPP which has run into funding difficulties has members domiciled in Quebec.

In order to understand the nature of this problem, it is necessary to sketch out the general rules that have evolved in Canada for dealing with inter-jurisdictional conflicts issues affecting pension plans. Pursuant to reciprocal agreements developed by pension regulators across the country,²²⁶ pension plans are registered in the jurisdiction in which the plurality of plan members are employed. The regulator of the jurisdiction of registration deals with such procedural issues as monitoring solvency and funding through annual filings and approving plan amendments. It is understood, however, that the substantive rights of plan members are governed by the law of the province within which they work.²²⁷ Members of the same pension plan may therefore have different rights with respect to substantive issues.

As discussed above, Ontario permits most MEPPs to amend plans to reduce accrued benefits when it is necessary to do so to address funding and solvency deficiencies. Quebec does not permit such reductions; instead, it imposes on participating employers the obligation to make special payments to reduce any such funding shortfalls. This can create substantial unfairness for Ontario members, particularly in situation in which there are a substantial number of Quebec members. For example, a MEPP that has 60%

²²⁴ See *supra* at 24.

²²⁵ This right is, of course, qualified: see discussion at 26, *supra*.

²²⁶ These reciprocal agreements, enabled by the domestic legislation of each jurisdiction, have been recognized as enforceable by the Supreme Court of Canada: *Boucher v. Stelco Inc.*, [2005] SCC 64

²²⁷ *Régie des rentes du Québec v. Pension Commission of Ontario*, [2000] O.J. No.2845 (Div. Ct.)

Ontario members and 40% Quebec members would be registered in Ontario. If the plan runs into financial difficulties, the trustees, following the procedures set out in the *PBA* and regulations, may determine that the best course of action is to reduce accrued benefits. This remedy can be imposed on the Ontario plan members. But under Quebec law as it has been interpreted to date, it cannot be imposed on the Quebec members.²²⁸ This may leave the board of trustees with no option but to impose an even larger accrued benefit cut on the Ontario members to make up for the fact that the Quebec members have a legal right to be sheltered.

9. COMMUNICATIONS

Most of the provisions of the *PBA* and *Reg. 990* dealing with the communication of information to plan members are common to MEPPs and SEPPs, and the issue of the nature and quality of communications between pension plans and their members and former members is not unique to MEPPs. In relation to the issue of the possible reduction of accrued benefits, *Reg. 990* does impose a particular communication obligation on MEPPs. As discussed above, the *PBA* allows many MEPPs scope for the reduction of accrued benefits, and exempts all MEPPs from the protection of the PBGF. The regulation reflects obvious concern that MEPP members should be clearly apprised of those facts peculiar to their situation. Accordingly, s.40(1) of *Reg. 909*, which lists the minimum contents of the annual statement required to be sent out by all pension plans to all members under s.27 of the Act, includes the following:

- (t) for multi-employer pension plans and pension plans that provide defined benefits where the obligation of an employer to contribute to the pension fund is limited to a fixed amount set out in a collective agreement,
 - (i) a statement that the pension benefits established under the pension plan are not guaranteed by the Guarantee Fund, and
 - (ii) a statement that if, on wind up of the plan, the assets of the plan are not sufficient to meet the liabilities of the plan, pension benefits may be reduced.

This provision is deficient on at least two grounds:

²²⁸ *Intersan Inc. c. Conseil des fiduciaires du régime transcanadien de retraite et Régie des rentes*, [2004] LNQCTAQ 21 (Tribunal administratif du Québec) The *Intersan* case involved the CLC plan, Canada-Wide Industrial Pension Plan (CWIPP), registered in Ontario. This plan has a number of participating unions as well as a number of participating employers. Each participating employer negotiates a "cents per hour" contribution rate with the applicable union. CWIPP then determines the DB benefit level that the negotiated contribution rate should be able to support, based on certain actuarial assumptions and on the demographics of the employee group; this is called the "target benefit". The plan reserves the right, however, to adjust the benefit level based on the solvency position, both while participation is ongoing and in the event of termination of the participation agreement. The case involved the termination of Intersan's participation agreement in CWIPP (supplementary information supplied by David Short, former plan actuary, and witness before the Tribunal). See also *Kelly c. Tribunal administratif du Québec*, [2005] J.Q. no 6819 (CS), involving a plan registered in Alberta.

- it is doubtful whether this language is sufficiently clear to alert MEPP members to exactly how and why their plans are different than most Ontario defined benefit plans; and
- there is no requirement to advise members that their accrued benefits may be reduced not only in a wind-up situation, but also at other time while the plan is still on-going.

Furthermore, it is arguably under-inclusive in that:

- it applies only to MEPPS with fixed employer contributions, whereas all MEPPs are exempt from the PBGF; and
- there is no requirement that *former* members be given this information, although it is clearly pertinent to them as well.

The federal jurisdiction requires plans with solvency deficiencies in all cases to report to their members the amount by which their benefits would be reduced if the plan were wound up in that state.²²⁹ Likewise British Columbia requires annual disclosure in all cases to plan members that benefits may be reduced on wind-up if funds are insufficient, even in situations where plan sponsors are liable to top up the funding, since in the event of a bankruptcy they may not be in a position to do so.²³⁰ Disclosure requirements specific to MEPPs are neither comprehensive nor widespread in the other Canadian jurisdictions surveyed.

PART V CONCLUSION: IMPLICATIONS FOR REGULATION

As noted at the outset, this Report was prepared against the backdrop of the following general questions:

- Does the *PBA* adequately recognize the variety of MEPPs currently in existence, and is it sufficiently flexible to provide for the on-going development of new structures and benefit types?
- Does the *PBA* provide adequate regulatory guidance with respect to the representative structure, quality and conduct of the governing bodies of MEPPs?
- Does the *PBA* provide adequate protection for the benefits of MEPP member? are its funding rules realistic in light of the unique structure of MEPPs?
- Do the *PBA*'s wind-up and partial wind-up rules adequately recognize the fluidity among participating employers in MEPPs?
- Do MEPPs generally experience more regulatory problems than SEPPs?

The implications of this research for the first four of these questions are reflected in the issue-by-issue discussions in Part IV of this Report. In summary, those discussions

²²⁹ *PBSR*, s.23(1)(q)(i)(C)

²³⁰ BC Reg.s.10(c)

suggests that Ontario's MEPP model is out of sync with the profile of MEPPs in the province in some respects, particularly insofar as it assumes that all non-statutory MEPPs fall into the classic MEPP model, with defined benefits funded by defined contributions. The discussions highlight the approach of other jurisdictions in distinguishing between unionized and non-unionized MEPPs, and in tailoring the regulation of funding and benefit stability rules to the provisions of the plan rather than to the structure of the plan. They also point to other jurisdictions where recent amendments to legislation have increased the accountability of governing bodies, and the third party service providers who work with them.

On all these issues, other models are available in other Canadian jurisdictions. In particular, Ontario might benefit from examining:

- British Columbia's clear distinction between Negotiated Cost Plans and other types of DB plans;
- Alberta's distinction between unionized MEPPs and non-unionized MUPPs;
- The requirement in the federal and British Columbia legislation that there be regulatory approval of any reduction in accrued benefits;
- Three features of Quebec's legislation:
 - The new MFPP;
 - The new approach to quality-control within governing bodies; and
 - The regulation of the relationship between governing bodies and third party service providers.

With respect to the final question, "Do MEPPs generally experience more regulatory problems than SEPPs?", for reasons explained in the introduction to Part III, it would be difficult to draw any definitive conclusions for the data available. On the face of the quantitative measures reviewed in that Part, however, it does not appear that MEPPs are facing more difficulties than SEPPs. Their share of Superintendent's official decisions is only slightly higher than their proportion of the total number of plans in Ontario. While MEPP matters go to the Tribunal more frequently than might be anticipated simply on the basis of the number of MEPPs registered in the province, the number of Tribunal appeals is certainly not out of proportion to the number of MEPP members who are covered by those plans. Neither MEPP prosecutions nor wind-up statistics suggest a particular problem with these types of plans. Likewise, while all DB plans are experiencing difficulties meeting regulatory funding requirements, MEPP data is in line with SEPP data on both a going concern and a solvency basis.

Although plans in Ontario vary dramatically in size, there are no clear signals given by this data to suggest that smaller plans have more difficulty than larger plans in meeting regulatory requirements. Likewise, no clear patterns emerge with respect to differences between private sector plans and public sector plans. As noted in Part II, several of the comparator jurisdictions exclude public sector plans from their general pension legislations, and consequently from the statistics provided for this Report. It is possible that closer study of the legislative differences between these jurisdictions may shed some light on the variations in the statistics from jurisdiction to jurisdiction on some of the

quantitative measures reviewed here. On the basis of the information currently available, however, no clear trends and patterns are evident on the basis of plan size and sector.

APPENDIX A: INCIDENCE OF MEPPS AND SEPPS ACROSS CANADA
December 31, 2006

Jurisdiction	Number of SEPPs	Number of SEPP Members	Number of MEPPs	Number of MEPP Members	Total Plans	Total Plan Members
British Columbia	692	354,000	70	146,000	762	500,000
Alberta	684	147,000	23	55,000	707	202,000
Saskatchewan	383	146,000	8	5,000	391	151,000
Manitoba	379	119,000	10	44,000	389	133,000
Ontario	7,440	1,179,000	126	950,000	7,566	2,129,000
Quebec	1,365	340,000	86	270,000	1,451	610,000
New Brunswick	298	17,000	43	26,000	341	43,000
Nova Scotia	511	86,000	9	7,400	520	93,400
Newfoundland	187	74,000	7	3,700	194	77,700
Federal	1,300	557,000	32	25,000	1,332	582,000
TOTALS	13,239	3,019,000	414	1,532,100	13,653	4,521,100

Source: Lynda Ellis, Senior Manager, Pension Policy, Pension Division, FSCO, as reported by provincial regulators

APPENDIX B: SIX LARGEST AND SIX SMALLEST MEPPS IN ONTARIO

March 31, 2007

Name of Plan	Number of Active Members	Benefit Type	Sector	Is it a JSPP?
Ontario Municipal Employees Retirement System (OMERS)	230,736	DB	Public	Yes
Canadian Commercial Workers Industry Pension Plan (CCWIPP)	170,335	DB	Private	No
Ontario Teachers Pension Plan (Teachers)	163,200	DB	Public	Yes
Hospitals of Ontario Pension Plan (HOOPP)	148,354	DB	Public	Yes
Labourers Pension Fund of Central and Eastern Canada	33,908	DB	Private	No
Nursing Homes and Related Industries Pension Plan	21,925	DB	Public	No
Sheet Metal Workers Local 539 Pension Plan	96	DC	Private	No
National Hockey League Pension Plan for Canadian Off-Ice Employees	87	DC	Private	No
Employees of the London Mechanical Trades Association	56	DC	Private	No
IATSE Motion Picture Projectionists Pension Plan for Thunder Bay Local 467	10	DC	Private	No
IBEW Local 894	9	DC	Private	No
Joint Retirement Board for Conservative Judaism	7	DC	Private	No
Source: FSCO Pension Plan Database, www.fSCO.gov.on.ca:80/english/pensions/pplanaccess.asp				

APPENDIX C: NUMBER OF PENSION PLANS BY PLAN TYPE

April 1, 2001-March 31, 2006

Year	2002	2003	2004	2005	2006
All Plans	6239	6176	6254	6518	
All MEPPs	120	117	119	125	
All SEPPs	6188	6059	6135	6393	
MEPPs as % of All Plans	2%	2%	2%	2%	

Source: FSCO Annual Reports, 2002-2006

Year	2002	2003	2004	2005	2006
All Plans	1,205	1,256	1,284	1,304	1,332
All MEPPs	30	30	32	32	32
All SEPPs	1,175	1,226	1,252	1,272	1,330
MEPPs as % of All Plans	2.5%	2.4%	2.5%	2.5%	2.4%

Source: Philip Yung, Senior Officer, Approvals and Projects, Private Pension Plans Division, OSFI, September 2007

Year	2002	2003	2004	2005	2006
All Plans	1743	1678	1616	1511	1451
All MEPPs	76	100	95	97	86
All SEPPs	1667	1578	1521	1414	1365
MEPPs as % of All Plans	4.4%	6.0%	5.9%	6.4%	5.9%

Source: Pierre Perron, Régie des rentes du Québec, October 2007

Data from Alberta and British Columbia not available.

APPENDIX D: ACTIVE PENSION PLAN MEMBERS BY PLAN TYPE
April 1, 2001-March 31, 2006

TABLE 1: Ontario Active Members, April 1, 2002-March 31, 2006

	2002	2003	2004	2005	2006
All Plans	1963816	1993670	2025515	2056736	
All MEPPs	697240	851288	876053	913066	
All SEPPs	1266576	1142382	1149462	1143670	
MEPP					
Members as % of Total	35.5%	43%	43%	43%	

Source: FSCO Annual Reports, 2002-2006

TABLE 2: Federal Active Members, April 1, 2001-March 31, 2006

	2002	2003	2004	2005	2006
All Plans	579000	547000	572000	576000	582000
All MEPPs	21000	21000	23000	25000	25000
All SEPPs	558000	526000	549000	551000	557000
MEPP					
Members as % of Total	3.6%	3.8%	4%	4.3%	4.3%

Source: Philip Yung, Senior Officer, Approvals and Projects, Private Pension Plans Division, OSFI, September 2007

TABLE 3: Quebec Active Members, April 1, 2001-March 31, 2006

	2002	2003	2004	2005	2006
All Plans	553,674	590,303	616,883	617,827	609,872
All MEPPs	147,168	235,872	256,703	267,629	270,020
All SEPPs	406,506	354,431	360,180	350,198	339,852
MEPP					
Members as % of Total	26.6%	40%	41.6%	43.4%	44.3%

Source: Pierre Perron, Régie des rentes du Québec

Data from Alberta and British Columbia not available.

APPENDIX E: NUMBER OF MEPPS AND SEPPS BY PLAN AND BENEFIT TYPE

April 1, 2001-March 31, 2006

TABLE 1: Ontario Pension Plans by Plan and Benefit Type: April 1, 2001-March 31, 2006

	2002		2003		2004		2005		2006	
	DB	DC	DB	DC	DB	DC	DB	DC	DB	DC
All Plans	2,821	3,418	2,792	3,384	2,894	3,360	3,198	3,320		
MEPPs	86	35	84	33	83	36	85	40		
SEPPs	2,735	3,383	2,708	3,351	2,811	3,324	3,113	3,280		
MEPPs as % of All Plans	3.1%	1%	3%	1%	2.9%	1.2%	2.7%	1.2%		

Source: FSCO Annual Reports, 2002-2006

TABLE 2: Federal Pension Plans by Plan and Benefit Type: April 1, 2001-March 31, 2006

	2002		2003		2004		2005		2006	
	DB	DC	DB	DC	DB	DC	DB	DC	DB	DC
All Plans	416	789	420	836	428	854	432	872	468	884
MEPPs	26	4	26	4	28	4	28	4	28	4
SEPPs	390	785	394	832	400	852	404	868	420	880
MEPPs as % of All Plans	6.2%	0.5%	6.2%	0.5%	6.5%	0.5%	6.5%	0.5%	6%	0.5%

Source: Philip Yung, Senior Officer, Approvals and Projects, Private Pension Plans Division, OSFI, September 2007

Table 3: Quebec Pension Plans by Plan and Benefit Type: April 1, 2001-March 31, 2006

	2002		2003		2004		2005		2006	
	DB	DC	DB	DC	DB	DC	DB	DC	DB	DC
All Plans	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
MEPPs	55	21	78	22	74	21	70	17	68	18
SEPPs	1667(1)		1578		1521		1414		1365	
MEPPs as % of All Plans										

Source: Pierre Perron, Régie des rentes du Québec
(1) SEPP Data is not available by plan type

APPENDIX F: WIND-UPS AND PARTIAL WIND-UPS

April 1, 2001-March 31, 2007

TABLE 1: ONTARIO FULL AND PARTIAL WIND-UPS, APRIL 1, 2001 TO MARCH 31, 2006

	2002		2003		2004		2005		2006	
	DB	DC	DB	DC	DB	DC	DB	DC	DB	DC
MEPPS										
Partial wind-up	n/a	n/a	2	0	0	2	0	2	4	2
Full wind-up	n/a	n/a	1	0	1	1	0	1	0	0
TOTALS	n/a	n/a	3	0	1	3	0	3	4	2
SEPPS										
Partial Wind-up	n/a	n/a	61	43	43	34	55	41	58	62
TOTALS	n/a	n/a	99	137	100	106	105	113	127	129

Source: Lynda Ellis, Senior Manager, Pension Policy, Pension Division, FSCO

TABLE 2: FEDERAL FULL AND PARTIAL TERMINATIONS, APRIL 1, 2001 TO MARCH 31, 2006

	2002		2003		2004		2005		2006	
	DB	DC	DB	DC	DB	DC	DB	DC	DB	DC
MEPPS										
Partial wind-up	1	0	0	1	0	0	0	1	0	0
Full wind-up	0	0	0	0	1	0	0	0	0	0
TOTALS	1	0	0	1	1	0	0	1	0	0
SEPPS										
Partial Wind-up	4	5	6	5	3	9	2	11	2	6
Full wind-up	0	9	0	9	3	5	8	7	2	13
TOTALS	4	14	6	14	6	14	10	18	2	19

Source: Philip Yung, Senior Officer, Approvals and Projects, Private Pension Plans Division, OSFI

TABLE 3: QUEBEC FULL AND PARTIAL WIND-UPS, APRIL 1, 2001 TO MARCH 31, 2006

	2002		2003		2004		2005		2006	
	DB	DC	DB	DC	DB	DC	DB	DC	DB	DC
MEPPS										
Partial wind-up	1	0	0	1	0	0	0	1	0	0
Full wind-up	0	0	0	0	1	0	0	0	0	0
TOTALS	1	0	0	1	1	0	0	1	0	0
SEPPS										
Partial Wind-up	4	5	6	5	3	9	2	11	2	6
Full wind-up	0	9	0	9	3	5	8	7	2	13

TOTALS	4	14	6	14	6	14	10	18	2	19
Source: Pierre Perron, Régie des rentes du Québec										

British Columbia reports 251 plan terminations over the past five years, of which 37 were partial wind-ups. Only 5 involved MEPPs: *Source: Michael Peters, Executive Director, Financial Institutions Commission, October 30, 2007.* There is no plan termination or wind-up data available from Alberta.

**APPENDIX G: FUNDING DATA, ALL SURVEYED JURISDICTIONS
APRIL 1, 2002-March 31, 2006**

Funding data is not collected and maintained in the same way in all jurisdictions across the country, and therefore it cannot be reported here on a consistent 5-year basis. This Appendix reports the data as provided by the regulators in each province.

TABLE 1: Ontario Funding Data for DB Plans, Valuation Period January 1, 2001- December 31, 2005			
Funding Valuation Reports Due	January 31, 2005	January 31, 2006	January 31, 2007
Valuation Period	2001-2003	2002-2004	2003-2005
Number of Plans (1)			
MEPPS	79	73	79
SEPPs	1639	1649	1619
ALL Plans	1718	1722	1698
% of Fully Funded Plans on a Solvency Basis			
MEPPs	30	27	25
SEPPs	32	26	22
All Plans	32	26	22
% of Fully Funded Plans on a Going Concern Basis			
MEPPs	70	64	67
SEPPs	45	39	45
All Plan	46	40	46
Median Solvency Ratio			
MEPPs	93	93	94
SEPPS	96	92	90
All Plans	96	92	90
Median Going Concern Ratio			
MEPPs	102	102	105
SEPPs	103	99	101
All Plans	103	99	101
(1) Designated plans and 7 large public sector plans not included			
Source: FSCO Annual Funding Reports dated September 2005, June 2006 and March 2007, as provided by Lynda Ellis, Senior Manager, Pension Policy, Pension Division, FSCO			

TABLE 2: Federal Funding Data for DB Plans, April 1, 2002-March 31, 2006						
		2002	2003	2004	2005	2006
Solvency Funding						
	MEPPS	54%	29%	40%	50%	42%
	SEPPS	25%	18%	17%	35%	38%
	All DB Plans	27%	19%	19%	36%	39%
Going Concern Funding						
	MEPPs	53%	62%	74%	71%	81%
	SEPPs	41%	45%	43%	45%	74%
	All DB Plans	41%	46%	44%	47%	75%
Average Solvency Funding Ratio						
	MEPPS	97%	94%	77%	102%	97%
	SEPPS	93%	91%	89%	106%	108%
	All DB Plans	92%	91%	88%	105%	107%
Average Going Concern Funding Ratio						
	MEPPs	103%	102%	107%	102%	108%
	SEPPs	104%	108%	101%	104%	118%
	All DB Plans	104%	108%	101%	104%	118%
Source: Philip Yung, Senior Officer, Approvals and Projects, Private Pension Plans Divisions, OSFI						

TABLE 3: Quebec Funded Data for DB Plans, April 1, 2002-March 31, 2006						
		2002	2003	2004	2005	2006
Solvency Funding						
	MEPPS	66.7%	58.2%	43.4%	32.1%	34.9%
	SEPPS	67.3%	56%	43.7%	32.2%	29.1%
	All DB Plans	67.3%	56.1%	43.6%	32.2%	29.4%
Going Concern Funding						
	MEPPs	72.7%	58%	43.1%	31.4%	32.8%
	SEPPs	71.4%	57.2%	42.6%	30.9%	31.7%
	All DB Plans	71.4%	70.9%	50.9%	39.6%	50.0%
Median Solvency Funding Ratio						
	MEPPS	105.98%	104.75%	97.66%	95.31%	94.69%
	SEPPS	105.66%	101.13%	96.69%	91.19%	90.155%
	All DB Plans	105.675%	101.375%	96.99%	91.51%	90.595%
Median Going Concern Funding Ratio						
	MEPPs	105.3%	104.5%	100.0%	96.5%	99.9%

SEPPs	105.3%	101.7%	97.7%	93.9%	94.4%
All DB Plans	105.3%	101.8%	97.8%	94.1%	94.7%

Source: Pierre Perron, Régie des rentes du Québec

TABLE 4: Alberta Funding Data for DB Plans, April 1, 2003-March 31, 2006

	2002	2003	2004	2005	2006
Solvency Funding					
SMEPPS	n/a	77.8%	42.1%	40%	39.1%
SEPPS	n/a	43.8%	19.3%	43.2%	50%
All DB Plans	n/a				
Going Concern Funding					
SMEPPs	n/a	83.3%	47.4%	55%	52.1%
SEPPs	n/a	50.7%	74%	39.1%	51%
All DB Plans	n/a				

Source: Alberta Annual Statistical Reports: 2002-2006

TABLE 5: British Columbia Funding Data for DB Plans, Current Data

Solvency Funding	
MEPPS	64%
SEPPS	28%
All DB Plans	36%
Going Concern Funding	
MEPPs	70%
SEPPs	50%
All DB Plans	54%
Median Ratio, Solvency Funding	
MEPPs	103.48%
SEPPs	105.19%
All Plans	99.87%
Median Ratio, Going Concern Funding	
MEPPs	94%
SEPPs	103%
All Plans	91.50%

Source: Michael Peters, Executive Director, Pensions, Financial Institutions Commission, British Columbia, October 30, 2007

APPENDIX H: ALBERTA MUPPS

October 2007

Plan Name
Construction Benefit Services Employee Pension Plan
Pension Plan for the Employees of Bond-A-Ply (Alberta) – A Division of Genron Enterprises and Participating Affiliate
Universities Academic Plan
APEX Supplementary Pension Plan
Pension Plan for the Employees of Pimee Well Servicing Ltd
Graham Group Ltd. Pension Plan
The Alberta Roofers Investment Pension Plan
Pension Plan for the Employees of Koch Exploration Canada Corporation
Pension Plan for the Employees of Meadowcroft Housing Corporation Ltd.
Pension Plan for the Cerum Group of Companies
The Pension Plan for the Employees of Alberta Lung Association and Related Companies
Pension Plan for the Clergy & Lay Workers of the Evangelical Lutheran Church in Canada
Pension Plan for the Employees of Agristar Foods Ltd. and Agristar Produce Ltd. and Related Companies
The Pension Plan for the Employees of Participating Member Firms of Merit Contractors Association and Provincial Affiliates
ASBA Supplemental Integrated Pension Plan (ASBA SIPP)
Pension Plan for the Employees of Geo. C. Webb 7 Sons (1980) Ltd.
Alco Gas & Oil Production Equipment Ltd. and Participating Affiliate Employees Pension Plan
Pension Plan for the Employees of Synenco Energy Inc. and Related Employers
Retirement Plan for the Employees of Alberta Association of Municipal District and Counties
The Pension Plan for the Employees of Alsa Groups Inc.
Revised Pension Plan for the Employees of Federation of Alberta Gas Co-ops Ltd.
Smith Group of Companies Employee Pension Plan

Source: Mark Prefontaine, Acting Deputy Superintendent of Pensions, Alberta Finance, Alberta Superintendent of Pension

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